* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 6th December, 2012
% *Date of Decision: 17th January, 2013*

\+ **W.P. (C) 8375/2010**
\+ **W.P. (C) 8376/2010**
\+ **W.P. (C) 8377/2010**
\+ **W.P. (C) 8378/2010**

REMFRY AND SAGAR ..... Petitioner
Through: Mr. S. Ganesh, Sr. Advocate with Ms. Shashi M. Kapila, Mr. Cyril Abrol, Mr. Samridh Bhardwaj and Mr. Pravesh Sharma, Advocates.

versus

COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms. Suruchi Aggarwal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R.V. EASWAR, J.

These are four writ petitions filed by the petitioner seeking quashing of the notices issued under section 148 of the Income Tax Act, 1961 ('Act', for short) and all proceedings consequent thereto.

2. The petitioner is a law firm specialising in intellectual property and corporate laws. It was founded in 1827 by one Henry Oliver at Calcutta. In the year 1957 certain Englishmen took over the firm. By deed dated 04.04.1973 these gentlemen by names Holloway and Silver Stone transferred the firm absolutely to Dr. V. Sagar, a lawyer. The transfer took effect from April, 1973 and the entire practice of the firm became that of Dr. Sagar. On 18.10.2000 a company, i.e. Remfry & Sagar Consultant Pvt. Ltd. was incorporated and one of its objects was that the goodwill of the firm Remfry & Sagar would vest in it in perpetuity.

3. On 01.06.2001, Dr. Sagar executed a gift deed by which the goodwill of the name "Remfry & Sagar" was transferred to the private limited company. For stamp

duty purposes the gift was valued at ₹45 crores. Since a limited company cannot practice the legal profession, on 05.06.2001 Dr. Sagar entered into partnership with four other partners for carrying on legal practice. On the same day i.e. 05.06.2001 an agreement (hereinafter referred to as "licence agreement") was entered into between the company and the firm constituted by Dr. Sagar and four others, which is known as Remfry & Sagar and which is the petitioner in all the writ petitions, under which a licence was granted to the petitioner for use of the goodwill and name of Remfry & Sagar subject to payment of licence fee @ 25% of the amount of the bills raised. The agreement would later appear to have been amended on 14.01.2002 but that is inconsequential for our purpose.

4. In the return of income filed by Remfry & Sagar, the petitioner herein, for the year ended 31.03.2002, the relevant assessment year being 2002-03, it claimed the payment made to the company under the licence agreement as revenue expenditure in the return of income. The return was processed under Section 143(1) and an intimation was issued to that effect. This effectively meant that the return was not being disturbed and consequently the payment made under the licence agreement was allowed as a deduction.

5. In the assessment made for the assessment years 2003-04 to 2006-07 also the amounts paid by the petitioner under the licence agreement were allowed as a deduction; in the first three assessment years, the assessments were completed under section 143(3) of the Act after scrutiny of the returns and in respect of the last year, the return was processed under section 143(1) of the Act. In all these years, it is common ground that the amounts paid by the petitioner under the licence agreement were claimed and allowed as deduction.

6. On 30.03.2010, the respondent issued notices under section 148 of the Act reopening the four assessments completed as above. The reasons recorded by him under section 148(2) of the Act are as under: -

"*<u>Reasons for reopening the case u/s. 147</u>*

Name of assessee	*:*	*M/s Remfry & Sugar, Remfry House, Millenium Plaza, Sector-27, Gurgaon-122002.*

