



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

+ **Writ Petition (Civil) No. 8283/2010**

% **Reserved on: 23rd July, 2013**
Date of Decision: 30th August, 2013

M/s OPG Metals & Finsec Ltd.Petitioner
Through Mr. Salil Kapur, Mr. Vikas Jain,
Mr. Sanat Kapur & Mr. Ankit Gupta,
Advocates.

Versus

Commissioner of Income Tax & Anr. ... Respondents
Through Mr. Kamal Sawhney, Advocate.

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

SANJIV KHANNA, J.

OPG Metals and Finsec Ltd. by this writ petition challenges reassessment notice dated 25th March, 2010 under Section 148 of the Income Tax Act (the Act), which relates to assessment year 2003-04 and the order dated 4th October, 2010 passed by the Assessing Officer dismissing their objections to the reassessment notice.

CONTENTIONS OF THE PETITIONER

2. The petitioner's first contention is that it is a case of change of opinion as earlier a notice dated 7th November, 2006 under Section 148 of the Act was issued to the petitioner, in respect of the same assessment year. At that time when the Assessing Officer vide



assessment order dated 28th December, 2007 had made an addition Rs.6,66,382/-, he did not deem it fit and appropriate to make any addition in respect of share transactions which are subject matter of the present reassessment notice. Thus it is a case of change of opinion after application of mind by the Assessing Officer. At the time of first reassessment, the details of the questioned share transactions/consideration were specifically enclosed in form of a chart with the return of the income and also filed with the Assessing Officer, with letter/objections raised before the Assessing Officer. The Investigating Wing of the Department had furnished lists of beneficiaries of accommodation entries ascertained from the account of the alleged operators vide letters dated 2nd March, 2006, 16th June, 2006 and 5th February, 2007. Therefore, petitioner submits that this information regarding alleged dubious transactions, which is made subject matter of the second reassessment notice, was already available with the Assessing Officer when he had passed the first reassessment order on 28th December, 2007. In the present case there has been full and true disclosure of all material facts. Reliance is placed upon *Income Tax Officer vs. Madani Engineering Works Ltd.* [1979] 118 ITR 1 (SC) and judgment of a Division Bench of this Court in *Haryana Acrylic Manufacturing Co. v. Commissioner of Income-tax* (2009) 308 ITR 38 where it was held that:

“In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income



from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to Section 147. If this condition is not satisfied, the bar would operate and no action under Section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in *Wel Intertrade Private Ltd.* (supra) we had agreed with the view taken by the Punjab & Haryana High Court in the case of *Duli Chand Singhanian* (supra) that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing officer under Section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29.03.2004 under Section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 02.03.2005 are without jurisdiction as no action under Section 147 could be taken beyond the four year period in the circumstances narrated above.”

3. It is submitted that in the first round of reassessment, the issue was related to alleged bogus share transactions/consideration received through an alleged accommodation entry provider, which is the ground or reason for issue of second reassessment notice. This question could and should have been examined and addition could have been made during the first round of the reassessment proceedings. Judgment in the case of *Jai Bharat Maruti v. Commissioner of Income Tax* (2010) 324 ITR 289 (Delhi) on the point that Assessing Officer can reopen proceedings based on particular items and cannot proceed to bring to tax items which are not connected with what was initially indicated in



the reasons disclosed under Section 148 (2) of the Act was pronounced on 20th October, 2010 and is therefore later in point of time. Thus, the assessing officer could have examined all transactions/credits in books, including cases not mentioned in the reasons to believe recorded on the first occasion, when the first re-assessment order was passed on 28th December, 2007.

4. It is also submitted that Commissioner of Income Tax (Appeals) by order dated 16th March, 2009, has accepted the appeal of the petitioner and deleted the additions made by the Assessing Officer vide reassessment order dated 28th December, 2007. Revenue had accepted the said decision and, therefore, the present reassessment proceedings are based on surmises and conjectures. They are liable to be quashed, since the CIT(Appeals) has held that the share transfer transactions were genuine.

FACTS

5. Petitioner company for the assessment year 2003-04 had filed their return declaring loss of Rs.4,03,243/- on 28th Nov, 2003. The return was processed under Section 143(1) of the Act and no regular assessment order was passed.

