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

Date of Decision: 19.07.2021

\+ **ITA 153/2020 & CM APPL. 7854/2020**

PRINCIPAL COMMISSIONER OF INCOME TAX – 8,
..... Appellant
Through: Mr.Kunal Sharma, Sr. SC with Ms.Zehra Khan, Jr. SC and Mr.Shubhendu Bhattacharyya, Adv

versus

M/S SUPERIOR FILMS PRIVATE LIMITED ..... Respondent
Through: Mr.Gautam Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This appeal has been heard by way of video conferencing.

2. This appeal has been filed challenging the order dated 31.07.2019 passed by the learned Income Tax Appellate Tribunal (hereinafter referred to as the 'ITAT') in ITA No. 4938/Del/2012.

3. The dispute originates from the return of income filed by the respondent under Section 139 (1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') for the assessment year 2004-05 on 11.01.2004. The said return was selected for scrutiny and a notice under Section 143 (2) of the Act was issued by the Assessing Officer

to the respondent on 21.11.2005. The same resulted in Assessment Order dated 29.12.2006 making an addition of Rs.96,36,129/- to the taxable income of the respondent after calculating depreciation (Rs.9,08,897/-) and adjusting the brought forward losses of previous assessment year under Section 72 of the Act (Rs.76,80,953/-), the income of the respondent was assessed at Rs.10,46,779/-. The respondent challenged the Assessment Order before the Commissioner of Income Tax (Appeals)-XII. The Commissioner of Income Tax (Appeals)-XII was pleased to allow the appeal vide order dated 30.01.2009 and a relief of Rs.12,94,257/- was granted to the respondent. It is only on 22.03.2011 that a notice under Section 148 of the Act was issued by the Assessing Officer to the respondent claiming that a deduction of franchise fee of Rs.2,40,00,000/- paid by the respondent to M/s Satyam Cineplex Limited was wrongly allowed as it gave an enduring benefit to the respondent and was an expense of capital nature. It was stated that allowing depreciation at the rate of 25% amounting Rs.60,00,000/-, balance amount of Rs.1,80,00,000/- should have been added to the income of the respondent for the Assessment Year 2004-05. The said proceedings resulted in Assessment Order dated 19.12.2011 on the same terms.

4. The Assessment Order was challenged by the respondent before the Commissioner of Income Tax (Appeals)-XII, who vide order dated 18.06.2012 was pleased to allow the appeal holding that as the Assessing Officer has not alleged any failure on the part of the respondent to disclose truly and fully all material facts, the notice

under Section 148 of the Act after the expiry of four years from the end of the relevant Assessment Year was not maintainable. It was further held that this was a case of change of opinion by the successor Assessing Officer and in fact the claim of the respondent for the Assessment Year 2003-04 to 2009-10 had also been accepted.

5. The appellant challenged the above order before the learned ITAT, which was pleased to dismiss the appeal vide its Impugned Order dated 31.07.2019 observing that as the notice under Section 148 of the Act was issued more than four years from the end of the Assessment Year and it remained undisputed that the Assessee did file return under Section 139 of the Act; an Assessment Order under Section 143 (3) of the Act was passed on 19.12.2011; reassessment proceedings under Section 147 had been initiated only on 22.03.2011; and the Revenue had failed to show which material facts were not disclosed by the Assessee, no action under Section 147 of the Act could be taken by the appellant.

6. The learned counsel for the appellant submits that in terms of the third proviso to Section 147 of the Act a four-year period provided in the first proviso to the said section would commence only on the final adjudication of the appeal filed by the respondent, which in the facts of the present case was disposed of by the Commissioner of Income Tax (Appeals) [hereinafter referred to as 'CIT (Appeals)'] vide order dated 30.01.2009. He submits that therefore, the notice under Section 148 of the Act issued on 22.03.2011 was within the

four-year period as provided in the first proviso to Section 147 of the Act.

7. We are unable to agree with the submission made by the learned counsel for the appellant. The relevant extracts from Section 147 of the Act are as under: -

> **"*Income escaping assessment.***
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> ***147.*** *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in section 148 to 153, referred to as the relevant assessment year) :*
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> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the*

assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

***Provided further** that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:]*

***Provided also** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.*"

8. The learned CIT (Appeals) in his order dated 18.06.2012 while allowing the appeal of the respondent observed as under: -

"A notice under section 148 was served upon the assessee on March 22, 2011. The Assessing Officer has recorded the reason for reopening as under:-

"In this case it has been noticed that the assessee has claimed and was allowed franchise fee of Rs.2,40,00,000/-. The franchise fee being of capital nature was not allowable and should have been disallowed and added back to the income of the assessee after allowing

depreciation at the rate of 25% amounting to Rs.60,00,000/- and balance amount of Rs.1,80,00,000/- should have been added back to the income of the assessee"

From the reason so recorded, the AO has not alleged any failure on the part of the assessee to disclose truly and fully all material facts which is a pre-condition for taking action u/s 148 where action is taken after expiry of 4 years. The assessee has disclosed full details in return of income accompanied by audited accounts and copy of agreement submitted during the course of assessment proceedings u/s 143(3).

