IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 11.08.2014

W.P.(C) 2594/2013, CM 4918/2013 & CM 15970/2013

ORIENTAL BANK OF COMMERCE …..Petitioner

versus

ADDITIONAL COMMISSIONER OF INCOME TAX …..Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Rajat Navet, Ms Sanya Talwar and Mr Rohan Yadav.

For the Respondent : Mr N.P.Sahni and Mr Nitin Gulati.

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition is directed against the re-assessment order dated 28.03.2013 passed by the Assessing Officer in re-assessment proceedings pursuant to the notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'said Act') dated 29.03.2012 pertaining to the

assessment year 2005-06. The writ petition also seeks the quashing of the entire re-assessment proceedings under Section 147/148 of the said Act as being without jurisdiction.

2. It is an admitted position that the original assessment was completed on 20.03.2006. The notice under Section 148 was issued in respect of the said assessment year 2005-06 on 29.03.2012 and, as such, the said notice was beyond the period of four years from the end of the relevant assessment year. Thereby, the provisions of the first proviso to Section 147 of the said Act would be invoked. Along with the notice under Section 148 dated 29.03.2012 the purported reasons for the re-opening were also furnished. The said reasons read as under:-

> **"Reasons for reopening the case u/s 147 of the Income Tax Act, 1961 in the case of M/s Oriental Bank of Commerce- A.Y. 2005-06**
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> Return declaring an income of Rs.174,45,44,140/- was filed on 29.10.2005. Assessment u/s 143(3) of the IT Act was made on 20.03.2006 at an income of Rs.664,17,56,340/- and under section 154/154/154/143(3) was made on 28.03.2008 at an income of Rs.583,65,72,060/- under normal provisions of the IT Act.
>
> The scrutiny of assessment revealed that the assessee has failed to disclose following facts in its Computation of Income and Balance Sheet:-
>
> (a) The assessee had made a provision of Rs.4,67,46,051/- on account of "Expenses" in the balance sheet. As the

provision made was not an ascertained liability, the same should also have been disallowed and added back to the income of the assessee. The mistake resulted in underassessment of Income of Rs.4,67,46,051/- involving tax effect of Rs.1,71,05,548/-.

(b) The assessment record revealed that under section 143(1), a refund of Rs.125,55,01,247/- was allowed to the assessee. However, assessment under section 154/154/143(3) a demand of Rs.154,25,41,272/- was raised and no amount was refundable on assessment. Thus, the assessee was liable to pay interest under section 234 D on excess refund of Rs.125,55,01,247/-. The mistake resulted in short levy of interest of Rs.62,77,506/-.

I, therefore, have reasons to believe that the escapement of Income is on account of failure on the part of the assessee to furnish true and fair particulars and disclose truly and fully all material facts necessary for assessment for the above assessment year, the income of Rs.4,67,46,051/- has escaped assessment and interest u/s 234D to the extent of Rs.62,77,506/- has not been withdrawn within the meaning of proviso to section 147 of the IT Act.

Sd/-
(Shankar Gupta)
Asst. Commissioner of Income Tax
Circle 13(1), New Delhi"

3. It is the case of the petitioner that no additions were made in respect of either of the two reasons – (a) and (b) – indicated above. Instead, without issuing a separate notice under Section 148 of the said Act, by virtue of a mere note-sheet entry during the course of the re-assessment proceedings on

16.03.2013, the petitioner was asked to furnish a reply to the following entry:-

> "On examination of claim of the assessee for provision for expenses, it is noticed that the assessee has claimed 10% under section 36 of the act shows that the assessee has calculated for in excess of 10% of aggregate rural advances. He is asked to show cause as to why the excess should not be disallowed by 21.03.2013."

In response thereto the petitioner furnished its reply on 21.03.2013 to the said query indicating that the deduction had been correctly claimed under Section 36(1)(viia) of the said Act. Thereafter, the assessment order dated 28.03.2013, which is impugned before us as being without jurisdiction, was passed.

