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

Reserved on: October 16, 2015
Date of decision: December 03,2015.

**ITA 1108/2010**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Rohit Madan, Senior Standing counsel with Mr. Zoheb Hossain, Advocate.

versus

VISHISHTH CHAY VYAPAR LTD. ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates.

**AND**

**ITA 1109/2010**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr. Rohit Madan, Senior Standing counsel with Mr. Zoheb Hossain, Advocate.

versus

VISISTH CHAY VYAPAR LTD. ..... Respondent
Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advocates.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE VIBHU BAKHRU**

**J U D G M E N T**

**% 03.12.2015**

**Dr. S.Muralidhar, J.**:

1. These two appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') pertain to the Assessment Year ('AY') 1995-96. ITA No. 1108/2010 is directed against the decision of the Income Tax Appellate Tribunal ('ITAT') dated 30th June 2009 in ITA No. 4403/Del/2007. ITA No. 1109/2010, which is the penalty appeal, is directed against the order dated 30th April 2009 in ITA No.113/Del/2008.

2. While admitting ITA No. 1108/2010 on 27th November 2014, the following questions of law were framed by the Court:

> "(1) Whether Income Tax Appellate Tribunal was right in holding that reassessment proceedings under Section 147/148 of the Income Tax Act, 1961 were bad in law?
>
> (2) Whether the finding of the Income Tax Appellate Tribunal accepting the genuineness of the loss in respect of shares held as stock-in-trade is perverse and accordingly cannot be sustained?"

3. As far as ITA No. 1109/2010 is concerned, by an order of the same date, the following question was framed:

> "Whether the Income Tax Appellate Tribunal was correct in deleting the penalty under Section 271(1)(c) of the Income Tax Act, 1961?"

4. It must be noted at the outset that the impugned order dated 30th June 2009 of the ITAT is common to the other appeals of the Revenue before the

ITAT pertaining to AYs 1997-98, 1998-99 and 1999-2000. However as regards the Revenue's appeals against the same impugned order of the ITAT for those AYs being ITA Nos. 1105, 1106 and 1107 of 2010, a separate judgment has already been passed by this Court on 30th April 2015 allowing the said appeals. What distinguishes those appeals from the present one is that in none of those appeals a question concerning the validity of the assumption of jurisdiction under Section 147 of the Act arose. As far as those appeals were concerned, the sole question that was framed by the Court on 3rd September 2014 concerned the correctness of the decision of the ITAT in accepting the genuineness of loss as declared by the Assessee in respect of shares purchased and sold or held as stock-in-trade. The Court by the said judgment dated 30th April 2015 decided the said question in favour of the Revenue and against the Assessee for those AYs.

5. The background facts leading to the filing of the present appeals is that the Assessee is a non-banking finance company registered as such with the Reserve Bank of India ('RBI'). Its objects are investments in shares and providing loans and advances. The Assessee's shares are listed in Delhi Stock Exchange.

6. For AY 1995-96, the Assessee filed a return of income on 29th November 1995 declaring an income of Rs. 6,23,880. The return was picked up for scrutiny and by an assessment order dated 10th July 1996 under Section 143(3) of the Act, the Assessing Officer ('AO') determined the taxable income of the Assessee at Rs. 6,83,130. In the course of the assessment proceedings, the Assessee filed details of the shares held by it as stock-in-

trade and claimed a share loss of Rs. 1,35,17,125. The Assessee disclosed an opening stock of 18,30,000 shares of M/s. Purbanchal Prestressed Ltd. ('PPL') of the value of Rs.1,83,00,000 (Rs.10 per share). It showed a sale of 2,22,000 shares of the value of Rs.22 lakhs. The closing stock of 16,10,000 shares was shown as Rs.32,20,000 at Rs.2 per share. Thus the loss on the valuation of the shares was shown at Rs.1,28,80,000.