Assessment Year	*:*	*2003-04*
PAN	*:*	*AAEFR6753P*
Status	*:*	*Firm*

Return was filed on 2.12.2003 declaring income at ₹13,33,80,850/-. Assessment under section 143(3) was made at ₹13,38,04,030/-. In the case of the assessee, assessment of AY 2007-08 has been made where assessee's claim of expenditure of ₹22,51,33,484/- to M/s Remfry & Sagar Consultants Pvt. Ltd. being the Licence Fee payment to M/s Remfry & Sagar Consultants Pvt. Ltd. for the use of goodwill of "Remfry & Sagar" and to practice in this name was examined during the deep scrutiny in assessment. The License agreement which was entered into in June 2001 was examined and the case records of AY 2003-04 were also examined. The claim was disallowed, being wrong claim of deduction of licence fee payment to M/s R & S Consultants for the use of goodwill. The facts for the AY 2003-04 are the same as AY 2007-08. Though scrutiny assessment has been made in AY 2003-04, no question was asked during assessment on this issue in questionnaire, neither was the justification and allowability of the deduction of Licence Fee payment to M/s Remfry & Sagar Consultants Pvt. Ltd. for the use of goodwill of "Remfry & Sagar" and to practice in this name examined vide order sheet entry during assessment. Neither did the assessee suo motu furnish information nor did the assessee suo motu furnish reasons as to why the said claim is allowable. So the issue was not examined at all in AY 2003-04, reasons as to why the said claim is allowable were neither asked for nor supplied. On the other hand, in AY 2007-08, matter has been deeply scrutinized and claim found wrong. Assessee has not disclosed all material facts correctly and fully during assessment for the AY 2003-04. Merely making a claim does not amount to disclosure of all material facts correctly and fully during assessment. Had assessee disclosed all material facts correctly, claim would not have been allowed as discovered in assessment proceedings for AY 2007-08. The facts and the issues for the AY 2003-04 are the same as AY 2007-08 and the decision is applicable. Hence there is failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment on the part of the assessee and as per the proviso to section 147, income chargeable to tax has escaped assessment for the AY 2003-04 by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for the said assessment year which were not put up by the assessee. Accordingly, I am satisfied that income ₹9,86,06,944/- has escaped assessment for said assessment year being assessee's claim of expenditure to M/s Remfry & Sagar Consultants Pvt. Ltd. being the License Fee payment to M/s Remfry & Sagar Consultants Pvt. Ltd. for the use of goodwill of "Remfry & Sagar" and to practice in this name. In view of these

facts, I have reason to believe that income chargeable to tax has escaped assessment for the AY 2003-04.

Notice u/s 148 is being issued.

(A.K.Dhir)
Assistant Commissioner of Income Tax
Circle 37(1), New Delhi."

7. The reasons recorded are identical for all the four assessment years except for the amount of income noted therein as having escaped assessment. The following chart will show the relevant details: -

W.P.(C) No.	A.Y.	ORIGINAL ASSESSMENT (U/S.)	COMPLETED ON	NOTICE U/S. 148	BEYOND 4 YEARS	INCOME ESCAPING ASSESSMENT
8375/10	2003-04	143 (3)	02.02.2006	30.03.2010	Yes	9,86,06,944
8377/10	2004-05	143 (3)	31.07.2006	30.03.2010	Yes	15,80,69,137
8376/10	2005-06	143 (3)	26.12.2007	30.03.2010	No	16,73,06,288
8378/10	2006-07	143 (1)	12.10.2006	30.03.2010	No	21,51,64,619

8. The assessee submitted detailed objections to the notices issued under Section 148 contending that the full and true particulars relating to the claim were filed along with the return of income and in the course of the original assessment proceedings, that no new information or material was brought on record after the completion of the original assessments, that no reopening of the assessment was permissible on account of a mere change of opinion and in the circumstances the notices issued were bad in law and without jurisdiction. These objections were rejected by the respondent by orders dated 10.11.2010. In those orders he observed that the assessee did not provide the basic particulars necessary for allowing the claim and that it was while completing the assessment for the assessment year 2007-08 that he came to know that the payment was totally unwarranted and the assessee did not derive any benefit out of the same and that therefore the notices issued under Section 148 of the Act were valid. He accordingly directed the petitioner to respond to the hearing notices so that he could proceed with the reassessments. It is at that stage that the petitioner approached this Court by way of the present writ petitions.

9. The main contentions raised on behalf of the petitioner before us for the assessment years 2003-04 and 2004-05 can be summarised as under: -

(a) There was full and true disclosure of all the primary facts at the time of the original assessment. The profit and loss account in which the licence fees were debited, the tax audit report along with Annexure-III thereto which showed the particulars relating to payments made to connected persons as specified under section 40A (2)(b), the monthwise summary of several items of expenses and income including licence fees for use of goodwill, the confirmation from the company for receipt of the secretarial support fees, infrastructure usage fees, interest on loan and licence fees for use of goodwill, the supporting vouchers for the licence fee and the deed of partnership dated 05.06.2001 were all furnished to the assessing officer at the time of original assessment proceedings.

(b) The preamble to the partnership deed traced the history of payment of the licence fee, which included reference to the agreement for payment of the licence fee to the company. Thus the basic and primary facts relating to payment of licence fees could be found in the partnership deed. There was no failure to furnish primary facts.