6. Six companies/concerns namely M/s Kriti Metal Agencies Pvt. Ltd., M/s Sanjay Wire Industries Pvt. Ltd., M/s Bimla Wire Industries Pvt. Ltd., M/s Rohan Enterprises Pvt. Ltd., M/s Omsons Wire Industries Pvt. Ltd. And M/s OPEE Finance Co. Ltd. had merged into the petitioner company vide approval/sanction granted by the Delhi High Court under order dated 25th November, 2002 w.e.f. 1st April,



2002. These six companies had not filed independent returns income for the period relevant to the assessment year 2003-2004.

FIRST RE-ASSESSMENT PROCEEDINGS

7. The Assessing Officer on the basis of information received from Investigating Wing issued the first reassessment notice dated 7th November, 2006 under Section 148 of the Act recording the following reasons:

“The Principal Officer
M/s OPG Metals & Finsec Ltd.
(formerly known as M/s Om Sons Wire Industry Pvt.
Ltd.)
5440, Basti Harphol Singh, Sadar Thana Road,
Delhi 110 006

Sir,

Sub: Request for reasons recorded for initiating assessment proceedings u/s 148 of the I.T. Act for the A.Y. 2003-04 reg.

With reference to the above mentioned subject please refer to your letter dated 18.12.2006. As requested by you the reasons recorded for reopening the case u/s 148 are reproduced as hereunder:

“The Investigating Wing, New Delhi has sent detailed information. As per information, the assessee company’s name appears in the list of beneficiaries who have obtained accommodation entries from the following parties:-

| BENEFICIARY BANK NAME | BENEFICIARY BRANCH | VALUE OF ENTRY TAKEN | DATE ON WHICH ENTRY TAKEN | NAME OF ACCOUNT HOLDER OF ENTRY GIVING ACCOUNT | BANK FROM WHICH ENTRY GIVEN |
|-----------------------|--------------------|----------------------|---------------------------|--|-----------------------------|
| OBC | Azadpur | 602250 | 29 April, 2002 | MKM Finsec P. Ltd. | Ratnakar |
| OBC | Azadpur | 64132 | 11 Feb | MKM | SBH |



| | | | | | |
|-----------|------------|--------|------------------|---------------------------------|----------|
| | | | 2003 | Finsec P Ltd. | |
| STANCHART | Karol Bagh | 500000 | 29 April 2002 | Sashi Sales & Mktg P Ltd. | Ratnakar |

Since the assessee has received entries, I have reason to believe that income of the assessee to the extent of Rs.11,66,382/- has escaped assessment for which action u/s 147 of the IT Act, 1961 is initiated for the A.Y. 2003-04.”

8. It is apparent from the heading that the notice was issued specifically in respect of the company formerly known as Om Sons Wire Industry Pvt. Ltd., one of the six companies/concerns which merged with the petitioner's company, and there were three transactions dated 29th April, 2002 and 11th February, 2003 regarding which, on the basis of information made available by the Investigating Wing, the assessing officer had formed a prima facie view that these were accommodation entries. The first two entries related to account holder M/S MKM Finsec Pvt. Ltd. and mentions the bank and branch name from where the money was received.

9. In the assessment order dated 28th December, 2007, the Assessing Officer examined three entries and addition of Rs. 6,66,382 was made in respect of the alleged transaction with M/S MKM Finsec Pvt. Ltd. He did not make any addition in respect of entry No. 3 i.e. transaction of Rs.5,00,000/- dated 29th April, 2002 i.e. money received from Sashi Sales & Marketing Pvt. Ltd.