4. The learned counsel for the petitioner took us through the said re-assessment order dated 28.03.2013 and submitted that no additions have been made in respect of the purported reasons [(a) and (b)] as indicated above. Furthermore, even the deduction of approximately Rs.126 crores claimed under Section 36(1)(viia) in respect of the assessment year 2005-06 has been accepted. However, an addition has been made to the extent of Rs.453,96,44,854/- on account of the opening balance pertaining to the assessment year 2005-06. The learned counsel for the petitioner drew our

attention to paragraphs 3.3.1 and 3.3.2 of the said re-assessment order which read as under:-

> "3.3.1 In response thereto, the assessee submitted detail of deduction claimed U/s. 36(1)(viia). A perusal of detail shows that the opening balance of deduction U/s. 36(1)(viia) already claimed and allowed to the assessee as at 1/4/2014 is Rs.453,96,44,854/- {both 10% of rural advances and 7.5% of total income}. A perusal of the details submitted further reveals that aggregate of average advance made by each rural branch of the assessee computed in the manner prescribed in Rule 6ABA is Rs. 1040.56 crore. The total income of the assessee for the assessment year under consideration before making any deduction under section 36(1)(viia) and Chapter VIA is Rs.303,48,04,587/-
>
> 3.3.2 Thus, the amount of deduction to which the assessee is eligible by the provisions of section 36(1)(viia), is worked out as under:
>
> (i)7.5% on Rs.303,48,04,587, i.e., Rs.22,76,10,344; and
>
> (ii) 10% on Rs. 1040,55,96,000/-, i.e., Rs.104,05,99,600/-, totalling to Rs.104,05,59,600 + 22,76,10,344 = 126,81,69,944."

5. With reference to paragraph 3.3.1 extracted above the learned counsel for the petitioner pointed out that the claim of Rs.453,96,44,854/- had already examined and allowed in respect of the preceding years. Insofar as the current year was concerned the learned counsel for the assessee referred to paragraph 3.3.2 extracted above where it is specifically recorded that the assessee was eligible for the deductions to the extent of Rs.126,81,69,944/-

and, therefore, the deductions claimed in the year in question was not in issue. The learned counsel for the petitioner submitted that the addition which has been made in the re-assessment order does not pertain to the assessment year 2005-06 but, it pertains to preceding years which was not the subject matter of the original notice under Section 148 which was dated 29.03.2012 nor of the note sheet entry dated 16.03.2013.

6. The learned counsel for the petitioner, therefore, submitted that the re-opening as well as the re-assessment order were both without jurisdiction and the same ought to be quashed. He submitted that since there was no addition in respect of the original reasons given for re-opening of the assessment for the year 2005-06 there could be no addition in respect of a new entry. He also submitted that there was no valid notice under Section 148 of the said Act with regard to the additions made insofar as the deduction claimed under Section 36(1)(viia) of the said Act is concerned. Furthermore, there was a clear change of opinion even in respect of the issue pertaining to Section 36(1)(viia) of the said Act inasmuch as a specific question had been raised during the original assessment proceedings as a part of a questionnaire issued on 13.02.2006 by the Assessing Officer wherein question No.11 was as under:-

> "11. You have claimed Rs. 1040.55 Crs as aggregate advance pertaining to rural branches on which you have claimed 10% deduction U/s 36(i)(viia) of Rs. 104.05 Crs. Please demonstrate the method followed to work out the average aggregate advances made by the rural branches of the bank as per Sec. 36(i)(viia) r/w explanation (ia) of I.T. Act r/w Income Tax Rules 6ABA."

7. The learned counsel further submitted that the specific question was replied to on 28.02.2006 in the following manner:-

> "11) During the Assessment Year 2005-06, the bank has claimed deduction of Rs. 104,05,59,600/- towards Aggregate Average Advances pertaining to Rural Branches of the Bank under Section 36(1)(viiia) of the Income Tax Act, 1961.
>
> Certificate in this regard from Statutory Auditors of the bank is being enclosed for your kind perusal. Please note this certificate is issued by the auditors taking into consideration the criteria prescribed under Rule 6ABA as is evident from the certificate."