(c) The reasons recorded by the respondent for reopening the assessments merely referred to the opinion of the Assessing Officer while completing the assessment for the assessment year 2007-08, that licence fees were not allowable as business expenditure which amounted to a change of opinion based on the same facts, that were furnished by the petitioner at the time of the original assessment.

(d) The respondent did not aver in the reasons recorded that the petitioner failed to furnish the licence agreement dated 05.06.2001 at the time of the original assessment proceedings. It is, therefore, not open to him to now supplement the reasons recorded and try to improve his case.

10. The contention of the petitioner in respect of the assessment year 2005-06 is that the licence agreement was submitted at the time of the original assessments which was also scrutinised and the assessment was completed under section 143(3) and, therefore, the reopening of the assessment is permitted by a mere change of opinion on the same set of facts. In support of this claim, our attention was drawn to the letter issued u/s 133(6) by the respondent to the company to which payment of licence fees was made, on 01.11.2007 (Page 178 of the writ petition). In the written submission, it is stated that in the course of the original assessment proceedings for the assessment year 2005-06, the petitioner filed a copy of the licence agreement on 10.10.2007 and it was considered by the respondent before passing the scrutiny assessment order. It needs to be stated that neither in the affidavit of the petitioner nor in the objections filed by it on 8th November, 2010 was this fact asserted. We have also gone through the entire record before us in WP(C) No.8376/2010 which, inter alia, contains the details filed by the petitioner in the course of the original assessment proceedings but have not been able to locate any evidence to show that the licence agreement was filed. Initially while addressing arguments before us in support of the writ petition, the only document on which reliance was placed on behalf of the petitioner in support of the above claim was the letter dated 1st November, 2007 (page 178 of WP(C)No.8376/10), which is a letter written by the respondent under Section 133(6) of the Act to M/s Remfry & Sagar Consultants Pvt. Ltd. calling for information in relation to the petitioner's claim for deduction of the amounts paid to that company under the licence agreement. It is necessary to reproduce the entire letter:

"F No.ACIT Cir.37(1)/2007-08/

Office of the
Assistant Commissioner of Income Tax,
Circle 37(1), New Delhi

Dated : 1.11.2007

To,
M/s Remfry & Sagar Consultants,

Remfry House at the Millenium Plaza,
Sector-27, Gurgaon – 122002.

Sir,

Subject :- *Calling for information u/s 133(6) of the Income Tax Act, 1961 in the case of M/s Remfry & Sagar, PAN-AAEER6753P – A.Y.2005-06-reg.*

During the course of assessment proceedings in the case of assessee M/s Remfry & Sagar, it has been found that as per the agreement between M/s Remfry & Sagar Consultants Pvt. Ltd. and various partners of M/s Remfry & Sagar, it is agreed that 25% of the amount of bills raised by M/s Remfry & Sagar will be given to your company and the payment is to be made on monthly basis within 15 days of the end of each month in respect of bills raised during the previous month. Please produce the evidence regarding how much payment is made by M/s Remfry & Sagar to you during the FY 2004-05 and how you have accounted it in the profit and loss account of your company. You are also to produce with evidence whether the monthly payments have been made to you as per the agreement or not.

The above mentioned information is being asked for u/s 133(6) of the Income Tax Act, 1961. You are requested to sent the requisite information by 15.11.2007. If the above information is not sent within the stipulated time, penalty u/s 272(2)(c) will be imposed. According to Section 272A(2)(c) :

"If any person fails to furnish in due time any of the returns, statements or particulars mentioned in Section 133, he shall pay, by way of penalty, a sum (of one hundred rupees) for every day during which the failure continues."

Yours faithfully

(JEETENDRA KUMAR)
Assistant Commissioner of Income Tax
Circle 37(1), New Delhi."