DECISION

10. The short question is whether at that time and before passing the assessment order dated 28th December, 2007, the Assessing Officer had applied his mind in respect of sale transactions made by the other five



companies/entities which had merged with the petitioner company i OPEE Finance Co. Ltd., Kriti Metal Agencies Pvt. Ltd., Sanjay Wire Industries Pvt. Ltd., Rohan Enterprises Pvt.Ltd., and Vimla Wire Industries Pvt. Ltd., had engaged in purported bogus transactions with the MKM Finsec Pvt. Ltd., though these companies had declared long term capital gain on sales of shares of OPG Metal and Finsec Ltd., OPEE Finance Co. Ltd. and G.D. Goenka Tourism Pvt. Ltd. OPG Metal and Finsec Ltd. had also disclosed short term gains on sale of 50000 shares of MGK Overseas Pvt. Ltd. and Rohan Enterprises Pvt. Ltd. had also disclosed short term capital gains.

11. Normally, we would have held that Assessing Officer had duly applied his mind during the first reassessment proceeding regarding the subject matter of bogus sales through accommodation entries or credits. However, in the peculiar facts of the present case we are inclined to accept that during the earlier proceeding the Assessing Officer had not applied his mind and had not formed any opinion regarding the transactions in question. There are various reasons and grounds for the same and we shall be elucidating upon them below.

12. From the chart submitted by the petitioner giving details of long term capital gains/short term capital gains in respect of five companies, it does not transpire that the transactions were brokered or the sale consideration was received from MKM Finsec Pvt. Ltd. There was no reason or cause for the Assessing Officer to assume that these transactions of long term/short term capital gains were with MKM Finsec Pvt. Ltd or there were also bogus sales much like the case of Om Sons Wire Industry Pvt Ltd. In fact, order sheet notings recorded in the first round reveal that the petitioner was asked to furnish details



vide noting dated 11th July, 2007 and by letter of the same date, information relating to transactions with MKM Finsec Pvt. Ltd. as well as Shashi Sales and Marketing Pvt. Ltd. was asked. Similarly, by another order dated 22nd November, 2007, the authorized representative of the petitioner was asked to file bills and invoices of MKM Finsec Pvt. Ltd. through whom the transfers were made. However, in the replies filed by the petitioner only the details of shares which were earlier held by Om Sons Wire Industry Pvt. Ltd. and then transferred to MKM Finsec Pvt. Ltd were furnished. The petitioners kept silent on the numerous transactions made through five other companies with MKM Finsec Pvt. Ltd. and no details of these transactions were furnished. The documents i.e. the chart, placed on record and on which assessee excessively relies prove that the petitioner had furnished the relevant information but was cautious and careful not to mention about any other transactions of MKM Finsec Pvt. Ltd. From these documents it is not possible to discern involvement of MKM Finsec Pvt Ltd. in any of the transactions made by the five companies. Neither did the petitioner mention or state that there were other sale transactions with MKM Finsec Pvt. Ltd. in any of the letters, communications and correspondence with the Assessing Officer. Had that been the case, the position would have been different.

13. The Assessing Officer i.e. the Income Tax Officer, Ward 23, was equally clear. In the office note to the assessment order, he has mentioned and recorded as under:

“The case was reopened on the basis of information in respect of M/s Omsons Wire Industry Pvt. Ltd.



and, therefore, in assessment also issues relating to M/s Omsons Wire Industry Pvt. Ltd. only have been examined.”

14. The aforesaid office note shows that Assessing Officer in the first round had only examined the transactions of Omsons Wire Industry Ltd. and had not gone into any other transactions. Thus it can be safely stated that it is not a case of change of opinion as propounded and argued on behalf of the petitioner. On the said aspect, it would be appropriate to quote the following observations *CIT v. Usha International* [2012] 348 ITR 0485:

“15. Here we must draw a distinction between erroneous application/ interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression '_material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.



16. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. Decision of this Court in Writ Petition (Civil) No. 6205/2010, Dalmia Private Limited versus Commissioner of Income Tax Delhi 10 and Another, dated 26th September, 2011 and decision of Bombay High Court in Writ Petition No. 1017/2011, The Indian Hume Pipe Company Limited versus The Assistant Commissioner of Income Tax, dated 8th November, 2011 are two such cases. In the first case, the Assessing Officer in the original assessment had made additions of Rs. 19,86,551/- under Section [40\(1\)](#) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details etc. were not furnished, were to the extent of Rs. 52,84,058/- and not Rs. 19,86,551/-. In Indian Hume Pipe Company Limited (supra), after verification the claim under Section [54EC](#) was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not appreciate the implications or did not apply the correct law. The second category will be a case of "change of opinion" and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interest of the Revenue, can be made subject matter of adjudication under Section [263](#) of the Act.”



