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

\+ W.P.(C) 2769/2012

CANON INDIA PVT. LTD AND ANR ..... Petitioners
Through Mr. C.S. Aggarwala, Sr. Advocate with Mr. Prakash Kumar, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. N.P. Sahni, Sr. Standing Counsel.

% O R D E R
31.07.2013

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J (ORAL)

1. Canon India Pvt. Ltd., by this writ petition, has challenged the re-assessment proceedings initiated for the assessment year 2004-05 by issuance of notice dated 28th March, 2011 under Section 148 of the Income Tax Act, 1961(Act, for short).

2. For the assessment year 2004-05, the petitioner had filed their return detailing income earned, on 30.10.2004. The return was taken up for scrutiny and regular assessment order under Section 143(3) dated 22.12.2006 was passed. Income was assessed at 'Nil' after setting off brought forward losses.

3. Subsequently as noted above, notice for re-assessment dated

28.03.2011 under Section 148 was issued by the assessing officer. The petitioner filed written objections to the re-opening vide letter dated 12th July, 2011, which stand rejected by order dated 12.9.2011. This order, however, was set aside by the High Court in Writ Petition (Civil) No.7026/2011 and the issue/matter was remanded to decide the objections afresh. The respondent (assessing officer) has now passed the impugned order dated 11.4.2012 rejecting/dismissing the objections to the re-opening. The assessing officer has held that the reopening is valid and legal.

4. At this stage, we may notice two facts. Notice of re-assessment has been issued after four years from the end of the assessment year and the assessee was subject to regular assessment under Section 143(3) of the Act. First proviso to Section 147 of the Act is applicable.

5. Reasons to believe recorded by the assessing officer before issue of impugned notice, read:

> "REASONS FOR REOPENING THE CASE U/S 148 IN THE CASE O M/S CANON INDIA PVT. LTD., A.Y.2004-05
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> The return in this case for the A.Y. 2004-05 was filed on 30.10.2004 declaring income of Rs.Nil/-. The return was processed in Summary Manner in April, 2005 at an income of Rs.Nil/-.

The case was selected for scrutiny and the assessment was completed u/s 143(3) on 22.12.2006 at total income of Rs.Nil/-.

The perusal of assessment records for the a.Y.2004-05 reveals that the assessee had made a provision for warranty amounting to Rs.1,68,00,699/- in respect of goods sold. As the provision towards on unascertained liability is not allowable under the Act, it should have been disallowed and taxed. The mistake resulted in underassessment of income of Rs.1,68,00,699/- involving a short levy of tax of Rs.68,10,794/-.

"The Income Tax Act, 1961 provides that a provision made in the accounts for an accrued or known liability is an admissible deduction, while other provision made to not qualify for deduction. It has been judicially held that for a loss to be deductible, it must have actually arises and incurred and not merely anticipated as certain to occur in future."

Further, on perusal of assessment records for theA.Y. 2004-05, it was observed that while making processing, the assessee was allowed exemption under section 10A amounting to Rs.3,17,99,733/- before setting off of brought forward business losses/unabsorbed depreciation amounting to Rs.28,72,75,424/- which was not correct. The mistake resulted in incorrect allowance of exemption under section 10A involving potential tax effect of Rs.1,14,08,155/- .

" Section 10A of the Income Tax Act, 1961, provides that subject of the provisions of this section, a deduction of such profits and gains as are derived by on undertaking from the export of articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee."

> In view of the above facts, I have reason to believe that income chargeable to tax has escaped assessment owing to the failure on the part of the assessee to disclose fully and truly all material facts relevant for the assessment. Issue notice u/s 148 of the I.T.Act, 1961 for the A.Y. 2004-05."

6. A reading of the aforesaid "reasons to believe" indicate that two grounds or reasons have been given by the assessing officer for initiation of the re-assessment proceedings. The assessee had made a provision of warranty amounting to Rs.1,68,00,699/- which was an unascertained liability and, therefore, the entire amount should have been disallowed. The second ground is that there was an error in computation of deductions under Section 10A as brought forward losses and unabsorbed depreciation was not set off and was allowed to be carried forward.

7. The contention of the petitioner is that these two issues were raised and considered by the assessing officer at the time of original assessment. Thus it is a case of change of opinion or re-examination. Secondly, the petitioner had made full and true disclosure of material facts.

First issue- Provision for warranty.