What was relied upon was the words "during the course of the assessment proceedings in the case of assessee M/s Remfry & Sagar, it has been found that as per the agreement…….", appearing in the beginning of the letter. Relying on these words it was contended that they unmistakably show that the licence agreement was before the AO at the time of the original assessment

proceedings for the assessment year 2005-06. We do not think that the quoted words can be read and understood as containing any such admission of the AO. At best it can only be understood as referring to the claim of the petitioner that the payment was made as per the license agreement. In any case this is a roundabout way of showing that the licence agreement was filed. We are unable to appreciate why there cannot be any direct evidence of the licence agreement having been filed before the respondent in the course of the original assessment proceedings. We have also referred to the absence of anything in the details furnished by the petitioner in the course of the original assessment proceedings to show that the licence agreement was filed. It is only in the written submissions that the petitioner has stated that it furnished a copy of the licence agreement to the AO on 10.10.2007 and the said agreement was considered by him before passing the original assessment order. Since no such averment was made in the affidavit or in the objections filed before the AO to the reasons recorded, and in the absence of any evidence adduced before us to show that the copy of the licence agreement was filed before the AO on 10.10.2007, we are unable to accept the claim as proved. It remains a mere claim. We, therefore, proceed on the basis that even for the assessment year 2005-06, there is no evidence to show that the petitioner filed a copy of the licence agreement in the course of the original assessment proceedings.

11. The argument for the assessment year 2006-07 is somewhat different. It is contended that in respect of this year the assessing officer was fully aware of the fact that the assessee had claimed a larger amount as licence fee and that the only reason why he did not issue a notice under section 143(2) was because in the preceding three assessment years the assessments had been completed originally under section 143(3), including the assessment year 2005-06 in which year the assessment had undisputedly filed a copy of the licence agreement. The contention is that the mere fact that the original assessment for the assessment year 2006-07 was completed under section 143(1) of the Act without any scrutiny cannot lead to the conclusion

that the respondent did not form any opinion on the issue of allowability of the licence fee; consequently the reassessment for this year is also vulnerable to the charge of being prompted by a change of opinion. According to the petitioner, to hold to the contrary would be to ignore the reality of the situation and the consistent history wherein scrutiny assessments under section 143(3) of the Act were made by the respondent, which were also being reopened on the very same ground. It is contended that having regard to this extraordinary situation, no factual or legal distinction can be made between the first three assessment years in which scrutiny assessments were made and the assessment year 2006-07 in which the original return was merely processed under section 143(1) of the Act.

12. The arguments of the petitioner were summarised in the written submissions which have also been taken into consideration.

13. *Per contra* the learned standing counsel for the income tax department submitted that the primary or material facts relating to the claim of licence fees were not disclosed by the petitioner at the time of the original assessment proceedings. She submitted in particular that the licence agreement between the assessee and Remfry & Sagar Consultant Pvt. Ltd. was not filed in any of the assessment years; according to her, the licence agreement constituted a primary fact on the basis of which the claim was made and if that is not filed, it would amount to non-disclosure of primary facts. She referred to Explanation 1 to section 147 of the Act and contended that once it is established that the primary facts were not furnished, the fact that the petitioner had filed the partnership deed in which there is a narration of the history of the firm or that the letter dated 28.03.2005 filed by the assessee in the course of the assessment proceedings for the assessment year 2003-04 setting out the the history of the firm and its other business activities would not come to the rescue of the petitioner. She also took us through the assessment order for the assessment year 2007-08 in which the licence fee was disallowed. Reliance was also placed on paragraph 39 of the majority judgment in the case of ***CIT Vs. Usha International Ltd.(2012) 348 ITR 485***. It was submitted that in the order sheet dated 18.10.2005 relating to the assessment proceedings for the assessment year 2003-04 the assessee was asked to furnish details relating to "licence fee and official fees-unvouched" and

despite the specific request the petitioner did not file the licence agreement. Again our attention was drawn to the letter written by the assessing officer on 9th March, 2005 (page 177 of the writ petition) by which the petitioner was, inter alia, directed to furnish the nature of the licence fee expenses of ₹98.60 lakhs. The learned standing counsel thus contended that despite being asked, the petitioner did not furnish the primary fact i.e. the licence agreement and the failure to do so justified the reassessment proceedings.

14. So far as the assessment year 2005-06 is concerned, where the reassessment proceedings were initiated within the period of four years from the end of the assessment year, the argument of the standing counsel was that the information supplied by the petitioner under cover of letter dated 27.09.2006 was confined to the payments made to persons specified in section 40A(2)(b) of the Act and that did not include the licence agreement. She also pointed out that paragraph 12 of the above letter contained only a reference to the confirmation of the Remfry & Sagar Consultant Pvt. Ltd., but no agreement was filed. Moreover, this paragraph only contained a statement of fact that the payment of licence fee (along with certain other payments) was made "as per relevant agreements/ deals"; the licence agreement as such was not filed. It was thus contended that even in respect of this year, the primary fact i.e. the licence agreement, was not furnished by the petitioner in the course of the original assessment proceedings.