15. We have examined the contention of the petitioner that information with regard to transactions of other companies with MKM Finsec Pvt. Ltd. was within the knowledge of the Assessing Officer in the first round as three letters had been written by the Investigating Wing of the Department. The letter dated 2nd March, 2006 was followed by letters dated 16th June, 2006 and 5th February, 2007. These letters were written by Directorate of Income Tax (Investigation) to the Chief Commissioner of Income Tax, Delhi/Commissioner of Income Tax, Delhi-V, enclosing therewith, a compact disc. The disc had data that had to be scanned, sifted through and then the details of alleged transactions, including company name, persons involved etc., had to be fully ascertained. The assessing officers were required to scan through thousands of entries to discern and determine which of their assessee, if any, has been a beneficiary of an accommodation entry. From these letters, it is not possible to know that the Assessing Officer i.e. the Income Tax Officer, Ward 13(4) had information in his possession and was aware that the five other companies had also entered into transactions with MKM Finsec Pvt. Ltd. but he has chosen to ignore and had deliberately not gone into the said aspect. The petitioner cannot point out any other information or detail available in the original file which reflects that the Assessing Officer had the knowledge regarding the same. Thus, when the said facts were not in knowledge of the Assessing Officer during the first reassessment proceedings before him to form an opinion on the transactions now in question, it would be a fallacy to argue that the second reassessment was change of opinion. Reliance placed upon decision of this Court in *Jai Bharat Maruti (supra)* decided on 20th October, 2010 is



misconceived. Date on which the judgment is pronounced is not relevant but what is relevant is whether or not the Assessing Officer had examined the transactions subject matter of the second reassessment orders. The decision in *Jai Bharat Maruti (supra)* pronounced on a later date does not mean that the Assessing Officer while passing the first reassessment order on 28th December, 2007 could not have accepted the plea of the assessee and had examined and gone beyond the items or subject matter of the reassessment notice. The said assumption is ill founded.

16. The contention of the petitioner that the issue or subject matter of the first reassessment was broad enough and included the transactions which are subject matter of the second reassessment proceedings, is incorrect. The first reassessment notice was very specific and related to shares which were procured by Omsons Wire Industry Pvt. Ltd and had been sold to MKM Finsec Pvt. Ltd. Two transactions with the said company were specifically mentioned and third transaction was with Sashi Sales & Marketing Pvt. Ltd. The third transaction appeared to be fair transaction. The Assessing Officer could not have presumed that there were other transactions in respect of shares purchased by the amalgamated companies of the petitioner with MKM Finsec Pvt.Ltd.

17. For examination of other contentions raised, we have to refer to reasons to believe recorded by the Assessing Officer before issue of second notice under Section 148 of the Act dated 28th March, 2010. The said reasons read as under:-

“Reasons for issuing notice u/s 148 of the Act in the case of M/s OPG Metal & Finsec Ltd. A.Y. 2003-04 and



- (i) M/s OPEE Finance Co. Ltd.
- (ii) KRITI METAL AGENCIES PVT LTD
- (iii) BIMLA WIRE INDUSTRIES PVT LTD
- (iv) ROHAN ENTERPRISES PVT LTD

Merged with M/s OPG Metal & Finsec Ltd.-reg.

Return of income declaring loss of Rs.403240/- was originally filed by M/s OPG Metal & Finsec Ltd. on 28/11/2003 vide ack. No. 1351000562 after consolidating the accounts of 6 transferor companies, i.e., (i) Kriti Metal Agencies P Ltd., (ii) Sanjay Wire Industries P. Ltd. (iii) Bimla Wire Industries P. Ltd. (iv) Rohan Enterprises P. Ltd. (v) Omsons Wire Industry P. Ltd. and (iv) OPEE Finance Co. Ltd. merged with the assessee company w.e.f 1-4-2002 in view of the approval granted by Hon'ble High Court of Delhi vide its order dated 25-11-2002. The case was processed u/s 143(1) on 25/03/2004.

