* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 1st December, 2010

\+ ITA No.1415/2008

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Joint CIT ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1425/2008

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Joint CIT ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1426/2008

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Joint CIT ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1100/2009

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Income Tax Officer ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1103/2009

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Income Tax Officer ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1104/2009

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Income Tax Officer ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

ITA No.1200/2009

Video Electronics Ltd.

..... Petitioners

Through: Mr. Anup Sharma, Advocate

versus

Income Tax Officer ..... Respondent

Through: Ms.Prem Lata Bansal, Advocate

CORAM:
HON'BLE MR. JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

SURESH KAIT J.(Oral)

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1. In these appeals, though, various questions of law are proposed, it is accepted by learned counsel for the appellant that the main issue is about

the reopening of the proceedings under Section 147 read with Sectio of the Income Tax Act. The decision in respect of other issues raised would depend upon the outcome of the appeals. These appeals are accordingly admitted on the following substantial question of law.

> 1. Whether on the facts and law, the Tribunal was right in holding that the initiation of proceedings under Section 147 read with Section 148 of the Act in all the three years is justified?

2. With the consent of learned counsel for the parties, we have heard the matter finally at this stage.

3. The issue raised by the assessee had been adjudicated by the Tribunal wherein Accountant Member of the Tribunal disagreed with the order passed by the Judicial Member. Therefore, the matter was referred to third member. The Third Member of Tribunal has restored the issue relating to claim of the deduction, while concurring with the view taken by the Judicial Member on the following of aspects:-

> "1) That initiation of proceedings under Section 147 read with Section 148 of the Act in all the three assessment years is justified.
>
> 2) That there is justification for disallowance of claim of depreciation of ₹ 25,36,136 in assessment year 1990-91, ₹14,18,926 in assessment year 1991-92 and ₹ 10,63,721 in assessment year 1992-93.

> 3) There is justification for disallowance of consultancy charges allegedly paid to M/s Esskay Financial Consultants."

4. The third member of the Tribunal has further added that the payment of consultancy charges allegedly paid by M/s Esskay Financial Consultancy is disallowed. As a consequence, the transaction of lease of computers having been held as not genuine. He has further held that even otherwise there is contradiction in the claim made by the assessee regarding the services rendered by M/s M/s Esskay Financial Consultancy and the claim made by Sh. R.P.Goel.

5. The other points of difference are as under:-

> "4. Whether on the facts and in law, the learned Judicial Member is justified to restore the matter back to the Assessing Officer with certain directions to consider utilization of withdrawal of ₹ 55 lacs from the deposit with IDBI and ₹ 8,15,000 made during the year under consideration and claimed under Section 32AB of the Act or the learned Accountant Member is justified in deleting the addition of ₹ 55 lacs and directing reconsideration of deposit of ₹ 8,15,000 by the Assessing Officer by appraising the facts afresh."

a The Judicial Member had restored the issue relating to the claim of deduction of ₹ 8.15 lacs and ₹ 55 lacs under Section 32AB to the file of the Assessing Officer for fresh consideration in the light of provisions of Section 32AB after holding that the utilization of withdrawal from IDBI account

for purchase of equipment was not genuine. On the contrary, the Accountant Member having considered the purchase of computers as genuine held the assessee was entitled to deduction under Section 32 AB.

The third member having agreed with the Judicial Member on the issue relating to the transactions of purchase and lease of computers has held that the issue was rightly been restored back by the Judicial Member. Accordingly, third member of the Tribunal held that the issue relating to utilization of withdrawal of ₹ 55 lacs from the deposits with IDBI is justified to be remanded back to the Assessing Officer for fresh consideration.

Vide order dated 15.07.2008 a formal order was passed by both members on the issue, which is impugned in the instant appeal. As noted at the outset, the main issue is about the reopening of proceeding under Section 147 read with Section 148 of the Income Tax Act. The decisions in respect of other issues raised would depend upon the outcome of this question. Accordingly, arguments were heard on the question of law framed in respect of this issue.

