* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ **INCOME TAX APPEAL NOS. 52/2010 & 87/2010**

Reserved on : 17th October, 2011.

% **Date of Decision** : 11th November, 2011.

M/S ATMA RAM PROPERTIES PRIVATE LIMITED.... Appellant
Through Mr. Kaanan Kapur, Advocate.

VERSUS

D.C.I.T. …..Respondent
Through Mr. Kamal Sawhney, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

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

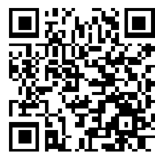
SANJIV KHANNA, J.:

These two appeals under Section 260A of the Income Tax Act, 1961 (Act, for short) have been filed by Atma Ram Properties Private Limited, the appellant and relate to assessment years 1999-00 and 2000-01. For the said years, the appellant had filed returns of income on 10th December, 1999 and 30th November, 2000 declaring income of Rs.49,85,970/- and Rs.39,87,710/-, respectively. Return for the assessment year 1999-2000 was taken up for scrutiny and the total income was assessed at Rs.1,11,76,124/-. Return for the assessment year 2000-2001 was not taken up for scrutiny and

was processed and the returned income as declared was n enhanced/modified.

2. For the assessment year 2001-02, the Assessing Officer made an addition of Rs.1,56,51,570/- as deemed dividend under Section 2(22)(e) of the Act. This amount reflected the advance given by a group company, i.e. Atma Ram Builders Pvt. Ltd., to the appellant-assessee. On appeal, the Commissioner of Income Tax (Appeals), [CIT (Appeals), for short], rejected the argument of the appellant that the aforesaid amount of Rs.1,56,51,530/- reflected only a current account entry and no loan or advance was taken. However, he restricted the addition to Rs.19,51,725/- as the said amount was advanced to the appellant during the assessment year 2001-02. He deleted the balance addition of Rs.1,36,99,845.14 as the said amount was the opening balance and had not been advanced or given as a loan/advance during the assessment year in question, i.e., assessment year 2001-02. The CIT (Appeals) further observed that the Assessing Officer was free to take remedial action as per law.

3. The Assessing Officer thereupon initiated reassessment proceedings recording identical reasons for the two assessment



years in question. The relevant portion of the reasons read as under:-

> “ Appeal order in the case of M/s Atma Ram Properties Pvt. Ltd. for A.Y. 2001-02 was passed by the Ld. CIT(A) vide order No.206/03-04 dated 28.06.2004 wherein addition of Rs.1,56,51,570/- on account deemed dividend u/s 2(22)(e) of the I.T. Act, 1961 was restricted to Rs.19,51,725/-. The Ld. CIT(A) held that addition to the extent of Rs.1,36,99,845/- was to be made in earlier years. On perusal of record it was found that the advance for M/s Atma Ram Builders Pvt. Ltd. was received by the assessee in various assessment years as per following details:-

A.Y.	Opening balance	Amount received during the year	Closing balance
1	2	3	4
1999-00	2,22,617.34	79,23,834.00	77,00,182.66
2000-01	77,00,182.66	60,00,000.00	1,36,97,582.66

> In view of the fact that the addition on the issue of deemed dividend for advance received by the assessee from M/s Atma Ram Builders Pvt. Ltd. has been confirmed by the Ld. CIT(A) in A.Y. 2001-02, I have reason to believe that income of the assessee as shown in Col. (3) has escaped assessment for A.Y., shown in col. (1).
>
> The assessee has failed to disclose fully & truly all material facts necessary for

> its assessment. The income in this case has been under assessed in terms of clause (e) of explanation 2 to sec. 147 of the I.T. Act, 1961."

4. Reassessment orders were thereafter passed making addition, under Section 2(22)(e) of the Act of Rs.79,23,834/- and Rs.60,00,000/- for the assessment years 1999-2000 and 2000-01 respectively. The said additions were sustained by the CIT (Appeals) and the Income Tax Appellate Tribunal (tribunal, for short).

5. On 17th October, 2011, the following substantial question of law was framed and the learned counsel for the parties were heard:-

> "1) Whether the Assessing Officer was justified and correct in law in initiating the reassessment proceedings for reasons recorded in Annexure A2."