Thereafter this case was reopened u/s 147 of the Income Tax act, 1961 after recording the reasons in writing in respect of one of the transferor company named M/s Om Sons Wire Industry P. Ltd. that this company has taken accommodation entries to the tune of 11,66,382/-. While making the assessment u/s 147 entries related to M/s Om Sons Wire Industry P Ltd. were only considered and assessment was made on 28/11/2007.

A comprehensive investigation was carried out by the Investigation wing for identification of entry operators engaged in the business of money laundering for the beneficiaries and on the basis of investigation carried out and evidences collected, a report has been forwarded. I have perused the information contained in the report and the evidences gathered. The report provides details of the modus operandi of the 'money laundering scam' and explain how the unaccounted money of the beneficiaries are ploughed back in its books of account in various forms including the form of bogus share capital/capital gains etc after routing same through the bank account(s) of the entry operators. Entry operators were identified after thorough investigation on the basis of definitive analysis of their identity, creditworthiness and the source of the money ultimately received by the beneficiaries. These entry operators are found to be mostly absconding/non-complying after the unearthing of the 'Money Laundering Scam' leaving the said money at the disposal of the beneficiaries without any associated cost or liability.



The details received from Investigation wing were in 2-3 parts. Therefore the following entry too related to the assessee company (transferee and transferee companies) were not considered while opening and completion of assessment proceedings u/s 147 was inserted by the Finance (No.) 2 Act, 2009 the information received after reopening of assessment was not examined as the same were not in the reasons so recorded:-

| BANK FROM WHICH ENTRY GIVEN | BRANCH OF ENTRY GIVING BANK | NAME OF ACCOUNT HOLDER | Account No. of entry operator | DATE ON WHICH ENTRY TAKEN | Instrument no. by which entry taken | Amount of entry | Beneficiary name | Beneficiary bank account |
|-----------------------------|-----------------------------|------------------------|-------------------------------|---------------------------|-------------------------------------|-----------------|---------------------------------|--------------------------|
| RATNA KAR | KAROL BAGH | MKM FINSEC LTD. P | 40 | 13-Mar-03 | Opec Finance Co. | 200,000 | OPEE FINANCE CO LTD. | LAKSHMI VILAS BANK |
| RATNA KAR | KAROL BAGH | MKM FINSEC LTD. P | 40 | 18-Mar-03 | Opec Finance Co. | 200,000 | OPEE FINANCE CO LTD. | LAKSHMI VILAS BANK |
| State Bank of Hyderabad | KB | MKM FINSEC LTD. P | 50037 | 27-Mar-03 | CLG: 15012 OPEC | 320,548 | OPEE FINANCE CO LTD. | LAKSHMI VILAS BANK |
| RATNA KAR | KAROL BAGH | MKM FINSEC LTD. P | 40 | 30-Jan-03 | OPG Metals & Finsec | 502,250 | OPG Metals & Finsec | LAKSHMI VILAS BANK |
| SBH | KB | MKM FINSEC LTD. P | 50037 | 4-Mar-03 | KRITI METAL AGENCIES (P) | 167,900 | KRITI METAL AGENCIES PVT. LTD. | OBC |
| RATNA KAR | KAROL BAGH | MKM FINSEC LTD. P | 40 | 5-Mar-03 | Kriti Metal Agencies | 299,536 | KRITI METAL AGENCIES PVT. LTD. | OBC |
| RATNA KAR | KAROL BAGH | MKM FINSEC LTD. P | 40 | 8-Mar-03 | Kriti Metals agencies | 221,069 | KRITI METAL AGENCIES PVT. LTD. | OBC |
| SBH | KB | MKM FINSEC LTD. P | 50037 | 6-Feb-03 | CLG: 11505 BIMLA WIRE | 152,409 | BIMLA WIRE INDUSTRIES PVT. LTD. | BHARAT OVERSEAS BANK |
| SBH | KB | MKM FINSEC LTD. P | 50037 | 10-Mar-03 | CH: 12589 ROHAN ENTERPRI | 390,831 | ROHAN ENTERPRISES PVT LTD. | BHARAT OVERSEAS BANK |