15. The first issue to be tackled is the contention put forth on behalf of the petitioner that the reasons recorded for reopening the assessment do not allege that the petitioner failed to file the licence agreement dated 05.06.2001 nor is there anything in the counter affidavit to that effect and, therefore, it is not open to the revenue to take up that point for the first time before this Court as it is a well-settled legal position that the reasons recorded cannot be improved upon or supplemented by subsequent averments in the course of the proceedings and that the validity of the notice under section 148 has to be judged only on the reasons recorded under section 148(2) of the Act. We accept that contention in principle, but at the same time it needs to be pointed out that what has to be alleged in the reasons recorded is the failure of the assessee to furnish the primary facts at the time of the original

assessment and we do not think that it is also necessary for the assessing officer to list the documents that were required to be furnished, but not actually furnished, by the assessee in the course of the original assessment proceedings. The primary condition for reopening an assessment is that there should be reason to believe that income chargeable to tax had escaped assessment. In the case of an assessment made under section 143(3) of the Act, the failure to furnish full and true particulars is one of the grounds on which it can be reopened where the notice of reopening is issued within a period of four years from the end of the relevant assessment year; it is however the only reason on which the assessment can be reopened, if more than four years have elapsed from the end of the relevant assessment year. This is the combined effect of section 147 and the first proviso thereto. The first proviso refers to the failure on the part of the assessee to make a return or "to disclose fully and truly all material facts necessary for his assessment, for that assessment year". Explanation 1 below the section is in the following terms: -

> *Explanation 1*.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

16. It is in the light of the statutory language that we have to examine the reasons recorded under section 148(2) of the Act in the present case. A perusal of the reasons recorded shows that the respondent has clearly stated therein that the assessee has not disclosed all material facts correctly and fully and there was failure on its part to disclose fully and truly all material facts necessary for his assessment as per the proviso to section 147 of the Act, by reason of which there was escapement of income chargeable to tax. The reasons also refer to the fact that in the course of the assessment proceedings for the year 2007-08 the licence agreement entered into in June, 2001 was examined but the claim for deduction of the licence fee payment was found not allowable. It further refers to the fact that in the course of the assessment proceedings for the assessment years 2003-04, 2004-05, 2005-06 and 2006-07 neither the assessee *suo motu* furnished information (regarding the licence fee payment) nor did it furnish reasons as to why the said claim is allowable.

It is true that the genesis of the present proceedings was the scrutiny assessment made for the assessment year 2007-08 in the course of which the petitioner had furnished the licence fee agreement; it is equally true that the respondent has clearly stated in the reasons recorded that there was failure on the part of the petitioner to furnish full and true particulars. The reference to failure of the petitioner is obviously to the failure to file the licence fee agreement, if regard is had to the reasons read as a whole, and the specific reference therein to the petitioner having filed the agreement in the assessment proceedings for the year 2007-08 as contrasted with the petitioner's failure to furnish full and true particulars or material facts at the time of the original assessments for the four earlier assessment years. It seems to us proper to understand and appreciate the reasons recorded in a fulsome manner and not to treat them as statutes and so long as the failure of the assessee to furnish primary or material facts has been brought out in sufficient relief, it is not necessary to insist on the specific failure of the assessee being stated in the reasons. A parrot-like repetition of the statutory language without any substance would certainly not amount to satisfying the jurisdictional conditions but if the language used coupled with the context is sufficiently capable of conveying the fact that there was failure on the part of the assessee to furnish primary facts fully and truly at the time of original assessment, that should be sufficient compliance with the requirements of section 148(2) of the Act. In this view of the matter we are unable to accept the contention of the petitioner that the failure to refer to the omission of the petitioner specifically to file the licence agreement (in the reasons recorded) is fatal to the validity of the reassessment proceedings.