6. Learned counsel for the appellant-assessee has submitted that the reassessment proceedings were initiated after four years but the tribunal has erroneously held that there was failure/omission on the part of the assessee to make full and true disclosure. Secondly, it is a case of change of opinion.

7. Section 147 of the Act reads as under:-

> "**147. Income escaping assessment.**--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 sections 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 sections 148 to 153 referred to as the relevant assessment year):

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 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Explanation 1.--Production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:--

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but--

(i) income chargeable to tax has been under assessed; or

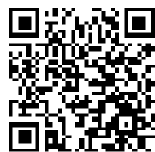
(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.— For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

<u>Assessment year 1999-2000. (ITA No. 87/2010)</u>



8. In the assessment year 1999-00, the undisputed positi[on] is that the appellant had answered queries raised by the Assessing Officer vide letter dated 8th February, 2002. The said letter reads as under:-

> "Dated 08 Feb, 2002
> The assessing Officer,
> Circle 2(1), CR Building,
> IP estate New Delhi.
>
> Sub:-Atma Ram Properties (P) Limited, Assessment Year 1999-2000 Completion of assessment
>
> Sir,
> In continuation of our discussion with you, copies of sister concerns mentioned below are enclosed:

Creditors:

Indian cine cosmos Pvt. Limited	Rs.45,50,585.65
Kulvinder Distributors P Ltd.	Rs.9,13,582.49
Mrs. Poonam Sawhney	Rs.1,39,480.21
Ashwin & Co. Pvt Limited	Rs.7,83,350.00
Sadoon Builders P Limited	Rs.1,43,473.83
Smt. Sadhna Chadha	Rs.12,17,630.99
M/s AR Chadha & Co. (I) P Ltd.	Rs.47,41,429.50
Atma Ram Builders Pvt. Limited	Rs.77,00,182.66
Atma Ram Construction P limited	Rs.87,323.77

Debtors:

Mrs Archana mamgain	Rs.54,29,342.52
ARSD Endowment trust	Rs.14,690.00
ARC Cement Ltd.	Rs.27,98,461.76
AR Chadha	Rs.14,26,761.62
AR Chadha & Co.	Rs.75,04,916.62
Atma Ram Trust	Rs.7,44,592.37
Mr. CM Chadha	Rs.24,11,088.69
Smt. Chuniwati Chadha	Rs.16,42,963.63
Smt. Kamlesh Sawhney	Rs.11,73,376.87

Yours faithfully,
For Atma Ram Properties P limited

(C M Chadha)
(Director)"

9. The aforesaid letter refers to the discussion with the Assessing Officer and also mentions enclosing a copy of accounts of sister concerns as creditors or debtors. The said letter refers to Atma Ram Builders Private Limited to whom Rs.77,00,182.66 was due and payable.

10. It is not disputed that after this letter was filed, the Assessing Officer passed the assessment order under Section

143(3) dated 15th February, 2002 making some enhancemer and assessed the income of the appellant at Rs.1,11,76,124.88 instead of declared return income of Rs.49,89,970/-. However, no addition was made under Section 2(22)(e) of the Act on the ground of deemed dividend.

11. The Revenue has produced the original file before us. Vide order dated 7th February, 2002 the appellant-assessee was asked to file confirmations of sundry creditors and loan/advances. The order sheet dated 14th February, 2002 states that an advocate had attended and filed submissions vide letter dated 8th February, 2002. The letter dated 8th February, 2002 is on record along with a detailed annexure which sets out names of the creditors and debtors, who it is stated were sister concerns of the appellant-assessee. The annexure to the said letter contains a statement mentioning the opening balance, entries made during the year in respect of each one of the creditors and debtors and the closing balance. Notings on the said letter indicates that the Assessing Officer had examined whether these were old entries or there were also deposits or payments during the year in question.

12. In view of what we have stated above, it is apparent that the Assessing Officer at the time of original proceedings had

gone into the question of loans and advances from sist concerns. Figures and details were furnished and given along with an annexure which had particulars like opening and closing balance as well as entries/transactions during the year in question. Account of Atma Ram Builders Pvt. Ltd. was enclosed.

13. Revenue has debated and stated that the Assessing Officer had not examined and gone into the question whether or not provisions of Section 2(22)(e) of the Act were attracted to the present case and therefore re-assessment proceedings have been validly initiated.

