IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 20th January, 2010

\+ **ITA 239/2008**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Ms Suruchi Aggarwal

versus

GOETZE (INDIA) LTD. ..... Respondent
Through: Mr Ashish Mohan

CORAM:
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SIDDHARTH MRIDUL

1. Whether 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.

BADAR DURREZ AHMED, J (ORAL)

1. In this appeal under Section 260A of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), the Revenue is aggrieved by the order dated 13th July, 2007 passed by the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') in ITA No. 207/DEL/2005 relating to the assessment year 1997-98.

2. The issue before the Tribunal was as to whether certain prior period expenses amounting to Rs75,96,534/- had been rightly disallowed by the Assessing Officer and confirmed by the Commissioner of Income Tax (Appeals) in reassessment proceedings under Sections 147/148 of the Act.

3. It is an admitted position that the reopening was subsequent to the four-year period stipulated in the proviso to Section 147 and, consequently, the same could only be initiated if any income chargeable to tax had escaped assessment by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice under Section 142(1) or Section 148 or "*to disclose fully and truly all material facts necessary for his assessment*", for that assessment year.

4. The only issue which arises for consideration in the present case is whether the assessee had failed to disclose, fully and truly, all material facts with regard to the said prior period expenses.

5. According to the assessee, all details with regard to prior period expenses had been submitted during the course of the regular assessment under Section 143(3). Furthermore, it was pointed out that during the course of the regular assessment the Assessing Officer had, from time to time, raised queries and required information from the assessee on the very aspect of prior period expenses. The assessee had submitted the information as well as answered the queries which were raised by the Assessing Officer. One of the answers given to a query raised by the Assessing Officer was as under:-

> "Some of the expenses were received after the closure of book of the relevant accounting year and could not be accounted in that year. They were therefore accounted for in the subsequent year. We confirm that these expenses have not been claimed by us/allowed to us in any earlier year. Similar expenses have been allowed to us in the preceding assessment years 1996-97."

6. From the above it is clear that the issue of prior period expenses was

in contemplation at the time of the regular assessment proceedings. Since the Assessing Officer was making enquiries and requiring information on this aspect of the matter, it is obvious that the Assessing Officer was applying his mind to the question of prior period expenses. It is only after consideration of these materials, information and answers which were provided by the assessee that the Assessing Officer completed the assessment under Section 143(3) on 29th February, 2000.

7. The Tribunal took note of these specific facts and observed as under:

> "**15.** Further, on examination of the entire material on record it is fully established that in this case the application of the mind on the part of the Assessing Officer relating to issue of prior period expenses is fully revealed. The reply of the assessee dated 6.9.1999 available at page 51 indicates that in pursuance of the hearing dated 12.8.1999 in respect of the assessment proceedings certain information/details "as desired by your honour, are being filed." The Assessing Officer was still not satisfied and thereafter the assessee again vide letter dated 21.1.2000 available at page 53 of the paper book, submitted reply regarding prior period expenses and gave details in the shape of vouchers, bills etc. Since the Assessing Officer was still not satisfied, the assessee vide letter dated 31.1.2000 again submitted a detailed reply. From this reply also it is clear that the details were furnished by the assessee in the context of hearing, which took place on 24.1.2000 in respect of the assessment proceedings. Hence, information/details regarding the previous year's expenses were again furnished by the assessee before the Assessing Officer on the demand of the Assessing Officer. It is clear the assessee filed details along with vouchers which fact also establishes that it was only after examination of these details and after application of mind, the Assessing Officer did not make further queries. Had he not applied the mind, then he would not have called for further details. On the direction of the Assessing Officer, the assessee filed plant-wise and year-wise details. Details of prior year's expenses are available at pages 103 to 111 of the paper book. It was only after these details the Assessing Officer felt fully satisfied and did not make any query nor made any disallowance in the assessment order.

> **15.** Under the above narrated circumstances, firstly the application of the mind by the Assessing Officer is fully proved and secondly, it is also proved that the assessee had furnished full details and entire relevant material. Thus it cannot be said that the assessee did not furnish details or did not disclose full and true facts relating to the issue on the basis of which the opening was made or that the Assessing Officer did not apply the mind to such particulars. On the other hand, it is fully established that there was no failure on the part of the assessee in supplying material facts."