The detailed facts of the present case are as follows:-

6. The assessee is a limited company, manufacturer of TVs and r leasing business of computers. During assessment year 1990-1991 the assessee purchased computers from M/s Pertech Computers Limited (in short PCL) and on the same date leased them to M/s Altos India Limited (in short AIL), who in turn sub-leased to PCL, this being a lease back transaction. In the regular assessment made under Section 143(3) of the Act by the Assessing Officer, he duly accepted and granted depreciation of computers to the assessee in his order dated 29.03.1993.

7. During proceedings for assessment year 1993-1994 on enquiries it transpired that the lease transaction was not genuine. Therefore, M/s AIL and M/s PCL were summoned. In response to same, Sh.R.P.Goel, Accountant of PCL stated that the computer monitors and printers involved in the lease transaction were sold by PCL to M/s Video Electronics vide their invoice dated of 28.02.1990 and on the same day these assets were leased by M/s Video Electronics to M/s AIL, who in turn had sub-leased them to PCL without there being any physical movement of goods in the entire transaction. He further informed that, since the assets were pre-determined to be taken back on lease, the distinctive numbers were not mentioned in the sale invoice. He also made a specific statement that their company was not maintaining any record to this effect.

8. On further enquiry from PCL, Sh.Daban Bhai, Managing Direct PCL made a statement under Section 132(4) that physical identification of PC's pertaining to the party had not been kept as such he was not in a position to identify the computers pertaining to any particular party. In view of this he surrendered lists rendered charge to Profit & Loss account of M/s PCL.

9. On the basis of enquiry conducted and statement made, the Assessing Officer in the assessment year 1993-94 held that there was no sale and no leasing and hence no allowance of depreciation was given to assessment. These findings prompted the Assessing Officer to seek approval of CIT on 06.03.1998, after recording reasons for reopening assessment for assessment year 1990-1991 as under:-

> "return showing income of ₹ 33,86,260 was filed by the assessee on 31.12.90. Assessment has been completed under section 143(3) on 29.3.99. After completing of assessment it was gathered that the assessee has given computers, monitors and printers to Altos India Ltd on lease vide agreement dated 28.2.1990 @ ₹ 1,44,794 per month in the first three years and thereafter @ ₹ 70,833 per month for next five years. During enquiries in assessment year: 1993-1994 it was found that the computer given on lease to M/s AIL, has been on sub lease to M/s PCL, on the same terms and conditions vide agreement dated 28.2.90 to M/s AIL. The lease rentals were paid to M/s Video Electronics Ltd., directly by PCL. These transactions have not been entered in the books of M/s Altos India Ltd. A search was conducted in the

premises of PCL and its director surrendered lease rentals expenses claimed in Asstt. Years 1991-1992 and 1992-1993.

In view of these facts it is clear that the assessee has entered in this arrangement to claim the depreciation on the computer which are non-existent as no physical delivery of goods were given by PCL to M/s Video Electronics Ltd. The Altos India Ltd. is only a via-media to get depreciation on non-existent assets. The assessee has claimed depreciation on computers amounting to ₹ 18,91,060/- during this year.

I have reason to believe that the assessee has claimed depreciation amounting to ₹ 19,91,060 on the non-existent assets, therefore, the income of the assessee company has escaped assessment to the tune of ₹ 18,91,060/- during the year. To bring this income in tax-net notice under Section 148 is required to be issued.

Your kind approval is solicited to issue notice under Section 148 for Assessment Year 1990-1991."

10. After taking approval from CIT, the Assessing Officer issued notice under Section 148 of the Income Tax Act on 24.03.1998. Accordingly, he re-assessed the income by disbelieving transaction of computers including disallowance of depreciation on computers which were allowed originally.

11. The aforesaid action of the Assessing Officer was challenged before CIT(A). The CIT(A) upheld the reopening of the assessment and confirmed the addition made by the Assessing Officer in entirety. The assessee had further challenged the order dated 19.02.2001 passed by CIT(A) before the ITAT Principal Bench, New Delhi.