14. No doubt Section 2(22)(e) of the Act is not mentioned in the order sheet or in the assessment order but this does not help the case of the Revenue for the reason that the assessee cannot be faulted. If the Assessing Officer had failed to apply legal provisions/section of the Act, the fault cannot be attributed to the appellant assessee. The requirement is that the assessee should have failed or omitted to make full and true disclosure of material facts. The assessee is not required to disclose, state or explain the law. It cannot be said that the appellant-assessee had failed to make full and true disclosure of material facts. Full and true facts were stated by the assessee. Full and true details were furnished but as per the case of the Revenue there was a

lapse on the part of the assessing officer in not applying an invoking Section 2(22)(e) of the Act. This lapse or error on the part of the Assessing Officer cannot be attributed and regarded as a failure on the part of the assessee to make full and true disclosure of the material facts in the original assessment proceedings. The aforesaid error or failure of the assessing officer in not applying Section 2(22)(e) could have been corrected by exercise of power of revision as the original order may have been erroneous and prejudicial to the interest of Revenue, but limitation period for exercise of the said power had expired. The said error in applying a provision cannot be corrected in the present case due to the factual matrix, by exercise of power under Section 147 of the Act. It is not that the Revenue was remediless or the error could not be corrected or rectified. Due to delay and limitation, the remedial action cannot be taken under the applicable provision. Scope and ambit of each provision/remedy available under the Act is circumscribed and stipulated. Sometimes two or more provisions/remedies may be applicable and recourse to any one of the remedy may be proper but scope and ambit of a provision/remedy cannot be expanded beyond the legislative mandate. The jurisdictional

preconditions, if stipulated in the enactment, must be satisfie before recourse to a remedy/provision can be invoked.

15. The reasons recorded above do state that the appellant assessee had failed to fully and truly disclose the facts but do not indicate why and how the assessee had failed to make full and true disclosure of the material facts. Mere repetition or quoting the language of the proviso is not sufficient. The basis of the averment/statement should be either stated or should be apparent/ lucid/explained from the record.

16. In the present appeal, Explanation (1) to Section 147 also does not help or assist the Revenue. All material facts were available on record and no material facts had to be inferred or discovered by the assessing officer. The assessing officer in spite of being aware of the facts, failed to apply or, at best failed to consider whether Section 2(22)(e) of the Act was attracted. Failure to apply law or a section to admitted facts on record is not covered by Explanation (1). Explanation (1) applies when the assessing officer on the basis of account books or other evidence fails to discover or infer material facts which with due diligence could have been discovered. Explanation (1) deals with failure of the assessing officer to discover or infer all material facts on the basis of books of accounts or other

evidence produced by the assessee. Difference between fac and law is well recognized and understood. Explanation (1) reflects the said difference.

17. The assessing officer in the re-assessment order has not discussed the said aspect but the CIT (Appeals) in his order has accepted that the list of creditors and debtors was furnished by the appellant assessee but the assessee had tried to conceal the fact that the sister concerns' balances included balances in respect of transactions and loans. There is no basis or ground for recording the said finding. As noticed above, in the course of original assessment proceedings, the assessee was required to file compilations of sundry creditors, loans and advances as per order sheet dated 7th February, 2002 and pursuant to the said direction, the letter dated 8th February, 2002 was filed. The details included details of loans and advances. The Tribunal in the impugned decision dated 3rd July, 2009, has again recorded as under:-

> "On reading the aforesaid letter dated 08.02.2002, it is seen that the assessee has shown sum of Rs.77,00,18,266/- against M/s. Atmaram Builders Pvt. Ltd. under the head " creditors". The nature of the transaction made with M/s. Atmaram Builders Pvt. Ltd. has nowhere been disclosed. In the said letter, the assessee has nowhere stated that the sum of Rs. 77,00,182/- represents loans and