8. We are in agreement with the aforesaid conclusion arrived at by the Tribunal and find that there has been no failure on the part of the assessee to fully and truly disclose the relevant material. Therefore, the reopening of the assessment was beyond the jurisdiction of the Assessing Officer. We note that it was a case of mere change of opinion and that is not permissible for the purposes of invoking jurisdiction under Section 147 of the Act.

9. The learned counsel for the Revenue drew our attention to a decision of a Division Bench of this Court in the case of ***Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income Tax: 281 ITR 394(Del)***, to submit that no presumption can be raised that the Assessing Officer had applied his mind to all the material that was available to him at the time of framing of the assessment order. She also placed reliance on the said decision to submit that action under Section 147 was permissible, even if the Assessing Officer gathered his reason to believe from the very same record as has been the subject matter of the completed assessment proceedings.

10. We find that there appears to be some conflict between the decision in ***Consolidated Photo and Finvest Ltd.(supra)*** and ***Commissioner of Income***

Tax v. Kelvinator of India Ltd.: 256 ITR 1(Del), which was a Full Bench decision of this Court. In the Full Bench decision, it was specifically observed that when a regular order of assessment is passed in terms of Section 143(3) a presumption can be raised that such an order has been passed on application of mind. It was also pointed out that a presumption could also be raised to the same effect in terms of Clause (e) of Section 114 of the Indian Evidence Act indicating that judicial and official acts had been regularly performed. The Full Bench observed that if it were to be held that an order that has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to re-open the proceedings without anything further, the same would amount to giving premium to an authority exercising a quasi-judicial function to take benefit of its own wrong. The Full Bench decision also makes it clear that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. It is obvious that the Full Bench Decision holds the field.

11. We may also point out that recently the Supreme Court has dismissed the appeal arising out of the said Full Bench decision by virtue of its decision in Civil Appeal Nos. 2009-2011 of 2003 and Civil Appeal No. 2520 of 2008 by a judgment dated 18th January, 2010. The Supreme Court, after observing the changes and amendments brought about in Section 147, from time to time, held as under:

> "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid,

> Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be *per se* reason to re-open. 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 fulfillment 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."

12. We have already found that the present case is one of a mere change of opinion. Therefore, keeping the observations of the Supreme Court in mind, the only inescapable conclusion is that the Section 147/148 proceedings are without jurisdiction.

13. The learned counsel for the Revenue drew our attention to *Explanation 1* to Section 147, which stipulates that 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, would not 'necessarily' amount to disclosure within the meaning of the proviso to Section 147. In this backdrop, the learned counsel for the Revenue submitted that the mere production of the audited account books etc, did not amount to disclosure and it was open to the Assessing Officer to invoke the jurisdiction under Section 147 of the Act, in case a discovery was made that income had escaped assessment. She contended that mere production of the books of account and other evidence would not absolve the assessee from the responsibility of making a full and true disclosure.

14. In the facts of the present case, we find that it is not that the assessee produced the account books or other evidence from which the Assessing Officer could have 'discovered' material evidence after exercising due diligence. The case before us is one where the Assessing Officer was alive to the situation and repeatedly raised queries and sought information from the assessee on the very question in issue, that is, prior period expenses. We cannot also ignore the word 'necessarily' which has been used in the said *Explanation 1*. The legislature, by using the said word has made it clear that production of account books etc may amount to disclosure though not 'necessarily' so in every case. Whether the production of books of accounts and other evidence amounts to the kind of disclosure contemplated in Section 147 would have to be determined in the facts and circumstances of each case. In the present case, we have seen that there was no failure on the part of the assessee to make a full and true disclosure.

15. In view of the foregoing discussion, we are in complete agreement with the conclusions arrived at by the Tribunal. In any event, the conclusions have been arrived at on findings of fact and settled legal principles. No substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

JANUARY 20, 2010/*mk*