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

Reserved on : 13.01 2011

% Date of decision : 28.01.2011

\+ **ITA No. 17 / 1999**

THE CENTRAL INDIA ELECTRIC SUPPLY CO. LTD.
... ... APPELLANT

Through : Mr. P.N. Monga & Mr. Manu Monga
Advocates.

- V E R S U S -

INCOME TAX OFFICER, COMPANY CIRCLE – X, NEW DELHI & ANR.
... ... RESPONDENTS

Through : Mr. Sanjeev Sabharwal,
Advocate.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MR. JUSTICE RAJIV SHAKDHER

1. Whether the Reporters of local papers may be allowed to see the judgment? YES

2. To be referred to Reporter or not? YES

3. Whether the judgment should be reported in the Digest? YES

SANJAY KISHAN KAUL, J.

1. This appeal arises out of the Order dated 04.03.1999 of the Income Tax Appellate Tribunal (for short, 'the Tribunal') in terms whereof the appeal of the assessee relating to the assessment year 1965-66 and the appeal filed by the

Revenue relating to the assessment year 1979-80 were partly allowed, while the cross-objections of the assessee relating to the assessment year 1979-80 were dismissed.

2. The questions of law, which arise for consideration before us in the present appeal, are:

> "(1) Whether on the facts and in the circumstances of the case, the Tribunal was justified in holding that re-assessment proceedings under Section 147(a) read with Section 148 of the Income-tax Act, 1961 had been rightly initiated against the assessee?
>
> (2) Whether the Tribunal was right in holding that valid approval had been accorded by the Central Board of Direct Taxes under Section 151(i) of the Income-tax Act for re-opening of the assessment of the assessee?"

3. The necessary facts are being set out hereinafter. The assessee company was engaged in the generation and supply of electricity from its units at Bilaspur and Katni. These units were acquired by the Government of Madhya Pradesh in the year 1964 when the appellant's licence expired & not renewed. The compensation for compulsory acquisition of both the units was fixed at Rs.5,85,000/- and paid to assessee in the year 1964 itself. The assessee filed its return on 07.10.1965 claiming a loss of Rs.50,572/- and thereafter revised return on 16.12.1967 declaring a loss of Rs.1,07,183/- on account of retrenchment. The assessment was completed at the behest of the assessee at a total loss of Rs.56,611/- on 13.01.1969 for the assessment year 1965-66 which was not allowed to be carried forward due to

closure of business. It is not disputed that the assessee company also delivered possession to the M.P. Electricity Board in the year 1964 itself.

4. Since dispute arose in respect of the purchase price of the acquired land as the appellant company made a claim for higher compensation, each party nominated an Arbitrator. As the Arbitrators differed on the claim, the matter was referred to the Umpire, who made his Award for enhancement of compensation, which was made Rule of the Court. An appeal was preferred before the Madhya Pradesh High Court, which was disposed of vide Order dated 14.09.1971. The matter was taken up to the Supreme Court & decided vide its Order dated 24.07.1985 thereby modifying the Order of the Madhya Pradesh High Court by reducing the amount of compensation by Rs.60,000/-.

5. It is not disputed that the assessee received some payment in the previous year 1978-79 relatable to the assessment year 1979-80. Since the amount of enhanced compensation was deposited by the assessee in a nationalized bank, the benefit of Section 54-E of the Income Tax Act, 1961 (for short, 'IT Act') was claimed by the assessee.

6. A notice dated 15.11.1981 under Section 148 of the IT Act was issued to the assessee appellant company requiring it to furnish its return for assessment. The assessee filed its response vide letter dated 14.02.1982 thereby declaring a loss of Rs.56,611/- as assessed originally on 13.01.1969. It

was claimed by the Income Tax Officer (for short, 'ITO') that since income had accrued to the assessee company under the head of 'Long Term Capital Gains' (LTCG) on transfer of assets in respect of its two units, it was liable to tax in the same assessment year when the transfer took place and escaped assessment. The ITO assessed that the appellant derived LTCG to the extent of Rs.9,48,357/- – Rs.2,24,847/- on land and Rs.7,23,510/- on assets entitled to depreciation. The ITO found that the assessee failed to disclose the aforesaid amounts in both the returns filed on 07.10.1965 and 16.02.1967 and computed a sum of Rs.8,91,746/- under Section 143(3) as the income chargeable to tax.

