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

\+ **ITA No.533 of 2011**

% DECISION DELIVERED ON: **MARCH 21, 2011.**

COMMISSIONER OF INCOME TAX . . . APPELLANT

through : Mr. Kamal Sawhney, Sr. Standing Counsel.

VERSUS

MODIPON LTD. . . .RESPONDENT

through: Mr. Santosh K. Aggarwal, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (**ORAL**)

1. Assessment in this case was completed under Section 143(3) of the Income Tax Act (hereinafter referred to as 'the Act') on 30.01.2004 at loss of ₹1,03,63,693/- as against the returned loss of ₹1,75,90,254/-. Thereafter, proceedings under Section 147 of the Act were initiated by issuing notice under Section

148 of the Act on 21.07.2005. Re-assessment proceedings were completed on 29.09.2006 at loss of ₹39,13,425/-. In re-assessment proceedings additions of ₹31,87,271/- and ₹32,63,000/- were made on account of disallowance of prior period expenses and capital expenditure respectively claimed as revenue expenses. The reopening was made on the basis of 'tangible material' in the form of tax audit report filed by the assessee and on the basis of information available in the Profit and Loss account.

2. Before the CIT (A), the assessee had challenged the validity of re-assessment proceedings. The CIT (A) vide para No.2.3.3 of his order dated 25.09.2008 held that the reasons were recorded for reopening the assessment on 20.07.2005 within four years and therefore, the case is covered by the main Section 147 of the Act and not by the proviso in Section 147 of the Act. It was held by him that as per the amended provision of Section 147 of the Act, the only necessary pre-requisite is formation of belief by recording reasons for escapement of income. The CIT (A) held that the only requirement was that the AO should have some tangible material to come to the conclusion. The CIT (A) held that it cannot be said to be a 'change of opinion' when the issue was never decided in the

original assessment. The CIT (A), therefore, upheld the order of the AO.

3. The Income Tax Appellate Tribunal ('the Tribunal' for brevity) relying on the judgment of the Apex Court in the case of ***Commissioner of Income Tax Vs. Kelvinator of India Ltd.*** **320 ITR 561 (SC)** quashed the reassessment order passed by the AO by holding that in present case also, the reopening was on mere change of opinion on the basis of material which was already available on record at the time of completion of the original assessment. The Tribunal held that as per reasons recorded by the AO, the re-assessment proceedings were initiated by the AO on the basis of tax audit report filed by the assessee and on the basis of information available in the Profit and Loss account and there is no reference to any new material which has come to AO's possession after the completion of original assessment.

4. It is not in dispute that the re-assessment proceedings were initiated by the AO on the basis of tax audit report filed by the assessee in Form No.3CD and on the basis of information available in the Profit and Loss account. There was no reference to any new material by the AO which had come into

his possession after the completion of original assessment under Section 143(3) of the Act. It is also a matter of record that before initiating re-assessment proceedings by issuing notice under Section 148 of the Act, the AO had initiated proceedings under Section 154 of the Act for the same reasons and proceedings initiated under Section 154 were dropped by him after the issuance of notice under Section 148 and were thus pending on the date of initiation of the re-assessment proceedings. In these circumstances, the Tribunal while setting aside the reassessment proceedings relied upon the Full Bench Judgment of this Court in the case of ***Kelvinator of India Ltd. (supra)*** and quoted the following passage from the said judgment:

> "This has been the settled position in law all through. However, the question which requires consideration is whether any change in law has been brought about on account of amendment of Section 147 with effect from April 1, 1989.
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> In Jindal Photo Films Ltd. [1998] 234 ITR 170 (Delhi), R.C. Lahoti J. (as his Lordship then was), observed (headnote):
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> The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods.
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> It was further held by the Bench that (page 178):

> Reverting back to the case at hand, it is clear from the reasons placed by the Assessing Officer on record as also from the statement made in the counter affidavit that all that the Income-tax Officer has said is that he was not right in allowing deduction under Section 80-I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase 'reason to believe' in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Officer has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.
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> It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this Court. If 'reason to believe' be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Section 147/148 of the Act."

5. Various other judgments are also referred to by the Tribunal in support of its aforesaid view.

6. In these circumstances, we do not find any substantial question of law that would arise for consideration in this appeal. The appeal is devoid of any merit and is accordingly dismissed.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

MARCH 21, 2011
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