> advances taken from sister concerns having specified percentage of holding of shares in the share capital of the assessee company. We, thus find that the ld. CIT(A) has rightly noted that the fact that the assessee has categorized the amount payable to M/s. M/s. Atmaram Builders Pvt. Ltd. under the head "creditors" without indicating that the assessee has taken loans and advances from the sister concern having share holding the share capital of the assessee company. From the details so filed and the assessment order originally made u/s 143(3), it is clear that the issue as to whether the amount shown under the head "creditors" in the name of M/s. Atmaram Builders Pvt. Ltd. was covered by the provisions contained in section 2(22)(e) was never a subject matter of assessment originally made u/s 143(3) of the Act nor any deliberation or discussion was made in that proceedings, and no basic and primary facts and details necessary to decide the applicability of section 2(22)(e) of the Act were furnished by the assessee. The assessee did not disclose the true and correct nature of payment received from M/s. Atmaram Builders Pvt. Ltd. nor disclosed the extent of holding of M/s. Atmaram Builders Pvt. Ltd. in the share capital of the assessee company so as to enable the A.O. to apply his mind regarding the applicability of the provisions contained in section 2(22)(e) of the Act to amount taken from M/s. Atmaram Builders Pvt. Ltd."

18. The aforesaid reasoning is incorrect and cannot be accepted as the letter dated 8th February, 2002, was filed in response to the noting dated 7th February, 2002, made by the assessing officer requiring the assessee to file compilation of sundry creditors, loans and advances. They were described and

mentioned as sister concerns. Further along with the letter date 8th February, 2002, the assessee had filed statement of accounts of each creditor/debtor including the opening balance, closing balance or transaction or entries during the year. We do not think that the law/ statute requires or imposes any further obligation on the appellant. The disclosure in the present case by the appellant was full and true.

19. In ***CIT versus Burlop Dealers Ltd.,*** [1971] 79 ITR 609 (SC), a similar provision in Section 34(1) of the Income Tax Act, 1922 was examined and it was held that the said provision did not impose a more onerous obligation than disclosing the primary facts relevant to the assessment. It was observed as under:

> "We are of the view that under section 34(1)(a) if the assessee has disclosed primary facts relevant to the assessment, he is under no obligation to instruct the Income-tax Officer. about the inference which the Income tax Officer may raise from those facts. The terms of the Explanation to section 34(1) also do not impose a more onerous obligation. 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 the 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.
>
> The assessee had disclosed his books of account and evidence from which material facts could be discovered : it was under no obligation to inform the Income-tax Officer about the possible inferences which may be raised against him. It was for the Income-tax Officer to raise such an inference and if he did not do so the income which has escaped assessment cannot be brought to tax under section 34(1)(a)"

20. The aforesaid decision of the Supreme Court was elucidated and explained in ***Phool Chand Bajral Lal versus I.T.O.,*** [1993] 203 ITR 456 (SC) and it was held that where the Assessing Officer gets fresh information that was not available at the time of original assessment, i.e. after the conclusion of the original assessment proceedings, which enables him to form a reasonable belief that income had escaped assessment because of omission or failure of the assessee to disclose full and true facts, reassessment proceedings could be validly initiated. It has to be, therefore, examined whether the assessing officer had received information from any other external source after conclusion of the first/ original assessment proceedings to show that the assessee had not made true and full disclosure of the facts. It was held as under:

"Thus, it is seen that in Burlop Dealers' case [1971] 79 ITR 609 (SC), apart from the Income-tax Officer holding during the assessment proceedings of the same assessee for a subsequent year, that the alleged agreement between the assessee and Ratiram was bogus, there was no other information or material from any other external source which came to the notice of the Income-tax Officer after the assessment proceedings which could enable the Income-tax Officer to form a reasonable belief that the income of the assessee had escaped assessment in the earlier year. As a matter of fact, after the conclusion of the original assessment proceedings, there was no fresh material at all available with the Income-tax Officer in Burlop Dealers' case [1971] 79 ITR 609 (SC) which could have enabled the Income-tax Officer to entertain any reason to believe that the income of the assessee had escaped assessment for the assessment year 1949-50. An assessment order for the subsequent year could not by itself lead to any inference, much less to the formation of a reasonable belief that income chargeable to tax had escaped assessment in the previous year, on account of the failure on the part of the assessee to make a true and full disclosure of the primary facts during the proceedings of the concluded assessment. The judgment in Burlop Dealers' case [1971] 79 ITR 609 (SC) cannot be understood as laying down any such proposition that even where the Income-tax Officer gets some fresh information which was not available at the time of the original assessment, subsequent to the conclusion of the original assessment proceedings, which enables him to form a reasonable belief that the income of the assessee had escaped assessment because of the omission or failure of the assessee to disclose true and full facts during the assessment proceedings, he cannot reopen the assessment. The observations in Burlop's case [1971] 79 ITR 609 (SC), noticed above, were made in the

peculiar fact-situation of that case and cannot be construed to be of universal application irrespective of the facts and circumstances of the particular case.