8. Thereafter, the Assessing Officer did not disallow the deduction so claimed. Consequently, it was argued, the fact that the Assessing Officer, through the re-assessment order, had made an addition on this very ground, would straightaway amount to a mere change of opinion, which is not permissible in law.

9. Finally, the learned counsel for the petitioner also submitted that the deduction under Section 36(1)(viia) of the said Act which has been disallowed by virtue of the re-assessment order does not even pertain to the assessment year 2005-06 but relates to earlier assessment years. This also is not permissible, particularly, because it had become time barred by 16.03.2013 when the note sheet entry was made. In fact, it was stated to have been time-barred even when the initial re-opening notice dated 29.03.2012 was issued.

10. The learned counsel for the petitioner placed reliance on the following decisions in support of his submissions:-

(i) ***Ranbaxy Laboratories Ltd. v. Commissioner of Income Tax*: (2011) 336 ITR 136 (Del).**

(ii) ***Commissioner of Income Tax v. Jet Airways (I) Ltd.: (2011) 331 ITR 236 (BOM).***

(iii) ***Commissioner of Income Tax v. Dr Devendra Gupta*: (2011) 336 ITR 59 (Raj).**

(iv) ***Commissioner of Income Tax, Delhi-II v. Kelvinator of India Ltd.*: 99 (2002) Delhi Law Times 221 (FB).**

(v) ***Commissioner of Income Tax v. Usha International Ltd.*: (2012) 348 ITR 485 (Delhi).**

(vi) ***Wel Intertrade Pvt. Ltd. and Anr. v. Income Tax Officer*: (2009) 308 ITR 22 (Del).**

11. Mr Sahni appearing on behalf of the Revenue contended that it was not correct on the part of the learned counsel for the petitioner to submit that no findings or additions have been made on the original reasons – (a) and (b) of the reasons for re-opening of assessment. He submitted that insofar as reason (a) was concerned there was a clear finding in the re-assessment order and the same is recorded in paragraphs 2 and 2.1 which read as under:-

> "2. The assessee has shown an increase in the amount of its provisions for expenses by an amount of Rs.4,70,46,051/-, which is an increase of nearly 20%. The expenditure claimed by the assessee under the head other expenses has shown a rise of more than Rs.24 crores, i.e. an average of Rs. 2 crores a month whereas the increase in provisions for expenses has risen by more than 4 crores. The operating expenses of the assessee has also shown a large rise of more than 23%. The assessee has explained that these provisions are for expenses incurred in the last month which could not be accounted for, thereby creating a provision.
>
> 2.1 The assessee being a large organization with more than 1000 branches and 30 regions stated that it is difficult to obtain even headwise break up of such expenses and provision for expenses. This claim of the assessee cannot be accepted as there must be at least a headwise breakup of such provision for expenses to enable the officer to examine the expenses claimed by the assessee. The expenses has shown head wise expenses of the Delhi Head Office amounting to more than Rs. 12 crores. Thus, the assessee could not account for the headwise details of expenses and the provision made thereon."

12. He submitted that though the Assessing Officer recorded his finding rejecting the pleas of the petitioner/assessee, through an inadvertence and by

a mistake no addition has been made in the computation given at the end of the assessment order which, according to him, can be rectified under Section 154 of the said Act. The computation given in the assessment order is as under:-

> "Based upon the above, the income of the assessee is re computed as under:
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> | | |
> |---|---|
> | 1. Income as per order U/s. 154, Dt. 31-03-2009 | Rs.267,25,60,863/- |
> | 2. Add: disallowance of excess deduction claimed U/s. 36(1)(viia) | Rs.453,96,44,854/- |
> | Total Income | Rs.**721,22,05,717/-** |
> | Rounded off to | Rs.**721,22,05,720/-** |
>
> Income is assessed at Rs.**721,22,05,720/-/**
>
> Penalty proceedings u/s 271(1)(c) with reference to all disallowance/additions discussed above are being initiated separately. Charge interest u/s 234B, 234D, and 244A(c) of I.T. Act as per law. Issue necessary forms."