From the above facts it is clear that the assessee has received unexplained sums from the entry operators as per the above details as per information available with the undersigned. As explained above, the identity, creditworthiness and genuineness of transactions with the persons found to be entry operators cannot be established. The facts about the transactions made by the aforesaid transferor company and transferee companies with MKM FINSEC P. LTD., established as an entry operator were not disclosed by the assessee during the proceedings u/s 147 of the IT Act, 1961 in the case of M/s Om Sons Wire Industry P. Ltd. (Pre-merged entity of M/s OPG Metal & Finsec Ltd.).

Therefore, I have reasons to believe that on account of failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment for above assessment year, the income chargeable to tax to the extent of accommodation entry mentioned above, i.e. Rs.2454543/- has escaped assessment within the meaning of Section 147 of the Act.

As more than four years have been elapsed from the end of the relevant assessment year and since the assessment of the assessee has completed earlier u/s 147 of the IT Act, 1961, sanction of Commissioner of Income Tax Delhi-V is required u/s 151(1) of the Income Tax Act, 1961, for issue of notice u/s 148 of the Income Tax Act, 1961."

18. The reasons are fairly detailed and refer to comprehensive investigation carried out by the Investigating Wing for identification of entry operators engaged in money laundering. It is mentioned that the details were received from the Investigating Wing in parts, on two or three occasions and provides details of the account number of MKM Finsec Pvt. Ltd. and individuals with whom transactions were made. In respect of the entries, the reasons record that the transactions between the transferor company i.e. the assessee and the transferee company, i.e. the MKM Finsec Pvt. Ltd. who was an entry operator, was not



disclosed during the first round of reassessment proceedings and t prima facie conclusion that income on account of the said bogus transactions had escaped assessment. Thus, the information regarding these transactions were not the subject matter of the earlier reassessment proceedings and details provided fresh material for the Assessing Officer to initiate second reassessment proceedings. Neither are we inclined to accept the argument that there was no due application of mind by the Assessing Officer or that the reasons to believe do not constitute live link with the formation to believe that the income has escaped assessment. In view of the position explained above, these contentions are baseless.

19. The petitioner has placed heavy reliance on the order passed by the CIT (Appeals) dated 4th March, 2009 deleting addition of Rs.6,66,382/- made by Assessing Officer on the sale transactions relating to shares which were purportedly sold by Omsons Wire Industries Pvt. Ltd. to MKM Finsec Pvt. Ltd. We have examined the said order passed by the CIT (Appeals). The appellate authority has referred to the failure of the Assessing Officer to conduct a full and proper enquiry because he had issued notices for appearance of Directors of MKM Finsec Pvt. Ltd. but failed to produce them for cross-examination, though the said company had written a letter testifying that they are not doing any business but were merely providing accommodation entries. The appellate authority felt that right of cross-examination was mandatory and there was violation of principles of natural justice. Reference was made to the decision of Delhi High Court in *CIT vs. Pradeep Gupta* (2008) 303 ITR 095 (Del). Similarly reference was made to another judgment of Delhi High Court



in *J.T. (India) Exports and anr. Vs. UOI & Anr.* (2003) 262 ITR 2 (Del-FB), wherein it has been held that Assessing Officer must pass a speaking order by giving reasons for the conclusions arrived at and an opportunity for hearing must be given. The appellate authority concluded that the Assessing Officer had relied upon information received from the Investigation Wing which was collected behind the back of the assessee, but he was not confronted. The Directors of MKM Finsec Pvt. Ltd. were not produced or allowed to be cross-examined. It is in light of the said facts the CIT (Appeals) has observed that the assessee had discharged the initial onus and the Assessing Officer ignoring evidence, without further investigation or inquiry, had made the addition without appropriately bringing on record adverse material and without confronting or giving opportunity to the assessee to meet the adverse material. The appellate order, therefore, proceeds on its own basis and factual matrix in the said case, cannot be regarded as order giving complete clean chit or holding that transactions with MKM Finsec Pvt. Ltd. were genuine or not bogus transactions or accommodation entries. It was a case of lack of investigation, improper conduct of proceedings and not a decision according pristine approval to the bonafides of the transactions. At the stage of issue of notice under Section 148 only formation of tentative, prima facie view is required. The final opinion and authoritative opinion is formed when the assessment order is passed. We do not think that the order passed by the CIT (Appeals) authoritatively records or proves that transactions with MKM Finsec Pvt. Ltd. were genuine business or commercial transactions. There is no such finding recorded or pronounced. The said order refers to the failure of the