7. The Assessee continued filing returns for the subsequent AYs 1996-97, 1997-98 and 1998-99 in which it showed losses on the sale of shares of PPL and sought to set off those losses against its income. For AY 1997-98, the loss shown in the purchases and the sales of shares was disallowed by the AO. It was noted by the AO that Mr. R.R. Modi, a Director of the Assessee company had actually floated PPL and no business activity had actually been carried out by it. The AO concluded that the share transactions involving the Assessee and PPL were of a collusive nature. The Assessee's appeal against the said order was dismissed by the CIT (A). Taking note of the above facts, a decision was taken to invoke Section 147 of the Act for AYs 1995-96 and 1996-97.

8. On 13th/14th March 2002 the reasons for re-opening of the assessments for those AYs were recorded. After noticing the facts concerning the dismissal of the Assessee's appeal by CIT (A) for AY 1997-98 it was recorded as under:

> "In this manner the assessee understated its income for the asstt year 1995-96 by an amount of Rs.1,28,80,000/- and this income has escaped asstt. **Obviously there was failure on the part of the assessee to disclose the complete facts**

> **to the Assessing Officer at the time of completion of assessment for the asstt year 1995-96**. Therefore it is proposed to reopen the case U/s 147. The conditions provided in the proviso to section 147 are also satisfied." (emphasis supplied)

9. A notice under Section 148 of the Act was issued to the Assessee on 26th March 2002 for AY 1995-96 recording inter alia that the income which had escaped assessment was Rs.1,28,80,000.

10. It must be noted at this stage that for AY 1996-97 also, jurisdiction under Section 147 of the Act was assumed and a notice for reopening of the reassessment was issued to the Assessee on 26th March 2000 under Section 148 of the Act. A reference was made in the said notice not to the losses as regards the valuation of the shares but regarding unexplained liabilities comprising credit received from M/s. Toko Fin and Associates and Shri Nemi Chand Jain. It was stated that an amount of Rs.3,95,77,133 relating to AY 1996-97 was an unexplained credit under Section 68 of the Act. The reopening of the assessment for AY 1996-97 was held to be invalid by the ITAT by an order dated 19th October 2004 since in the ultimate order of reassessment the sum of Rs.3,95,77,133 was not discussed. Only an observation was made "that the proceedings were opened for assessing the above sum."

11. Against the order dated 19th October 2004 passed by the ITAT allowing the Assessee's appeal, the Revenue filed ITA No. 450/2005 in this Court. Initially, by order dated 5th October 2010, the Court dismissed the said

appeal of the Revenue. The reason was that it had become infructuous since in the meanwhile in the remand ordered by the ITAT in respect of AYs 1997-96 to 1999-2000, the AO had held the transactions to be genuine. The Supreme Court, however, set aside this Court's order dated 5th October 2010. In its order dated 27th August 2012 in Civil Appeal No. 6058/2012 (***Commissioner of Income Tax v. M/s. Visisth Chay Vyapar Limited***), the Supreme Court noted that for AY 1996-97, the question concerning validity of the reopening of the assessment for AY 1996-97 was required to be considered by this Court. The appeal was accordingly remanded to this Court for a *de novo* consideration.

12. Pursuant to the above order, this Court again heard ITA No. 450/2005 *de novo* and by an order dated 16th October 2015 upheld the order of the ITAT that the order of reassessment was invalid. *Inter alia* it was noticed by this Court that the order of reassessment dated 27th March 2002 did not state the reasons for reopening the assessment to be the share loss but proceeded to disallow share loss in the sum of Rs.3,72,75,000.

13. However as far as the present AY, i.e., AY 1995-96 is concerned, as noticed hereinbefore, the reasons for reopening concerned the claim for loss on valuation of shares which is also the reason for passing of the reassessment order. Hence the present appeals were heard separately and orders reserved.