13. Insofar as the question of charging of interest under Section 234D on the purported excess refund granted to the petitioner/assessee is concerned, Mr Sahni submitted that although there is no discussion on this aspect in the assessment order there is a clear direction to compute the same as given in the extracted portion above. Therefore, Mr Sahni submitted that it was not open to the learned counsel for the petitioner to allege that no additions have been made in respect of the original reasons – (a) and/or (b), given in the reasons for re-opening the assessment pertaining the assessment year 2005-

06. He, thereafter, submitted that the case law relied upon by the learned counsel for the petitioner for the proposition that unless and until there are additions made in respect of the original reasons no fresh addition can be made for subsequent items found during the course of the re-assessment proceedings, would have no applicability.

14. Insofar as the disallowance under Section 36(1)(viia) of the said Act is concerned Mr Sahni submitted that the closing balance of the preceding year would constitute the opening balance of the current year therefore when the Assessing Officer questioned the opening balance it would by in itself have an impact on the closing balance of the preceding year as also on the closing balance of the current year. Therefore, the Assessing Officer was well within his rights to make the additions by making the disallowance under Section 36(1)(viia) of the said Act even though it pertained to the preceding year.

15. The learned counsel for the petitioner, however, pointed out in rejoinder that the reasons as originally furnished were by themselves not good enough for invoking the re-assessment proceedings. He drew our attention to the fact that in both the reasons – (a) and (b), the Assessing Officer has indicated that it was based on the mistake on the part of the

Assessing Officer. He submitted that though the reason mentioned that there was of a failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment, there is no specific indication as to which material was not fully and truly disclosed by the assessee which he was required to do for the purposes of assessment. All that the reasons indicate are that on account of a mistake on the part of the Assessing Officer the income had escaped assessment. He once again referred to the decision in ***Wel Intertrade Pvt. Ltd.*** *(supra)* to submit that a mistake on the part of the Assessing Officer is not sufficient to invoke the provisions of Section 147, particularly, in view of the first proviso thereof wherein one of the pre-conditions is that there must be failure on the part of the assessee to make a full and true disclosure of the material facts which would be necessary for making the assessment. Since there is no failure on the part of the assessee, the provisions of Section 147 could not at all have been invoked after the period of four years from the end of the assessment year. Insofar as the disallowance under Section 36(1)(viia) of the said Act is concerned, the learned counsel for the petitioner reiterated that there was a clear case of change of opinion which, in any event, was not permissible.

16. Now, let us examine the decisions relied upon by the learned counsel for the petitioner. In ***Ranbaxy Laboratories Ltd.****(supra)*, a Division Bench of this court had agreed with the reasoning of the Bombay High Court in the case of ***CIT v. Jet Airways (I) Ltd.***: **(2011) 331 ITR 236 (Bom)**. In the latter case, the Bombay High Court had observed in the context of proceedings under Sections 147/148 of the said Act that:-

> "Section 147 has this effect that the Assessing Officer has to assess or reassess the income ('such income') which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

17. This court in ***Ranbaxy Laboratories Ltd.****(supra)*, agreeing with the above views held as under:-

> "We are in complete agreement with the reasoning of the Division Bench of Bombay High Court in the case of *CIT v. Jet Airways (I) Limited* [2011] 331 ITR 236(Bom).We may also note that the heading of Section 147 is "income escaping assessment" and that of Section 148 "issue of notice where income escaped assessment". Sections 148 is supplementary and complimentary to Section 147. Sub-

> section (2) of Section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (1) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute escaped income. Section 147 mandates recording of reasons to believe by the Assessing Officer that the income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. *As per Explanation 3* if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under Section 147 regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under Section 148."

18. In ***Ranbaxy Laboratories Ltd.****(supra)*, which was an appeal under Section 260A of the said Act, the question under consideration was as follows:-

> "Whether on the facts the Tribunal was right in law in holding that the Assessing Officer had jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated especially when the reasons for the latter ceased to survive?"