8. In the notes to the computation of Income for the assessment

year 2004-05 filed with the original return, the assessee ha declared as under:-

> "2. During the year, the assessee had made a provision for warranty amounting to Rs.16,800,699 as per accounts in respect of goods sold on the basis of part year's trends. The same is an allowable expenditure as it has been made on a scientific basis and does not represent an adhoc provision. Reliance in this regard can be placed on the following decisions:
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> - Commissioner of Income Tax v. Beerna Mfrs (P) Ltd [2003] 130 Taxman 400 (Madras);
> - Commissioner of Inland Revenue v. Mitsubishi Motors New Zealand Ltd. 222 ITR 697 (Privy Council of New Zealand);
> - Voltas Ltd. 61 TTJ 543 (Mum. Tribunal);
> - Jay Bee Industries v. DCIT 61 TTJ 403 (Amritsar Tribunal); and
> - Wipro GE Medical Systems Ltd. v. DCIT 81 TTJ 455 (Bangalore Tribunal)"

9. During the course of the assessment proceedings with reference to the said note, the assessing officer had written a letter dated 11.10.2006 raising a query why the provision for Warranty expenses should not be disallowed. The assessee was also asked to furnish working of the claim. Reply to the said query goes into about 15 pages. Reference was made to several factual facets as well as legal position. Case laws on the subject

was relied upon.

10. It is clear from the aforesaid undisputed facts that the claim, i.e., provision for warranty and whether the same should be allowed as an expenditure was specifically examined and gone into during the first round or the original assessment proceedings. Mere fact that there is no discussion in the assessment order agreeing or accepting the stand of the assessee/petitioner, does not mean that the said question or issue was not examined. When a query is raised and answered by the assessee, the issue, it can be said, was debated by the assessing officer. If the assessing officer, thereafter, does not make any additions, he accepts the claim or the contention of the assessee.

11. In the impugned order dated 11.4.2012, the assessing officer has accepted that the queries were raised and answers were given on the question of provision for warranty but observed this aspect has not been discussed and dealt with in the assessment order. This is not sufficient and valid reason for initiation of re-assessment proceedings. In ***CIT vs. Usha International Ltd. (***2012) 348 ITR 485 (ITR), it has been held that reassessment proceedings will be invalid in case an issue or

query was raised and answered by the assessee in the origina assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations, it should be accepted that the issue was examined by the Assessing Officer but he did find any ground or reason to make addition or reject the stand of the assessee. Further, the Revenue is not without remedy and when an assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to invoke power under Section 263 of the Act.

Second Issue- Deduction under Section 10A

12. On the second ground or reason, it is noticed that during the original assessment proceedings, the assessing officer vide letter dated 23.5.2006 had asked the petitioner to furnish details relating to various exemption and deductions and the reason why the same should be accepted. They were also asked to submit details of losses carried forward, details of the returned and assessed losses from the beginning along with the relevant documents. These details were submitted. The petitioner vide letter dated 10.7.2006 had stated that the petitioner had not claimed any exemption under Chapter VI-A, in the relevant previous year though they had exported software and were entitled to claim deduction under Section 80HHE. The

petitioner claimed that the profits derived from export c computer software through the STP undertaking were covered under Section 10A of the Act, i.e. have to be excluded from total income as they do not form part of the income chargeable to tax. They had furnished details and documents relating to the STP Scheme, the sales made etc. It was stated that the undertaking which was developing software had complied with all conditions stipulated under Section 10A. The said section falls in Chapter-III, i.e., income which does not form part of the total income. The petitioner had obtained certificate from a Chartered Accountant in Form 56F which includes the details of export turnover, profit derived from STP Unit and the amount of deduction/exemption claimed. It was stated that in the earlier-assessment years, i.e., 2000-01 till 2003-04, the claim had been examined in detail by the assessing officer and his predecessors. The petitioner had furnished details of returned losses and assessed losses which had been carried forward by the petitioner, year after year which was enclosed in the form of an Annexure.

13. Annexure A to Form 56F gives complete details of computation of the deduction under Section 10A. The petitioner had also furnished details with regard to the brought forward

losses before the assessing officer at the time of origina assessment. Details of unabsorbed depreciation were available and filled before the assessing officer. Thus, the assessee had placed full and true material facts. The assessing officer was aware that the petitioner had claimed deductions under Section 10A and of the method and manner of computation of the said deduction. The assessing officer was fully aware and conscious of the fact that the assessee had brought forward losses and unabsorbed depreciation, but the same had not been set off in the computation under Section 10A of the Act. The unabsorbed depreciation and losses were allowed to be carried forward and not specifically disallowed or set off, as it was claimed in the computation sheet. Thus full and true material facts were not only disclosed but were known to and in the knowledge of the assessing officer.