12. As we have already mentioned, the two members of Tribunal p separate and conflicting orders. The Judicial Member agreed with the view taken by the revenue authorities that there was no leasing of computers, the same being a sham transaction. He thus held that the reassessment proceedings were justified and consequent deduction and additions were properly made. However, the Accountant Member agreeing with the contention of the assessee, hold the reassessment proceedings under Section 147 of the Income Tax Act to be unjustified and all consequential deduction like depreciation etc., to be allowable. Third Member has concurred with the Judicial Member.

13. The learned counsel appearing on behalf of the assessee submits in the instant appeals that the PCL was in the need of money. It had sold the computers and took back the same on lease. Learned counsel for the assessee has drawn attention to the minority view taken by the Accountant Member of the Tribunal and heavily relied upon the same.

14. The learned counsel for the assessee argued that there was no justification for the Revenue to reopen the case as the assessment had already completed under Section 143(3) of the Act on 29.03.1993. The assessee had disclosed all the material facts necessary for the assessment in the original return filed on 31.12.1990. In the assessment order the Assessing

Officer had reproduced the fact leading to the leasing activity and transactions, which were not entered by the assesee as under:-

> "During the year under assessment the company diversified into the leasing activity. The company purchased computers from M/s PCL, E46/10, Okhla Industrial Area, Phase-II, New Delhi-20 at a cost of ₹ 85,09,350/- (photocopy of purchase bills enclosed). In order to make the aforesaid payment, the company withdrew ₹ 55.00 lacs from IDBI, which was deposited with them under Section 32AB in the earlier years. The said fact has already been mentioned in the Audit Report as required under Section 32AB(5). These computers were leased out to M/s AIL, D-60, Okhla Industrial Area, Phase-I, New Delhi-20 as per photocopy of the lease Agreement enclosed. The lease agreement was executed through M/s S.K. Financial Consultants, 30/16, Daksh Nagar, Vishwash Nagar, Shahdara, Delhi as per photocopy of Bill enclosed and they were paid ₹ 2,12,750 for the services rendered by them."

15. The member in minority was of the view that the validity of proceedings initiated had to be decided from the reasons recorded and not from the new ground or new reasons or new material stating in the assessment order. He relied on the principle embodied in the judgment of Calcutta High Court in the case of **East Coast Commercial Company Ltd. Vs. ITO ITR 326 at pages 355 and 356**. Accordingly, the learned member was of the view that the reasons recorded reveal that the factum of surrender of lease rental expenses by M/s PCL were for the assessment year 1991-1992 and 1992-1993. Reasons recorded by the Assessing Officer do not state of any surrender of lease rentals by that company for the assessment year

1990-1991, the year under consideration. For this reason alone, Assessing Officer could not have formed a belief that the computers were non-existent or that the assessee had entered into an arrangement to claim depreciation so as to say that the income on that account for the year under consideration had escaped assessment. The learned member in minority also found that at the time when the reasons were recorded, the Assessing Officer did not have access to the statement of Sh.Dadan Bhai, Managing Director of M/s PCL which was recorded under Section 132(4) of the Act. This statement came in his possession during the course of reassessment on 31.08.1999 from JCIT, special range 4 where the file of M/s PCL existed. The Assessing Officer was thus found to have acted on the basis of only a part of the assessment extracted in the assessment order of PCL as under:-

> "Physical identification of pieces pertaining to party to party has not been kept. As such I am not in a position to identify the computers pertaining to any particular party. In view of the fact, I am surrendering lease rent charged to Profit and Loss account of M/s PCL."