14. In the present appeals, as noticed earlier, the first question concerns the validity of the reopening of the assessment for AY 1995-96. In the

reassessment order dated 24th February 2003, one of the central points that weighed with the AO was that Mr. R.R. Modi who had floated the Assessee was also controlling PPL. The assessment order noted that several adjournments were granted to the Assessee to enable it to furnish: (i) details of the name and address of the share broker through whom the purchase/sale of the shares of PPL was made, (ii) the number of shares purchased/sold, (iii) the contract note, (iv) the rate/distinctive numbers of the shares amount and (v) the date of payment made/received to/by stock exchange. However, no one from the side of the Assessee attended the hearing on the dates fixed after adjournment and the details were also not supplied. Consequently, the sum as proposed in the notice under Section 148 of the Act, i.e., Rs.1,28,80,000 was added to the income of the Assessee.

15. The appeal of the Assessee was dismissed by the CIT (A), by the order dated 8th December 2003, confirming the additions. The CIT (A) referred to the earlier order in the appeals for AYs 1996-97, 1998-99 and 1999-2000 where the issue regarding loss as a result of share valuation had been discussed at length. According to the CIT (A), the facts for AY 1995-96 were no different.

16. The further appeal by the Assessee before the ITAT was allowed by it on 25th August 2006 on the sole ground that the appellate order was passed by the CIT (A) in the absence of the Assessee. Also before the ITAT, the Assessee specifically urged the ground regarding validity of the assumption of jurisdiction under Section 147 of the Act since it was beyond the period of four years from the end of the relevant AY. Since this aspect of the matter

was not urged and, therefore, not decided by the CIT (A), the appeal was restored to the file of the CIT (A) for a fresh disposal.

17. On remand, the CIT (A) held, by the order dated 3rd August 2007, that the reopening of the assessment was illegal and without jurisdiction. *Inter alia* it was held that in the reasons recorded for reopening the assessment there was no allegation that "there was any omission or failure on the part of the assessee to disclose fully and truly all facts." In the absence of the recording of the above reason, the reopening which was initiated after a period of four years after the end of the relevant AY could not be sustained. Nevertheless, the CIT (A) also commented on the merits of the reopening which concerned the valuation of the closing stock of the shares of PPL. It was noted that the rate at which the shares of PPL was valued was based on the quoted rate of the said shares at the Gauhati Stock Exchange. The principle applied for valuation of closing stock, i.e., at cost or market rate whichever is lower, was an accepted system.

18. The Revenue then went in appeal before the ITAT by filing ITA No. 4403/Del/2007 relevant to AY 1995-96 in which the impugned order dated 30th June 2009 was passed upholding the order of the CIT (A).

19. The ITAT noted that in the original order of assessment under Section 143(3) of the Act passed by the AO on 10th July 1997, it was mentioned that the Assessee had produced the books of accounts which had been checked by the AO. The AO also noted that the Assessee was dealing in shares and securities. In the reasons recorded for the reopening of assessment, there was

no "reference to the fact that there was failure on the part of the Assessee to disclose fully and truly all the material facts with regard to the shares." Considering that the reopening of assessment was to be made beyond four years after the end of the AY in question, the recording of the above reason for reopening of the assessment was a jurisdictional one in the absence of which the re-assessment proceedings is void.

20. The ITAT concurred with the CIT (A) even as regards the merits by holding that the value of the closing stock of shares had been computed on the basis of the quotation in the Gauhati Stock Exchange which was at Rs.2 per share. The Assessee had consistently followed the method of valuation of shares at cost or at market price whichever is lower. This method had been accepted by the department for the earlier AYs. Consequently, the ITAT held that it was not open to the Revenue to challenge the said method for the AY in question at that stage. The ITAT referred to the decision in ***Radha Soami Satsang v. CIT 193 ITR 321 (SC)*** and the decision of this Court in ***CIT v. Lagan Kala Upvan 259 ITR 489 (Del)***.