From the fact stated by the assessee as well as those recorded in the assessment order it appears that at the time of scrutiny assessment proceedings, the assessee had fully and truly disclosed all material facts and thereafter scrutinizing the details furnished by the appellant, the AO made the regular assessment u/s 143(3)and had formed an opinion that the appellant has correctly claimed these expenses as revenue in nature. Also the AO without bringing any new facts or material on record formed an opinion that this expenditure gave benefits of an enduring nature to the appellant and the same should be treated as capital expenditure in the nature of intangible asset.

After perusal of the above facts and the facts stated in the assessment order I

am of the opinion that this is a case of change of opinion as the successor Assessing Officer has merely recorded a different opinion in relation to an issue to which the earlier Assessing Officer who framed the original assessment has already applied his mind and come to a conclusion that payments are revenue in nature. Moreover this very issue of franchise payment has been accepted by the Department in the Asst. Year 2003-04 to 2009-10 which is as under:-

S.No.	***A.Y.***	***Franchisee Fee Claimed***	***Franchisee Fee Allowed***	***Assessed***	***Assessing Authority***
1.	*2003-04*	*1925606*	*1925606*	*u/s 143 (1)*	*ITO, W-9(4)*
2.	*2004-05*	*24000000*	*24000000*	*u/s 143(3)*	*ITO, W9(4)*
3.	*2005-06*	*24000000*	*24000000*	*u/s 143(1)*	*DCIT, Cir. 9(1)*
4.	*2006-07*	*24000000*	*24000000*	*u/s 143(3)*	*Addl.CIT, R-9*
5.	*2007-08*	*24000000*	*24000000*	*u/s 143(1)*	*DCIT, Cir.9(1)*
6.	*2008-09*	*11844819*	*11844819*	*u/s 143(3)*	*DCIT, Cir.9(1)*
7.	*2009-10*	*9550033*	*9550033*	*u/s 143(1)*	*DCIT, Cir.9(1)*

9. In the order impugned before us, the learned ITAT has also observed as under: -

*"**(4)** We have heard both sides. We have perused the materials available on record, carefully. We have also considered the judicial precedents*

brought to our attention, at the time of hearing or referred to in the materials on record. We find that notice U/s 148 of I.T. Act was issued, thereby reopening the assessment, on 22.03.2011 which is more than 4 years after 31.03.2005 (i.e. more than 4 years from end of the Assessment Year 2004-05 with which we are concerned in this appeal). Therefore, the case of the assessee is covered by proviso to section 147 of I.T. Act. For ease of reference, the provisions of section 147 of I.T. Act are reproduced as under:

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***(4.1)** On perusal of proviso to section 147 of the Act, it is clearly prescribed that no action shall be taken u/s 147 of the Act after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the case before us, the undisputed facts are, that the assessee did file return u/s 139 of the Act; the AO did pass assessment order u/s 143(3) of the Act on 19.12.2011; and re-assessment proceedings u/s 147 of the Act have been initiated on 22.03.2011 much after the expiry of more than four years from the end of the*

relevant assessment year (AY 2004-05). Under these facts, no action u/s 147 of the Act can be taken unless income has escaped assessment by reason of failure on the part of the assessee to disclose all material facts fully and truly. In the instant case, the Revenue has failed to show which material facts were not disclosed by the assessee. We have perused the assessment order dated 19.12.2011 passed by AO u/s 143(3) /147 of the Act and we have also perused the aforesaid impugned appellate order of Ld. CIT(A) dated 18.06.2012. We have further perused the reasons recorded by the AO for initiation of proceedings u/s 147 of the Act and for issue of notice u/s 148 of the Act. Moreover, we have perused our records carefully. There is nothing on the basis of which it can be said that there was failure on the part of the assessee to disclose all material facts fully and truly. Infact we are unable to even find any allegation by the AO to the effect that there was failure on the part of the assessee to disclose all material facts fully and truly. Even at the time of hearing before us, it was not the case of the Ld. DR that the assessee has failed to disclose the material facts fully and truly. In these facts and circumstances, we hold that Revenue has failed to show that there was failure on the part of the assessee to disclose all material facts fully and truly.

(4.2) When the assessee has filed a return u/s 139 of the Act or in response

to sections 142(1) or 148 of the I.T.Act and when an assessment order u/s 143(3) or u /s 147 of the Act has already been passed then the assessee enjoys statutory protection under proviso to section 147 of the Act from any action u/s 147 of the Act after the expiry of four years from the end of the relevant assessment years; unless income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to fully and truly disclose all material facts necessary for his assessment for that assessment year. Onus is on Revenue to show that there was failure on the part of the assessee to fully and truly disclose all material facts necessary for his assessment for that assessment year and in the instant case, Revenue has failed to discharge this onus. When it is not the case of the Revenue that there was failure on the part of the assessee to disclose all material facts fully and truly, Revenue cannot violate the statutory protection enjoyed by the assessee under proviso to section 147 of the Act. *In the facts and circumstances of this case, we hold that the statutory protection enjoyed by the assessee under proviso to section 147 of the Act was wrongly violated by Revenue. Therefore, we dismiss all the grounds of appeal in this appeal filed by the Revenue, and hold that the assumption of jurisdiction u/s 147 of the Act and initiation of proceedings u/s 147 r.w.s. 148 of the Act was erroneous*