The facts in that case were that the reassessment proceedings had been initiated on the premise that on account of items such as club fees, gifts and presents and provision for leave encashment, income had escaped assessment. The explanation given by assessee pursuant to the notice under Section 148 was accepted by the Assessing Officer and he did not make any disallowance in respect of these items. However, during the reassessment proceedings the Assessing Officer found that that deductions claimed by the assessee therein under Section 80HH and 80I were inadmissible. In this context, the court held:-

> "**20.** The very basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under Section 80 HH and 80-I which as per our discussion was not permissible. Had the Assessing Officer proceeded not to make dis-allowance in respect of the items of club fees, gifts and presents, etc., then in view of our discussion as above, he would have been justified as per explanation 3 to reduce the claim of deduction under Section 80 HH and 8-I as well.
>
> **21.** In view of our above discussions, the Tribunal was right in holding that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive. Consequently, we answer the first part of question in affirmative in favour of Revenue and the second part of the question against the

Revenue."

19. It is pertinent to point out that in ***Ranbaxy Laboratories Ltd.****(supra)*, this court had also referred to a decision of the Rajasthan High Court in the case of ***CIT v. Shri Ram Singh*****: (2008) 306 ITR 343 (Raj)**, where it was held as under:-

> "To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe', had escaped assessment for any assessment year, did not escape assessment, then, the mere fact, that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

The decision of the Rajasthan High Court in ***Dr Devendra Gupta*** *(supra)* followed the decision in ***Shri Ram Singh*** *(supra)*.

20. We now come to the decision of the Supreme Court in ***Kelvinator of India Ltd.*** *(supra)* which was rendered in the context of the concept of 'change of opinion'. The question before the Supreme Court was – "whether the 'concept of change of opinion' stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act,

1961 by the Direct Tax Laws (Amendment) Act, 1987?" The Supreme Court held as under:-

> "6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

21. The full bench decision of this court in ***Usha International Ltd.*** *(supra)*, again in the context of change of opinion, held as under:-

"**13.** It is, therefore, clear from the aforesaid position that:

(1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original 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 but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

14. In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in *CIT* v. *DLF Power Ltd.* ITA No. 973 of 2011 decided on November 29, 2011 – since reported in [2012] 345 ITR 446 (Delhi) and *BLB Limited* v. *Asst. CIT* Writ Petition (Civil) No. 6884 of 2010 decided on December 1, 2011 – since reported in [2012] 343 ITR 129 (Delhi). In the last decision it has been observed (page 135):

> "The Revenue had the option, but did not take recourse to Section 263 of the Act, in spite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed

> by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be correct, when jurisdiction under Section 263 is invoked."
>
> **15.** Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion."

22. Finally, in ***Wel Intertrade Pvt. Ltd.*** *(supra)*, a Division Bench of this court analyzed the first proviso to Section 147 as under:-

> "A plain reading of the said proviso makes it more than clear that where the provisions of Section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under Section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, the question of making of a return is not in issue and the only question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this pre-condition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated

> February 5, 2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to Section 147 of the said Act had not been satisfied."

23. From the above review of the case law it is evident that, in the facts of this case, if no additions were made in respect of the said reasons (a) and/or (b), it was not open to the Assessing Officer to make additions on some other ground such as the disallowance of the deduction under Section 36(1)(viia) of the said Act without first issuing a notice under Section 148. Mr Sahni, appearing for the Revenue, argued that although no addition has been made in respect of reason (a), there is a finding against the assessee on that aspect. He, as pointed out above, referred to paragraphs 2 and 2.1 of the reassessment order to submit that the finding was recorded in favour of the Revenue. We are unable to agree with this. It is clear that no addition has been made on account of reason (a). It is also clear that though the specific point was taken in reason (a) and it was one of the 'reasons' to believe that income had escaped assessment yet, no addition was made. The proposition that by 'mistake' or through 'inadvertence' the Assessing Officer did not make the addition, cannot be accepted. Reason (a) was one of only two reasons for reopening the assessment. How can it be accepted that the Assessing Officer was so callous or naïve (whichever expression is taken)