16. The Accountant Member held that he had find that Sh.Dadan Bhai in his statement though had expressed his inability to indentify the computers of each party, yet in the same statement said that he may be able to reconstruct the party-wise identification from books of accounts. Sh.Dadan Bhai never stated that there were no computers at all. It is clear from his statement that the computers did exist. In fact, the Assessing Officer himself

had recorded a finding of fact that the goods had remained part c larger stock. Non-existence of computers, therefore, was no reason, nor was there any material with Assessing Officer to draw an inference that the assessee had entered in the arrangements to claim depreciation on the computers where which non-existent. The information with the Assessing Officer being vague, indefinite, remote and farfetched could not justify the formation of any belief that income of appellant had escaped assessment, while the Assessing Officer was found to have acted mechanically without even applying his mind or examining the fact that depreciation claimed and allowed for the year under consideration was ₹ 18,91,060 or ₹ 28,36,166. The learned minority member thus relied on the Apex Court judgment in ITO Vs. Lakhmani Mewal Dass 1976 103 ITR437 case, as been cited by the learned counsel for the assessee wherein it was held that, the reasons for formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. There must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year due to his failure to disclose fully and truly all material facts. No doubt the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion or that of the Income Tax Officer on the point as to whether

action should be initiated for reopening assessment, but at the same tim Court have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement from assessment. The words "definite information" which are there in Section 34 in the Act of 1922, at a time before its amendment in 1948, are not there in Section 147 of the Act of 1961. Therefore, it would not lead to the conclusion that, the action can now be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote.

17. The learned member has recorded in his order that the admitted position of the fact that the assessee had produced in original assessment i.e. all the evidences relating to purchase of computers, sale-cum-lease agreement, evidence of payments and source as to withdrawal of ₹ 55 lacs from IDBI. The Assessing Officer did not doubt the genuineness of the purchase and being satisfied with the ownership of the assessee in the computers and use thereof in his business, allowed claim of depreciation to it. Therefore, the assessee could not be held to have failed to make full and the true disclosure of material facts by not confessing before Assessing Officer that the purchase of computers and the entries in the books of accounts produced were not genuine to support this view. Since, all material facts had been disclosed fully and truly by the assessee and in the

absence of any new material and information it was not permissible t assessing authority to form a belief that there has been an escapement of income for the reason of failure on the part of the assessee. Once the assessment having been completed under Section 143(3) of the Act, no action could be taken under Section 147 of the Act after expiry of four years from the end of the relevant assessment year.

18. The learned counsel for the Revenue, on the other hand, has placed strong reliance upon on the reasons given by the Judicial Member and the third Member upholding the validity of the re-assessment proceedings. She has relied upon the judgment of Supreme Court in the case of ***MCorp Global Pvt. Ltd. Vs. CIT, Ghaziabad*** **(2009) 309 ITR 434 (SC)** the Supreme Court held in the aforesaid case as under:-

> "In this case, one is concerned with the nature of transaction dated 15-3-1991. The question to be asked is whether the assessee has proved the transaction dated 15-3-1991? The question of "appropriation" of the bottles to a particular contract is different from the concept relating to the nature of the transaction. In this case, the tell-tale circumstance against the assessee was that sub-lease is dated 8-3-1991. It is between M/s A (lessee) and M/s U (sub-lessee). This sub-lease precedes the lease dated 15-3-1991 between the assessee (lessor) and M/s A (lessee). As rightly questioned by the AO as to how M/s A (lessee) could have entered into a sub-lease in favour of M/s U on 8-3-1991 when it had not acquired leasehold rights till 15-3-1991 from the assessee as the lessor. Moreover, there is nothing in the alleged lease deed dated 15-3-1991 indicating commencement of the lease from a prior date. There is nothing in the so-called lease dated 15-3-1991 as to the arrangement between the parties prior to 15-3-1991. There is nothing in the so-called lease dated 15-3-1991 indicating