14. In these circumstances, we feel that the assessee had satisfied the requirement of making full and true disclosure of material facts and therefore requirement of the first proviso to Section 147 of the Act are not satisfied. In this connection, we would like to reproduce our observation in Writ Petition No.2768/2012 in the case of the petitioner which relates to assessment years 2003-04:

"8. It is true that when allegation of change of opinion is made one should expect full and true disclosure of primary and material facts but it would be incorrect to hold that if there is full and true disclosure of material facts it can be assumed that there was formation of opinion. Formation of opinion necessitates due examination of subject matter, where as in a case there is full and true disclosure of primary/material facts, the question whether there was formation of opinion need not be examined and answered. In **CIT v. Usha International Ltd. (2012) 348 ITR 485**, where the majority opinion authored by one of us (Sanjiv Khanna, J.), drew a distinction between the additional requirements stipulated in the first proviso i.e. 'full and true disclosure of material facts' and 'change of opinion' in the following words:-

> "24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does

> not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected."

9. Assessment is a tedious and complex process wherein examination of several subject matters, claims, entries or deductions is required. It is not wholly implausible that, in spite of best efforts and intention, the Assessing Officer may miss out and not examine a particular subject matter, claim, entry or deduction. It is not unknown that an entry, claim or statement may remain hidden in the reams of paper or documents. Therefore, by simply producing voluminous records before the Assessing Officer, an assessee cannot escape the re-assessment notice, unless it is apparent and evident from the records that the matter, claim, entry or deduction had come to the notice of the assessing officer. When a matter, claim, entry or deduction had not come to knowledge of the assessing officer previously or he was not aware of the claim etc., then it would be an oddity to call it "change of opinion". Awareness and knowledge of facts by the assessing officer is

necessary for "change of opinion". On the other hand, the first proviso operates on its own strength and conduct of the assessee is the core or the central question as the proviso alludes to disclosure of true and full material facts by the assessee and not application of mind or "change of opinion" by the assessing officer.

10. But then we have Explanation 1, which articulates that production of books or accounts or other evidences from which material facts could have been discovered had due diligence been exercised by the assessing officer, does not necessarily amount to disclosure of the material facts. Short contention and issue is when the disclosure can be regarded as full and true disclosure and when lack of due diligence of the Assessing Officer is covered by Explanation 1 to Section 147 of the Act.

11. In order to decide the said controversy, we would like to reproduce the first proviso and Explanation 1 to Section 147 of the Act, which read as under:

> **Provided** that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

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> "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."

Proviso 1 to Section 147 of the Act postulates that reassessment proceedings cannot be validly initiated, after the expiry of four years, unless there were true and full disclosure of facts by an assessee. This full and true disclosure of facts has to be made at the time of filing of return and the assessment proceedings. The proviso has to be read along with Explanation 1 and we have to examine the interplay between the proviso and the explanation to Section 147 of the Act.

12. In ***3i Infotech Ltd. Vs. Assistant Commissioner of Income Tax & Others (2010) 329 ITR 257 (Bom.)*** it has been elucidated:

> "Explanation 1 to section 147 stipulates that the 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 a disclosure within the meaning of the first proviso. In other words, an assessee cannot rest content merely with the production of account books or other evidence during the course of the assessment proceedings and challenge the reopening of the assessment on the ground that if the Assessing Officer were to initiate a line of enquiry, he could with due diligence have arrived at material evidence. The primary obligation to disclose is on the

assessee and the burden of making a full and true disclosure of material facts does not shift to the Assessing Officer. The assessee has to disclose fully and truly all material facts. Producing voluminous records before the Assessing Officer does not absolve the assessee of the obligation to disclose and the assessee, therefore, cannot be heard to say that if the Assessing Officer were to conduct a further enquiry, he would come into possession of material evidence with the exercise of due diligence. An assessee cannot throw reams of paper at the Assessing Officer and rest content in the belief that the officer better beware or ignore the hidden crevices in the pointed material at his peril.