that, though he found against the assessee yet he did not make any addition in respect of reason (a)? As pointed out in ***Usha International Ltd.****(supra),* when an Assessing Officer raises a specific issue in the assessment proceedings and yet does not make any addition in the assessment order, it should be accepted that the Assessing Officer did not find any ground or reason to make the addition. What is stated in paragraph 2 and 2.1 of the reassessment order are mere observations and not the conclusions. The fact remains that no addition was made by the Assessing Officer insofar as reason (a) is concerned. And, it must be taken that the Assessing Officer consciously did not make any addition after examining the entire issue.

24. Coming to reason (b), we find that there is no addition with regard to that either. Nor is there any adverse finding in the reassessment order. Mr Sahni, as pointed out above, suggested that there is a finding by referring to the sentence at the end of the reassessment order to the following effect:-

> "Charge interest u/s 234B, 234D and 244A(c) of I.T. Act as per law."

25. We are afraid that we cannot accept this argument either. This general statement at the end of the reassessment order cannot be regarded as a finding or an addition with regard to reason (b). If we recall, reason (b) was

a specific allegation that the assessee was liable to pay interest under Section 234D on excess refund of Rs.125,55,01,247/- and that because of the 'mistake' that the assessee had not been required to pay the interest amount, there was a short levy of interest of Rs.62,77,506/-. We do not find any conclusion with regard to this in the reassessment order. The Assessing Officer having indicated the specific amount of alleged short levy of interest had to return a conclusive finding resulting in an addition. There was none. Therefore, even in respect of reason (b) there was no addition made.

26. That being the position, since no addition had been made in respect of reasons (a) and/or (b), in view of the decisions in ***Ranbaxy Laboratories Ltd.****(supra)*, ***Jet Airways (I) Ltd.****(supra)*, ***Shri Ram Singh*** *(supra)* and ***Dr Devendra Gupta*** *(supra)*, it was not open to the Assessing Officer to independently assess some other income [in this case, disallowance under Section 36(1)(viia)].

27. The note sheet entry of 16.03.2013, cannot, by any stretch of imagination be regarded as a notice under Section 148. Where are the 'reasons to believe' that income had escaped assessment and, more importantly, that such escapement was on account of the assessee's failure to

disclose truly and fully all material facts necessary for assessment? By virtue of Section 148(2) the Assessing Officer is mandated to record his reasons before issuing any notice under Section 148. Moreover, as pointed out in ***Wel Intertrade Pvt. Ltd.*** *(supra)*, in cases where the first proviso to Section 147 applies, "in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under Section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, for that assessment year." This essential pre-condition is clearly missing in the present case even if we were, for the sake of argument, to assume, which we cannot, that the note-sheet entry of 16.03.2013 was a notice under Section 148 as also the 'reasons to believe' rolled into one!

28. As regards the deduction claimed under Section 36(1)(viia) of the said Act to the tune of Rs.126,81,944/-, the learned counsel for the petitioner has correctly pointed out that the same has been accepted by the Assessing Officer insofar as the assessment year 2005-06 is concerned. This would be evident from paragraph 3.3.2 of the reassessment order which has been

extracted in paragraph 4 above. The disallowance of Rs.453,96,44,854/- in the reassessment order does not pertain to assessment year 2005-06 but to an earlier year which was not the subject-matter of reassessment. This is clearly impermissible in law. This is apart from the fact that reassessment for an earlier year was in any event time-barred and would also amount to a 'change of opinion' which is also not permitted in law as is evident from the decision of the Supreme Court in ***Kelvinator of India Ltd.*** *(supra)*.

29. For all these reasons, the reassessment order dated 28.03.2013 as also the proceedings pursuant to the notice dated 29.03.2012 under Section 148 cannot be sustained. They are quashed. The writ petition is accordingly allowed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

AUGUST 11, 2014
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