17. We now proceed to a consideration of the question whether the licence agreement dated 05.06.2001 is a primary fact which ought to have been placed by the petitioner before the assessing officer in the course of the original assessment proceedings. In ***Calcutta Discount Co. Ltd. v. Income-tax Officer*** (1961) 41 ITR 191 a constitution Bench of the Supreme Court held that it was the duty of the assessee to furnish all the primary and material facts fully and truly before the assessing authority and failure to do so would invite action for reassessment. It was further held that the duty ends there and it is for the assessing authority to draw the

appropriate inferences from those primary facts and it is not the duty of the assessee to advise him as to what inferences may be drawn, both of fact and law. In ***Kantamani Venkata Narayana and Sons Vs. First Additional Income-Tax Officer***, (1967) 63 ITR 638, the Supreme Court held as under: -

> *"……. It is clearly implicit in the terms of sections 23 and 34 of the Income-tax Act that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year, and that the duty is not discharged merely by the production of the books of account or other evidence. It is the duty of the assessee to bring to the notice of the Income-tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment."*

18. As to what would be a primary fact would largely depend on the facts and circumstances of each case. In ***Associated Stone Industries (Kotah) Ltd. v. CIT*** (1997) 224 ITR 560 the Supreme Court was concerned with the correctness of the action under section 34(1)(a) of the Indian Income Tax Act, 1922 which authorised the assessing officer to reopen an assessment on the ground of failure on the part of the assessee to disclose material facts. The assessee therein was granted a lease by the ruler of the State for quarrying stones. The assessee was to pay royalty inclusive of income tax. Subsequently, there was a merger of the princely State with Rajasthan and a triangular litigation between the assessee, the State of Rajasthan and the Union of India ensued. The assessing officer initiated action to reopen the assessment to disallow a part of the royalty. The assessee took up the plea that the lease agreement entered into with the Maharaja of Kota State dated 02.05.1945 had been filed before the income tax officer at the time of original assessments and there was thus no failure on its part to furnish the primary facts. The Supreme Court, reversing the judgment of the Rajasthan High Court, held that the primary fact in the case was the lease agreement and since the same had been placed before the income tax officer at the time of original assessment, there was no failure to furnish primary facts. It was further held that it was not the duty of the assessee to draw the attention of the income tax officer to any particular clause or portion of the agreement and invite him to draw a particular inference from the same. It would

thus appear that whenever a claim is made for any deduction or allowance or relief in the computation of the total income, and if the claim is based on the terms and conditions of a document or documents, it is the duty of the assessee to place before the assessing officer the document or documents; the document would constitute the primary fact. The word "primary" means "that which is first in order, rank or importance; anything from which something else arises or is derived" (P. Ramanatha Aiyar's The Major Lexicon, IVth Edition 2010). In the petitions before us, it is an admitted position that the petitioner did not furnish the licence agreement dated 05.06.2001 before the assessing officer in the course of the original assessment proceedings for any year. The claim for deduction of the licence fee payment undeniably was based on the terms and conditions of the licence agreement. Only an appraisal of the various clauses of the agreement would have enabled the assessing officer to arrive at a conclusion regarding the allowability of the payment as business expenditure. Since the primary document, that is, the primary fact was not furnished, there was in our opinion such failure on the part of the petitioner as would attract the provisions of section 147 of the Act; it is a case to which Explanation 1 is attracted.

19. It is now necessary to examine the argument of the petitioner that several other facts and materials were before the assessing officer on the basis of which he could have examined the allowability of the claim. It was in particular contended that the partnership deed which was filed in the course of the original assessment proceedings narrated the history of the petitioner firm in the preamble wherein there was reference to the payment of the licence fee as also to the agreement, which would amount to sufficient disclosure. Reference was also made to the petitioner's letter dated 28.03.2005 written to the assessing officer in the course of the assessment proceedings for the assessment year 2003-04 in which the relevant primary details were said to have been furnished.

20. We have perused the partnership deed dated 05.06.2001 entered into between Dr. Sagar, Sampath Kumar, Ashwin Julka, Ramit Nagpal and Prem Nath Sewak. The preamble to the deed traces the history of the firm. Clause VIII of the preamble records that pursuant to a request by the partners, the company agreed to permit the

partners and the firm to use the name "Remfry & Sagar" in the carrying on of the practice and in connection therewith on terms and conditions incorporated in an agreement being entered into between the partners and the company contemporaneously with the execution of the deed of partnership. Our attention was not referred to any other clause in the partnership deed, which explains the terms and conditions incorporated in the licence agreement. Clause VIII of the preamble therefore cannot be considered as disclosure of a primary fact since all it does is to refer, in passing, to the licence agreement and nothing more. From this clause, it was not possible for the assessing officer to adjudicate upon the allowability or otherwise of the licence fees. The letter dated 28.03.2005 merely contained a note on the history of the firm and a note on its business activities. A copy of the partnership deed was enclosed to the letter; beyond that there is no reference to the licence agreement or to its terms and conditions. Thus, neither the partnership deed nor the letter can be considered to be primary facts on the basis of which an inference as to the allowability of the licence fee payment can be properly drawn by the assessing officer.