21. It is submitted by Mr. Rohit Madan, learned Senior Standing counsel for the Revenue, that the crucial fact that Mr. R.R. Modi, the Director of the Assessee, also controls PPL, whose shares he had purchased and sold, was not disclosed during the assessment proceedings for this year i.e. AY 1995-96 and that this was a material fact which came to light only during the assessment proceedings for AY 1997-98. He pointed out that the entire assessment record for the two AYs 1995-6 and 1997-98 were before the AO when the reasons for reopening the assessment were recorded. For both the

said AYs, 1995-96 and 1997-98, the losses claimed by the Assessee on account of the valuation of the shares of PPL calculated on the closing stock, was disallowed by the AO and the said order of the AO had been affirmed by the CIT (A). This was the reason for the AO affirming the reason to believe that even for AY 1995-96 the losses had been wrongly claimed and, therefore, income had escaped assessment. He also submitted that the Assessee failed to raise any objections to the reasons recorded by the AO either before the AO or before the CIT (A) in the first round of the appeal before the CIT (A). He accordingly submitted that there was a failure by the Assessee to disclose the material facts and that the reopening of the assessment was, therefore, justified.

22. In reply to the above submissions, Mr. Ajay Vohra, learned Senior counsel appearing for the Assessee, submitted that the very basis for reopening the assessment for AY 1995-96 was the order of the AO passed for AYs 1996-97 and 1997-98. As far as AY 1996-97 is concerned, the said order of reopening of the assessment has already been invalidated by concurrent orders of the CIT (A), the ITAT and recently this Court.

23. As far as AY 1997-98 is concerned, the basis for the additions made for that AY was the detailed enquiry undertaken by the AO by making a reference to the Additional Director of Investigation ('ADIT') to enquire and report on the financial position of one Mr. Nemi Chand Jain who purportedly acted on the instructions of Mr. R.R. Modi as stated by him during the course of search and seizure operation conducted in his case. Therefore, the basis of the additions for AY 1997-98 was different from

what was proposed for AY 1995-96. Mr. Vohra submitted that a perusal of the reasons recorded show that the AO had proceeded on surmises that for AY 1995-96 there was a failure on the part of the Assessee to disclose fully and truly all the material facts. He referred to a plethora of judgments and submitted that where reopening is sought to be done beyond the period of four years after the end of the relevant AY, the recording of the reason that the Assessee failed to fully and truly disclose all the material facts, was a jurisdictional one.

24. Before proceeding to discuss the above submissions, the legal position regarding Section 147 of the Act, prior to and subsequent to the amendment with effect from 1st April 1989, needs to be briefly recapitulated. In ***Chhugamal Rajpal v. SP Chaliha (1971) 79 ITR 603***, the Supreme Court was dealing with a case where the AO came to the conclusion that there were reasons to believe that income of the Assessee had escaped assessment pursuant to communications from the Commissioner of Income Tax showing that the alleged creditors of the Assessee were "name-lenders and the transactions are bogus." The Supreme Court disagreed and observed that the AO "had not even come to a *prima facie* conclusion that the transactions to which he referred were not genuine transactions. He appeared to have had only a vague felling that they may be '"bogus transactions'." It was further explained by the Supreme Court that:

> "Before issuing a notice under S. 148, the ITO must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under S. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped

assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of cl. (a) or cl. (b) of S. 147 are satisfied, the ITO has no jurisdiction to issue a notice under S. 148."

25. In ***ACIT v. Dhariya Construction Co.(2010)328 ITR 515 (SC)*** the Supreme Court in a short order held as under:

"Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the DVO. Opinion of the DVO per se is not an information for the purposes of reopening assessment under s. 147 of the IT Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment."

26. The decision of the Supreme Court in ***CIT v. Kelvinator of India Ltd.***: ***[2010] 320 ITR 561 (SC)*** was in an appeal against the decision of this Court. It was observed:

"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 fulfilment 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."

27. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd. 291 ITR 502***, it was held:

> "16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential."