assessing officer in the said proceedings and effect thereof which c
by no stretch of imagination be construed that the petitioner did not
indulge in bogus sales transactions, especially in case of the five
companies involved in the present reassessment, on which the CIT
(Appeals) did not dwell into and neither had the relevant material, at
the time, to examine the same.

20. The contention regarding full and true disclosure has to be
rejected in terms of explanation 1 to Section 147 which reads as under:

“*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.”

21. The explanation supports the case of the Revenue that mere
submission of the chart that the five other companies had entered into
sale transactions by itself would not amount to disclosure. Decision in
the case of *Income Tax Officer vs. Madani Engineering Works Ltd.*
(supra) relates to the assessment year 1959-60 and the reassessment
notice was issued on 25th January, 1968. In the said case the Supreme
Court had followed decisions in *CIT v. Burlop Ltd.* 1971 79 ITR 609
(SC) and had affirmed the view of the division bench of the High Court
quashing the reassessment proceedings, after noticing that the hundis
on the strength of which loans were obtained had been produced in the
original assessment proceedings. The decision in the case of *CIT v.*
Burlop Ltd (supra) has been considered in *Sri Krishna Pvt. Ltd v.*
Income Tax Officer, Cal (1996) 221 ITR 538. The Supreme Court



held that it must be confined to factual scenario of the particular case and observed:

“Learned counsel for the assessee, Sri Gupta placed strong reliance upon the decisions of this court in *Chhugamal Rajpal v. S. P. Chaliha* [1971] 79 ITR 603 ; *ITO v. Lakhmani Mewal Das* [1976] 103 ITR 437 and *CIT v. Burlop Dealers Ltd.* [1971] 79 ITR 609 as laying down propositions contrary to those laid down in *Phool Chand Bajrang Lal's case* [1993] 203 ITR 456 (SC). We cannot agree. The principle is well-settled by Calcutta

Discount's case [1961] 41 ITR 191 (SC) and it is not reasonable to suggest that any different proposition was sought to be enunciated in the said decisions. *Calcutta Discount's case* [1961] 41 ITR 191 (SC) emphasises repeatedly the assessee's obligation to disclose all material facts necessary for his assessment fully and truly in the context of the two requirements _called conditions precedent which must be satisfied before the Income-tax Officer gets the jurisdiction to reopen the assessment under section 147/148. This obligation can neither be ignored nor watered down. Nor can anyone suggest that a false disclosure satisfies the requirement of full and true disclosure. All the requirements stipulated by section 147 must be given due and equal weight. Finality of proceedings is certainly a consideration but that avails one who has fully and truly disclosed all material facts necessary for his assessment for that year _ and not to others. All the decisions relied upon by Sri Gupta have been elaborately discussed and distinguished in *Phool Chand Bajrang Lal's case* [1993] 203 ITR 456 (SC) and we fully agree with the same. We think it unnecessary to repeat those reasons. In particular, we agree with the reasons given in *Phool Chand Bajrang Lal's case* [1993] 203 ITR 456 (SC) for holding that the decision of this court in *Burlop Dealers' case* [1971] 79 ITR 609 (SC) must be confined to the particular fact-situation of that case and that it cannot be construed to be of universal application irrespective of the facts and circumstances of the case before the court.”

Therefore, merely furnishing details or disclosing that the five companies had entered into some transactions itself would not meet the requirement of full and true disclosure. As noted above, the disclosure



was neither full nor true (see paragraphs 12, 16 and 19 above). In the case of **Haryana Acrylic (supra)**, a Division Bench of this court has followed the dictum and the ratio of **Madani Enterprises (supra)**. In the case of *Honda Siel Power Products Limited v. Deputy Commissioner of Income Tax* (2012) 340 ITR 0053 a Division Bench of this Court of which one of us (Sanjiv Khanna, J.) was a member, it was held as under:

“The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse effect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of the assessee. The latter confers jurisdiction to reopen the assessment.”