In the present case, as already noticed, the Income-tax Officer, Azamgarh, subsequent to the completion of the original assessment proceedings, on making an enquiry from the jurisdictional Income-tax Officer at Calcutta, learnt that the Calcutta company from whom the assessee claimed to have borrowed the loan of Rs. 50,000 in cash had not really lent any money but only its name to cover up a bogus transaction and, after recording his satisfaction as required by the provisions of section 147 of the Act, proposed to reopen the assessment proceedings. The present is thus not a case where the Income-tax Officer sought to draw any fresh inference which could have been raised at the time of the original assessment on the basis of the material placed before him by the assessee relating to the loan from the Calcutta company and which he failed to draw at that time. Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of the original assessment is different from drawing a fresh inference from the same facts and material which were available with the Income-tax Officer at the time of the original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself, on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the Income-tax Officer would have the jurisdiction to reopen the concluded assessment in such a case. It is correct that the assessing authority could have deferred the completion of the original

> assessment proceedings for further enquiry and investigation into the genuineness of the loan transaction but, in our opinion, his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under section 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the Incometax Officer acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."

21. In the assessment year 1999-2000, no information or material in the form of facts was furnished from any external source. The facts were already on record furnished by the letter dated 8th February, 2002. In the subsequent year i.e. assessment year 2001-02, an addition under Section 2(22)(e) of the Act, was made but was partly deleted by the CIT (Appeals) on the ground that loans and advances pertaining to other years with the observation that the assessing officer was entitled to take remedial action as per law in the relevant years. This is not factual information or material which can be covered by the Explanation (1). The facts were already known and on record and were not brought to the notice of the department by virtue of the order passed by the CIT (Appeals) in the assessment year 2001-02.

22. In view of the aforesaid discussion, the substant question of law, raised by the assessee in Assessment Year 1999- 2000, is decided in favour of the appellant and against the respondent. The appeal is accordingly allowed and the reassessment proceedings are set aside.

Assessment year 2000-2001. (ITA No. 52/2010)

23. As far as assessment year 2000-01 is concerned, the return was not taken up for scrutiny and no order under Section 143(3) of the Act was passed. Therefore, the contention that there was change of opinion cannot be accepted. The contention of the appellant that the letter dated 8th February, 2002 was filed during the course of assessment proceedings for the assessment year 1999-00 and the said letter should be read and treated as a part of the records relating to the assessment year 2000-01, cannot be accepted. It is well settled that each assessment year is treated as a separate and independent. Letter dated 8th February, 2002, which was filed in the proceedings for the assessment year 1990-00, cannot be read and treated as was filed in the proceedings relating to the assessment year 2000-01. As noticed above, proceedings for assessment year 2000-01 were never initiated and the return for the said year was not made subject matter of the scrutiny. The

other contention of the appellant that they had made full and tru[e] disclosure in the said year must necessarily fail for the same reasoning. Clause (b) to the Explanation 2 is clearly applicable. In this case, books of accounts and other material were not produced and no letter was filed. Accordingly, order passed by the CIT (Appeals) in the assessment year 2001-02 would constitute information or material from any external source and the decision of the Supreme Court in ***Phool Chand Bajrang Lal's case*** (supra) would be applicable and supports the stand of the Revenue.

24. Reliance placed by the appellant assessee on ***Commissioner of Income Tax, Delhi – XI versus Batra Bhatta Company,*** 2008 (106) DRJ 389 (DB) is not apposite. In the said case, in the reasons for reopening recorded by the assessing officer, it was stated that the "issue/contentions raised in the case requires much deeper scrutiny". Thus, it was held that the facts of the case did not satisfy the requirement of Section 147 i.e. "if the assessing officer has reason to believe". Reason to believe do not mean reason to suspect and the said pre-condition was missing.

25. Thus, present appeal for the assessment year 2000-01 has to be dismissed and the question of law mentioned above answered against the appellant and in favour of the respondent.

ITA No. 52/2010 is accordingly dismissed.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

NOVEMBER 11th , 2011
VKR