any prior practice as submitted on behalf of assessee. On the contrary, the so-called lease dated 15-3-1991 recites that it shall commence only from 15-3-1991. Moreover, under the sub-lease between M/s A and M/s U it is stated that M/s A is the absolute owner of the bottles. Lastly, the so-called lease dtd. 15-3-1991 stipulated that the lessee, M/s A, shall have no right, title or interest to create a sub-lease without the permission of the lessor. No such permission has been produced. For the aforestated reasons, we find no infirmity in the concurrent findings of fact recorded by the authorities below. Transaction dated 15-3-1991 is not proved. Therefore, the AO was right in disallowing depreciation. [Para 11] An alternative submission was advanced on behalf of the assessee in the context of the second transaction that, if the said transaction was a financial arrangement, as held by the department, even then the assessee could be taxed only on interest embedded in the amount of lease rentals received from the lessee, M/s A. In this connection, it was submitted that the assessee had earned total income of ₹ 6,33,596 over a period of 36 months commencing from 15-3-1991 to 14-3-1994. Therefore, the matter should be remitted for recalculation. There is no merit in this argument for the simple reason that the concurrent finding shows that transaction dated 15-3-1991 is a sham. The finding shows that the transaction had not been proved by the assessee. In the circumstances, there is no question of the matter being remitted, as prayed for. Consequently, the assessing officer was right in coming to the conclusion that transaction dated 15-3-1991 was not proved and that the assessee was not entitled to claim depreciation of ₹ 30,17,122 in respect of the second transaction."

19. The learned counsel for the Revenue has relied upon another judgment of this Court reported as ***Goyal Gass Pvt. Ltd. vs. CIT*** **227 ITR 536 (1997)** wherein the claim of the assessee for depreciation was disallowed by the Assessing Officer. The disallowance was upheld in appeal by the CIT(A), ITAT and the High Court dismissed the appeal of the Assessee agreeing with the conclusion of the Tribunal.

20. On the issue of the reopening of the assessment of the year under consideration, the learned counsel has argued that on 06.03.1998 the Assessing Officer sought permission of CIT after recording reasons for reopening assessment for assessment year 1990-1991 as we have already reproduced in the preceding paragraphs. In support of her argument she has relied upon the judgment reported as ***Diwakar Enginers Ltd. vs. ITO*** **(2010) 329 ITR 28 (Delhi).** In the present case the Income Tax Officer became suspicious because during the assessment of the preceding years he found there existed sufficient material for Assessing Officer to initiate proceedings under Section 147 of the Act by issuing notice under Section 148 of the Act. The issuing of notice under Section 148, it is not necessary that material must be extensive and detailed. The High Court had led emphasis on the difference of material for purpose of initiation of investigation and those required for successfully completing the reassessment. One of the method by which the material can come into possession of the ITO is by assessment proceedings in the subsequent assessment years. In the present case, there was sufficient material for the Income Tax Officer to initiate proceedings under Section 147/148 of the Act. The only requirement of Section 147 of the Act is the Income Tax Officer has to record the reasons to believe which has been right recorded in the present case. In the case of **Diwakar Engineers (supra),** this Court came to the conclusion that the

assessment proceedings were rightly initiated under Section 147(a) and is no need for the revenue to refer and to rely upon the Section 147(b) to sustain the impugned notice and Section 147 of the Act. In view of the said discussion the writ petition filed by the assessee was dismissed.

21. We note that the assessee had not made full and true disclosure of material facts to the Assessing Officer at the time of original assessment. Sh.Dadan Bhai, Managing Director of M/s PCL had surrendered lease rent allegedly paid to various parties including the assessee. The parties had used M/s Altos India Ltd. a sister concern of M/s PCL to give the colour of genuineness to the lease transactions. The assessee had failed to inform the assessing officer about the sub-leasing of the computers by M/s Altos India Ltd. to M/s PCL, the original sellers of the computers.

22. Perusal of Sections 147 & 148 of the Income Tax Act shows that in case where original assessment has been made under Section 141(3), there is no substantial change in law in respect of powers of the Assessing Officer for re-opening of completed assessments. The Supreme Court in the case of S.*Narayanappa & Ors. Vs. C.CIT & Ors., 63 ITR 219* identified the conditions required to be fulfilled before exercising jurisdiction to reopen a completed assessment under Section 34 of the Income Tax Act, 1922 corresponding to Sections 147/148 of the Income Tax Act, 1961. The said conditions are as under:-

(i) The Assessing Officer must have reasons to believe that in has escaped assessment;

(ii) He must have reason to believe that such escapement is by reason of omission or failure on the part of the assessee to make a return.