28. In ***Calcutta Discount Company v. Income Tax Officer 41 ITR 191*** the Supreme Court, while considering the import of the words "omission or failure to disclose fully and truly all material facts necessary for his assessment", observed as under**:**

> "The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts 'are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession whether on disclosure by the assessee, or discovered by him on the basis of the facts disclose, or otherwise, the assessing authority has to draw inferences as regards

certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

29. The said decision was referred to in ***CIT v. Burlop Dealers Ltd. AIR 1971 SC 1635*** where it was held that:

"mere production of the books of account or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure within the meaning of Section 34(1), but where on the evidence and the materials produced the Income-tax Officer could have reached a conclusion other than one which he has reached, a proceeding under Section 34(1)(a) will not lie merely on the ground that the Income-tax Officer has raised an inference which he may later regard as erroneous."

30. The above decisions were followed in ***ITO v. Madnani Engineering Works Ltd. (1979) 118 ITR 1 (SC)***.

31. Turning to the decisions of this Court, in ***Haryana Acrylic Manufacturing Company*** **v.** ***CIT [2008] 175 Taxman 262 (Del)***, the legal position as regards the reopening of an assessment after the expiry of four years from the end of the relevant AY was analysed. The Court referred to the decisions of the Supreme Court in ***ITO v. Madnani Engineering Works Ltd*** (*supra*) and ***CIT v. Burlop Dealers Ltd.*** (*supra*) and observed as under:

"18. Viewed in this light, the proviso to section 147 of the said Act, carves out an exception from the main provisions of section 147. If a case were to fall within the proviso, whether or not it was covered under the main provisions of section 147 of the said Act would not be material. Once the exception carved out by the proviso came into play, the case would fall outside the ambit of section 147.

19. Examining the proviso [set out above], we find that no action can

be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied :

(*a*) an assessment under subsection (3) of section 143 or this section has been made for the relevant assessment year; and

(*b*) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee :

(*i*) to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148; or

(*ii*) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Condition (*a*) is admittedly satisfied inasmuch as the original assessment was completed under Section 143(3) of the said Act. Condition (*b*) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under subsection (1) of Section 142 or Section 148. This is clearly not the case here because the petitioner did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If it is also found that the petitioner had disclosed fully and truly all material facts necessary for its assessment, then no action under Section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the petitioner had made a full and true disclosure of all material facts.

20. 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."

32. This Court in ***Haryana Acrylic Manufacturing Company* v. *CIT*** (*supra*) also held that the decision in ***Phool Chand Bajrang Lal v. Income-Tax Officer 2003 ITR 456*** would not be applicable to this case as that decision was delivered in the context of Section 147(a) of the Act as it existed prior to the amendment introduced w.e.f. 1st April, 1989.

33. In ***Oriental Insurance Company v. CIT*** (decision dated 15th September 2015 in ITA 174/2013), it was observed:

"9. A *bona fide* reason to believe that income has escaped assessment is a necessary pre-condition that clothes the AO with the power to reopen the assessment, which has otherwise attained finality. The reasons to believe must have a 'direct nexus' and a 'live link' with the formation of an opinion by the AO that taxable income of an Assessee has escaped assessment.

....

12. It is well established that reasons to believe that income had escaped assessment is a necessary precondition for the AO to assume jurisdiction. Clearly, it would be difficult to sustain that this precondition is met if such reasons to believe that income of an Assessee has escaped assessment are based on palpably erroneous assumptions. The reason to believe must be predicated on tangible material or information. A reason to suspect cannot be a reason to believe; the belief must be rational and bear a direct nexus to the material on which such a belief is based."

34. In ***CIT v. Multiplex Trading*** (decision dated 22nd September 2015 in

ITA 356/2013), this Court surveyed the above case law and held:

> "12. ... [I]t would be impermissible for the AO to reopen the assessment unless the AO, on the basis of credible and tangible material, which was not in his possession during the initial assessment, believes that income of the Assessee has escaped assessment."
>
> "29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO to have a reason to believe that (a) the income of the Assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the amendment, only one singular requirement is to be fulfilled under Section 147(a) and that is, that the AO has reason to believe that income of an Assessee has escaped assessment. However, the proviso to Section 147 of the Act provides a complete bar for reopening an assessment, which has been made under Section 143(3) of the Act, after the expiry of four years. However, this proscription is not applicable where the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this Court in *M/s Haryana Acrylic Manufacturing Co. (P) Ltd.* (*supra*) explained that the ratio of the decision in *Phool Chand Bajrang Lal* (*supra*) may not be entirely applicable since the same was in respect of Section 147(a) as it existed prior to the amendment."