20. The profit and loss account, the tax audit report and the annexures thereto and the replies to the questionnaire issued by the assessing officer in the course of the original assessment proceedings do not contain anything with regard to the licence fee agreement. The annexure to the tax audit report only explains item No.18 of the report which requires particulars of payment made to the persons specified under Section 40A(2)(b) to be given. In the annexure III to the tax audit report what has been disclosed is that Remfry & Sagar Consultants Pvt. Ltd. was a company in which partners of the petitioner or their relatives were substantially interested and payments by way of licence fees, infrastructure usage fees, secretarial accounting and other support services were paid. This disclosure is only for the purpose of Section 40A(2)(b) which permits the assessing officer to disallow such payments to the extent they are found to be unreasonable having regard to the various factors spelt out in the Section. Furnishing of these particulars can in no way be considered as furnishing the primary facts in relation to the allwability of the payment of the licence fees which, as noted earlier, can be adjudicated upon only if

the terms and conditions stipulated in the agreement are made known to the assessing officer.

21. The contention of the counsel for the petitioner that the reopening of the assessments was prompted by the opinion which the respondent formed while framing the assessment for assessment year 2007-08 that the licence fee payment was not an allowable deduction, cannot be accepted because, as we have observed earlier though the genesis of the issue can be traced to the assessment proceedings for the assessment year 2007-08, the reasons recorded show that the assessing officer took proceedings under Section 147 on the ground that the licence agreement was not filed by the petitioner in the original assessment proceedings. When there is a failure on the part of the petitioner to furnish the primary facts, it is futile to examine the question whether the re-assessment was prompted by a change of opinion based on the view which the assessing officer took in subsequent assessment proceedings.

22. In respect of the assessment year 2006-07 there was no earlier assessment under Section 143(3). The return was merely processed by the assessing officer under Section 143(1) and since he did not have any opportunity to form an opinion regarding the allowability of the licence fee, the question of change of opinion does not arise. However, he must have "reasons to believe" that income chargeable to tax had escaped assessment and the reasons should be based on valid materials and should not be a pretence. It must have a rational connection or nexus or live link with the materials before the assessing officer. Even for this year, the petitioner had not furnished the license agreement along with the original return. The argument of the counsel for the petitioner is that the earlier three assessments were completed under Section 143(3) in which the license fee payment was allowed as a deduction and therefore the respondent did not feel the need to make any changes to the return filed by the assessee for the assessment year 2006-07 and since he was conscious of the fact that the license fee payments have been allowed by him as a deduction in the three earlier years, he took a conscious decision, though under Section 143(1), to allow the licence fee payment for the assessment year 2006-07 also, and in that sense the subsequent reopening of the assessment must be held to be based on a

mere change of opinion. We find it difficult to accept this strained and somewhat convoluted argument, if we may say so, with respect. It is difficult to attribute any knowledge to the assessing officer while he is dealing with a return for a particular year under section 143(1), as to what he had done in the case of the same assessee in the earlier assessment years. Therefore, we are not able to accept the argument that the assessing officer consciously allowed the license fee payment as a deduction when he accepted the return under Section 143(1). All we have to see is whether there was "reason to believe" within the meaning of Section 147. The fact that the petitioner did not place the primary facts relating to the claim of the license fee by filing the license agreement dated 05.06.2001 along with the return of income filed for the assessment year 2006-07 would itself constitute reason to believe that primary facts have not been furnished by the petitioner. There is nothing in Section 147 prohibiting the reopening of an assessment completed under Section 143(1) on the ground that the assessee failed to furnish the primary facts fully and truly. In our opinion, failure to furnish the primary facts would constitute reason to believe authorising the issue of notice under Section 148 of the Act also in a case where the first assessment was made by a mere processing of the return under Section 143(1).

For the above reasons we find no merit in the writ petitions which are dismissed. All interim orders stand vacated. There shall be no order as to costs.

(R.V. EASWAR)
JUDGE

(S. RAVINDRA BHAT)
JUDGE

JANUARY 17, 2013
hs/vld/bisht