Parliament has used the word "necessarily" in Explanation 1. The expression "necessarily" means inevitably or as a matter of a compelling inference. The Oxford English Dictionary defines the expression "necessarily" as meaning (i) by force of necessity ; unavoidably ; (ii) as a necessary aid or concomitant ; indispensably ; (iii) by a necessary connexion ; (iv) in accordance with a necessary law or operative principle ; (v) as a necessary result or consequence ; and (vi) of necessity ; inevitably. The production of account books or other evidence before the Assessing Officer will not, therefore, inevitably amount to an inference of disclosure within the meaning of the first proviso. As a Division Bench of the Calcutta High Court observed in Imperial Chemical Industries Ltd. v. ITO [1978] 111 ITR 614, the words "not necessarily" indicate that "whether it is a disclosure or not within the meaning of the said section . . . would depend on the facts and circumstances of each case, that is the nature of the document and circumstances in which it is produced." (at page 639). In Rakesh Agarwal v. Asst. CIT

> [1996] 221 ITR 492, the Delhi High Court held that the nature of the documents and the circumstances in which these are produced before the Assessing Officer will determine the question. If the material is not writ large on the document, but is embedded in voluminous records or books of account which require careful scrutiny by the Assessing Officer, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and the case would attract the Explanation."
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16. The first proviso and Explanation have to be read together and harmoniously to understand the legislative intent behind the two provisions. The first proviso applies where the original return has been subjected to scrutiny or regular assessment under Section 143(3) and the reassessment notice is issued after lapse of four years from the end of the assessment year. In such cases, for reassessment proceedings to be valid and legal, an additional condition has to be satisfied, viz there was failure of the assessee to disclose fully and truly all material facts necessary for the assessment. However, this condition need not be satisfied where a reassessment notice is issued prior to expiry of four years from the end of the relevant assessment year. Explanation 1 comes to the aid of the Revenue in cases where an assessee claims that he had produced Books of Accounts or documents/evidence and if the Assessing

Officer had examined the said Books of Accounts or other evidence with due diligence, or care and caution, he could have discovered the primary/material facts, subject matter of the re-assessment notice. Thus, Explanation 1 refers to failure on the part of the Assessing Officer to discover or uncover material facts even when books of accounts or other evidence were produced before the Assessing Officer at the time of original assessment. The Supreme Court in ***Malegaon Electricity Co. P. Ltd. vs. CIT*** [1970] 78 ITR 466 (SC) has observed:-

> "It is true that if the Income-tax Officer had made some investigation, particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realised by the assessee. It can be said that the Income tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to disclose fully and truly all material facts necessary for his assessment for that year."

The proviso casts an obligation and duty on every assessee to disclose fully and truly all material facts relevant for the assessment but do not require an assessee to go beyond disclosure of full and true material facts. It is for the Assessing Officer to decipher and decide whether or not, on disclosure of full and true material facts, the assessee is entitled to a claim, deduction, accept, reject or modify any computation etc. Thus, when the first proviso applies,

i.e. there was disclosure of true and full material facts, then further enquiry into whether or not Assessing Officer had applied his mind is not mandated. The underlying principle is that if there was no omission or failure on assessee's part to disclose true and full material facts; he is not to be faulted and reassessment proceedings against him would be barred after four years under first proviso to Section 147 of the Act.

17. Explanation 1 to Section 147 is introduced in a way to provide contours to the expression 'full and true disclosure of material facts' and restricts, moderates and clarifies the expression. Mere production of books of account or other evidence is not sufficient, when material lies embedded or buried in the books of account or documents produced, which the Assessing Officer would have uncovered and discovered through inference or otherwise on deeper scrutiny. This cannot be a ground to strike down the reassessment notice to bring to tax the escaped income. This is the only method and manner in which the first proviso and Explanation 1 can be harmoniously read without emasculating either one of them. Thus, one has to examine the disclosure of the facts stated in the document/return/accounts and once the disclosure is transparent and distinct and does not require deeper scrutiny/unearthing of material facts by due diligence the first proviso protects and Explanation1 is not attracted. In essence, the first

proviso stipulates that the assessee must transparently put forth necessary factual matrix by simply and clearly disclosing true and full material facts and nothing more. The Explanation stipulates that those facts which could have been deciphered or encrypted and remained concealed because of lack of transparency and clarity do not amount to full and true disclosure of material facts. In this manner, the two provisions can be reconciled and read together.

18. Both; the first proviso and Explanation 1 refer to material facts and not "Law".

15. In view of the aforesaid discussion, we allow the writ petition quashing the re-assessment notice as well as the order dated 11.4.2010.

16. The writ petition is disposed of. No orders as to costs.

SANJIV KHANNA, J.

SANJEEV SACHDEVA, J.

JULY 31, 2013
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