35. Recently in ***CIT v. Indo Arab Air Services*** (decision dated 20th October 2015 in ITA 292/2015) this Court held:

> "The explanation or the lack of it of the entries in the books of

> accounts may have certain relevance as far as ED is concerned but that by itself does not provide the vital link for concluding that for the purposes of the Act any part of cash deposits constituted income that had escaped assessment. There is a long distance to travel between a suspicion that income had escaped assessment and forming reasons to believe that income had escaped assessment. While the law does not require the AO to form a definite opinion by conducting any detailed investigation regarding the escapement of income from assessment, it certainly does require him to form a *prima facie* opinion based on tangible material which provides the nexus or the link to having reason to believe that income has escaped assessment."

36. Turning to the case on hand, the only reason for forming the 'reasons to believe' that income had escaped assessment was the dismissal of the Assessee's appeal by CIT (A) for AY 1997-98 when the share loss was disallowed for the first time. There was no material as such for coming to the conclusion that "the assessee understated its income" for AY 1995-96 by an amount of Rs.1,28,80,000. The following sentence in the 'reasons' shows that the conclusion was based on surmises: "Obviously there was failure on the part of the assessee to disclose the complete facts to the Assessing Officer at the time of completion of assessment for the asstt year 1995-96."

37. Interestingly nearly two years prior to the issuance of the above notice, the AO had issued a notice on 26th March 2000 under Section 148 of the Act for re-opening of the assessment for AY 1996-97 on account of unexplained credits from two firms but that ended in an order of re-assessment dated 27th March 2002 referring to the unexplained share loss. Therefore, when the AO issued the notice on 26th March 2002 under Section 148 proposing to reopen the assessment for 1995-96, there was no fresh material to enable him to form reasons to believe that income on account of share loss had escaped

assessment. Importantly, despite the fact that the reopening was sought to be made after the expiry of four years after the end of the AY 1995-96, no mention was made by the AO of the failure by the Assessee to make a full and true disclosure of all material facts in the original assessment. This is significant in the context of the AO noting in the original order of assessment under Section 143(3) of the Act, passed by the AO on 10th July 1997, that the Assessee had produced the books of accounts which had been checked by the AO. The AO also noted that the Assessee was dealing in shares and securities.

38. The fact that Mr. R.R. Modi, the Director of the Assessee was also the person who floated PPL, could not by itself have constituted 'tangible material' for forming 'reasons to believe' when viewed in the context of the fact that the value of the closing stock of shares had been computed on the basis of the quotation in the Gauhati Stock Exchange which was at Rs.2 per share. Further, both the CIT (A) and the ITAT have concurrently found as a fact that the Assessee had consistently followed the said method of valuation of shares at cost or at market price whichever is lower and that this method had been accepted by the Revenue for the earlier AYs. Clearly, therefore, the legal requirement that "the reason to believe must be predicated on tangible material or information" and that "the belief must be rational and bear a direct nexus to the material on which such a belief is based" was not fulfilled in the present case.

39. As a result, as far as ITA 1108 of 2010 is concerned, Question No.1 is answered in the affirmative, i.e., in favour of the Assessee and against the

Revenue by holding that the ITAT was right in holding that the reassessment proceedings under Section 147/148 of the Act were, in the facts and circumstances of this case, bad in law. Resultantly, Question No.2 does not arise for consideration and need not be answered. As far as ITA No. 1109 of 2010 is concerned, the sole question framed is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

40. The appeals are accordingly dismissed but, in the circumstances, with no order as to costs.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**DECEMBER 03, 2015**/dn