22. In the light of the aforesaid, it has to be held that the requirement of full and true disclosure at the time of first reassessment is not satisfied in the present case. Full and true disclosures cannot be garbled or hidden behind the cervices of the documentary material. The assessee must act with candor and there cannot be suppression of facts. The disclosure must be truthful and fair in all respects and assessee who seeks the benefit of the proviso to Section 147 must make a full and true disclosure of all primary facts. However, here the assessee has not specifically pointed out at the time of the first reassessment that there were other transactions between amalgamated companies and MKM Finsec Pvt. Ltd. This is not stated in the chart or any of letters written by the petitioner in the original proceedings that there were other



transactions with MKM Finsec Pvt. Ltd. Thus, the assessee did not come with clean hands and did not discharge the onus of disclosing true and full material facts.

23. Referring to similar explanation which was incorporated in Section 34 of the Income Tax 1922, Dass Gupta, J. who authored the majority opinion in *Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I, Calcutta & Anr.* (1961) 41 ITR 191, had opined:

“There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet the possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents." His omission to bring to the assessing authority's attention those particular items in the account books, or the particular portions of the documents, which are relevant, amount to "omission to disclose fully and truly and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessor's duty to disclose all of them - including particular entries in account books, particular portions of documents, and documents, and other evidence, which could have been discovered by the assessing



authority, from the documents and other evidence disclosed.

Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?

It may be pointed out that the Explanation to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences" - to draw the proper inferences being the duty imposed on the Income-tax Officer.

We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this."

Hidayatullah, J. elucidating the Explanation had stated as under:



“This means quite clearly that the mere production of evidence is not enough, and that there may be an omission or failure to make a full and true disclosure, if some material fact necessary for the assessment lies embedded in that evidence which the assessee can uncover but does not. If there is such a fact, it is the duty of the assessee to disclose it. The evidence which is produced by the assessee discloses only primary facts, but to interpret the evidence, certain other facts may be necessary. Thus, questions of status, agency, the benami nature of transactions, the nature of trading and like matters may not appear from the evidence produced, unless disclosed. If it be merely a question of interpretation of evidence by an Income-tax Officer from whom nothing has been hidden and to whom everything has been fully disclosed, then the assessee cannot be subjected to section 34, merely because the Income-tax Officer miscarried in his interpretation of evidence. But it is otherwise, if a contention which is contrary to fact, is raised and the Income-tax Officer is set to discover the hidden truth for himself. In the latter case, there is suppression of material fact, or, in other words, that lack of full and true disclosure which would entitle action under section 34 of the Act.”

We record that Hidayatullah, J. had not ultimately agreed with the majority opinion but we do not find any real conflict between majority opinion and the elucidation of Hidayatullah, J. recorded above, on the legal interpretation of the Explanation. Subsequently, Supreme Court in *Sri Krishna Pvt. Ltd. vs. Income Tax Officer, Calcutta* (supra) has elucidated and stated that the disclosure must be full and true and therefore postulate twin conditions. Partial disclosure may be misleading and therefore cannot be true and held to be full disclosure, though the disclosure must be restricted only to material facts. Similarly, the disclosure must be true and not false. At the initial stage we have to examine whether some reasonable ground exists for thinking that there is non-disclosure of material facts and this



would give sufficient jurisdiction to issue notice for reassessment. In way truthfulness of the facts disclosed can be finally ascertained only after full-fledged enquiry and investigation which results in the passing of the assessing order [see *Commissioner of Income-tax v. Jeskaran Bhuvalka* (1970) 76 ITR 128 (AP)].

24. In view of the aforesaid discussion, we do not find any merit in the present writ petition and the same is dismissed with costs of Rs.10,000/-.

(SANJIV KHANNA)
JUDGE

(SANJEEV SACHDEVA)
JUDGE

August 30th, 2013
kkb