in law in the facts and circumstances of this case. In view of this conclusion, there is no need for us to adjudicate whether the initiation of proceedings u/s 147 of the Act and the additions made in order dated 19.12.2011 u/s 143(3)/147 of the Act amounted to "change of opinion" as this issue becomes purely academic. Accordingly, we decline to interfere with the order of Ld.CIT(A) whereby she quashed the assessment order u/s 143(3)/147 of the Act dated 19.12.2011. For Coming to this conclusion, we take support from the order of the Hon'ble jurisdictional High Court in the case of Bharti Infratel Limited vs. DCIT 411 ITR 403 (Delhi) in which the Hon'ble Delhi High Court held that when the proviso applies, the Assessing Officer must satisfy himself and state that there has been failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment We take further support from the order of Hon'ble Gujarat High Court in the case of Hitech Outsourcing Services vs. Pr. CIT 408 ITR 129 (Guj.), in which Hon'ble High Court held that reopening was not permissible when there was no failure of the assessee to disclose necessary facts. Moreover, we take support from the order of Hon'ble Calcutta High Court in the case of Ranglal Bagaria (HUF) vs. ACIT 384 ITR 477 (Cal.), in which it was held that if the reasons do not indicate that any material fact relevant for the assessment had been suppressed or that

> *any false assertion on the part of the assessee in respect of the facts relevant for the assessment had been discovered, a reassessment on the relevant ground cannot be undertaken."*
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> *(Emphasis is in the original order itself)*

10. The learned counsel for the appellant has not contended that the above finding of the learned ITAT insofar as the respondent having disclosed fully and truly all material facts necessary for the assessment, is incorrect. His only submission is that the period of four years has to commence from the date of the decision in the appeal filed by the respondent against the earlier assessment order. For this purpose, he has placed reliance on the third proviso to Section 147 of the Act which has been reproduced hereinabove. In our opinion the said proviso does not in any manner extend the period within which action under Section 147 of the Act can be initiated by the Department. It merely empowers the Assessing Officer to assess or re-assess such income, which is not involved or is the subject matter of any appeal, reference or revision, and has escaped assessment. It does not grant any further extension of time to the Department to initiate a proceeding under Section 147 of the Act.

11. It is also not disputed before us that for the assessment years 2003-04 to 2009-10 the claim of the respondent stood accepted. Though the learned counsel for the appellant has submitted that each assessment year would give a separate cause of action and decision taken in one assessment year cannot act as a *res judicata* in the other years, the same would also have a vital bearing in the adjudication of

the present appeal. In ***Commissioner of Income Tax v. Excel Industries Limited,*** (2014) 13 SCC 459, the Supreme Court while considering similar submissions has held as under: -

> *"**24**. **Secondly**, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with Assessment Year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue.*
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> ***25**. In Radhasoami Satsang v. CIT, (1992) 1 SCC 659: (1992) 193 ITR 321 this Court did not think it appropriate to allow the reconsideration of an issue for a subsequent assessment year if the same "fundamental aspect" permeates in different assessment years. In arriving at this conclusion, this Court referred to an interesting passage from Hoystead v. Taxation Commr., 1926 AC 155: 1925 All ER Rep 56 (PC) wherein it was said: (Radhasoami Satsang case, SCC pp. 665-66, para 14)*
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> *"14. ...Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper*

apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted and there is abundant authority reiterating that principle. Thirdly, the same principle, namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken.' (Hoystead case, AC pp. 165-66)"

***26**. Reference was also made to Parashuram Pottery Works Co. Ltd. v. ITO, (1977) 1 SCC 408: 1977 SCC (Tax) 179: (1977) 106 ITR 1 and then it was held: (Radhasoami Satsang case, SCC pp. 666, paras 16-17)*

"16. We are aware of the fact that strictly speaking res judicata does not apply to income tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be

> *sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.*
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> *17. On these reasonings in the absence of any material change justifying the revenue to take a different view of the matter - and if there was no change it was in support of the assessee - we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of Income Tax in the earlier proceedings, a different and contradictory stand should have been taken."*
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> ***27**. It appears from the record that in several assessment years, the Revenue accepted the order of the Tribunal in favour of the assessee and did not pursue the matter any further but in respect of some assessment years the matter was taken up in appeal before the Bombay High Court but without any success. That being so, the Revenue cannot be allowed to flip-flop on the issue and it ought let the matter rest rather than spend the tax payers' money in pursuing litigation for the sake of it.*"

12. In view of the above, we do not find this to be a fit case to entertain in jurisdiction under Section 260A of the Act. The appeal is accordingly dismissed.

13. The order be uploaded on the website forthwith. Copy of the order be also forwarded to the learned counsel through e-mail.

NAVIN CHAWLA, J

MANMOHAN, J

JULY 19, 2021/*rv*/U.