(iii) Even if there has been omission or failure on the part of assessee to disclose fully and truly all material facts necessary for assessment but that did not result in the escapement e.g. where although there was non-disclosure of material facts the escapement was not as a consequence of such non-disclosure or omission of material facts but was due to carelessness on the part of the Assessing Officer or due to his taking a erroneous view of law action under Section 147 read with Section 148 of the Income Tax Act, 1961 would not be competent.

23. We have further noted that the Assessing Officer had made an assessment for the Assessment Year 1993-94 in the case of the assessee on 26.03.1996. In the course of assessment made under Section 143(3) of the said assessment year, the Assessing Officer had come across the statement of Sh.Dadan Bhai, Chairman of M/s PCL and the statement of Sh.R.P.Goyal. It is well settled principle of law that reopening of assessment on mere change of opinion is not permissible. If the Assessing Officer while framing original assessment has taken a view on the basis of facts of the case, he cannot turn around subsequently on change of opinion to say that the income chargeable to tax has escaped assessment.

24. In the instant case as we have discussed above, the Assessing C had made an assessment under Section 143(3) on 29.03.1993. The assessee had disclosed the lease rent received from M/s Altos India Ltd. and the same was assessed as such. Deduction was claimed by the assessee against such income on account of depreciation which was also allowed. It is pertinent to mention that the assessee had filed a certificate from M/s Altos India Ltd. to the effect that the equipment had been supplied to them and the same had been installed in their office at Delhi. The contents of the certificate from M/s Altos India Ltd. are as under:-

> "This is to confirm that the equipment, as per the lease agreement No.001/90 dated 28.02.90 have been received and the same have been put to use in full satisfactory condition at our office in Delhi."

25. Neither M/s Altos India Ltd. nor the assessee disclosed that M/s Altos India Ltd. had sub-leased the computers to its sister concern, namely M/s PCL without charging any extra premium on the lease rent payable to the assessee as per the lease agreement. As per the information given during original assessment proceedings M/s PCL was only a guarantor for the payment of lease rent on behalf of M/s Altos India Ltd. to M/s Video Electronics Ltd. It cannot be said that the Assessing Officer had reopened the assessment on mere change of opinion. Therefore, the material which has been received by the Assessing Officer i.e. after 29.03.1993 subsequent

to framing of the original assessment would be relevant for considering issue. It is a fact that the Assessing Officer came to know about the statement of Sh.Dadan Bhai, Chairman of M/s PCL and Director of M/s Altos India Ltd., during the course of assessment proceeding for the assessment year 1993-94, in which substantial amount of deduction claimed by way of lease rentals have been surrendered for taxation. The lease rent paid to the assessee is also included in the said amount. The Assessing Officer had also come to know about the sub-lease of the computers to M/s PCL by M/s Altos India Ltd. The Assessing Officer had come to know that M/s PLC had sold the same computers to the assessee which on paper had been leased out to it. On enquiry, it was found that M/s PLC had not delivered the computers to the assessee nor were the same delivered to M/s Altos India Ltd. The Assessing Officer also came to know that the lease rentals were not paid to the assessee by M/s Altos India Ltd. but by M/s PCL.

26. After going through the order passed by the authority below up to the Tribunal and the arguments advanced by the parties, we are of the view that the majority view taken by the Tribunal was right and we concur with the same. Tribunal was fully justified to remand the matter back to the Assessing Officer with certain directions. We do not find any reasons to interfere with the same. As a result, the question of law framed is answered

in favour of the respondent and against the appellant resulting into dis

of these appeals.

27. No costs.

SURESH KAIT, J

A.K.SIKRI, J

DECEMBER, 01, 2010
mr/RS