7. Being aggrieved by the notice under Section 148 dated 15.12.1981 for re-assessment as well as the Order of the ITO dated 24.03.1986, the assessee filed appeal before the Commissioner of Income Tax (Appeals) (for short, 'the CIT(A)'), which was partly allowed. The assessee contended that since it received a sum of Rs.11,57,965/- only on 28.09.1978 from the Government of Madhya Pradesh, which was deposited in the nationalized bank, it would be exempt from assessment for the assessment year 1979-80 as per the provisions of Section 54-E. It was submitted by the assessee before the CIT(A) that the Assessing Officer had observed that as per Section 45(1), any profit or gain arising from transfer of capital assets affected in a previous year

was chargeable to tax under the head of 'Capital Gains' as income of the previous year when the transfer took place, i.e., 1964. Therefore, the assessee was liable to pay additional tax on the income that escaped assessment.

8. The CIT(A), while affirming the order of the Assessing Officer, held that the assessee had rightly been taxed on account of capital gain arising out of both the units at Bilaspur and Katni. It was further held that the assessee company was not entitled to the benefit of exemption under Section 54-E as it was inserted by the Finance Act, 1979 w.e.f. 01.04.1979. It was also observed that the case of the assessee company was not covered under Section 155(7)(a) as the same was inserted by the Finance Act, 1978 with retrospective effect from 01.04.1974.

9. The appellant-assessee company being aggrieved by the order of the CIT(A) preferred an appeal before the Tribunal, which was partly allowed to the extent of exclusion of the amount of capital gain not chargeable to tax as per Section 54-E & it was held that the appellant is entitled for exemption of the same.

10. We may note that the relevant provisions as applicable for the assessment year in question are as under:

> "**147. Income escaping assessment.—** If —
>
> (a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his

assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that 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 or recomputed the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment year).

… … … … … … … …

149. Time limit for notice.— (1) No notice under Section 148 shall be issued —

(a) in cases falling under clause (a) of Section 147 —
  (i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under sub-clause (ii);
  (ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;

… … … … … … … …

151. Sanction for issue of notice.— (1) No notice shall be issued under Section 148 after the expiry of eight years from the end of the relevant assessment year unless the Board is satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice.

… … … … … … … …”

(emphasis supplied)

11. In the appeal preferred before us, learned counsel for the appellant set forth his challenge in the following terms :-

(i) The notice issued under Section 148 of the IT Act itself was stated to be unsustainable in view of the non-compliance of the provisions of Section 151 of the IT Act. The case being one where the notice was issued beyond a period of 8 years, but within a period of 16 years, the satisfaction of the Board that it is a fit case for issue of such notice was a prerequisite and this had not been met. In this behalf, the satisfaction was stated to be contained in a proforma where against the column as to *'Whether the Board was satisfied of the reasons recorded*', an endorsement was made '*Yes. The Board is satisfied*', which was signed by the Under Secretary on 23.11.1981. This satisfaction was in the form of a rubber stamp and, thus, it was stated to be suffering from non-application of mind apart from the fact that nothing had been placed on record to show that the Under Secretary had been authorized to record such satisfaction of the Board.

(ii) In order for the provisions of Section 147 of the IT Act to apply, the ITO has to have reason to believe that income chargeable to tax had escaped assessment for that year as a consequence of '*omission or failure on the part of an assessee to*

disclose fully and truly all material facts necessary for assessment for that year'. It was submitted that all the necessary facts were, in fact, set out and the factum of the litigation pending and reference to the Award formed a part of the Report of the Board of Directors, which was filed along with the returns.

(iii) The appellant or for that matter the Department could not have envisaged at the time of filing of the return as to what would be the final compensation to be determined in the matter as the issue was *sub judice*. As the sequence of facts have gone, it has shown that there have been modifications of the Awards by the superior Courts and the matter only culminated into a final quantification when the Supreme Court decided the matter.

(iv) The appellant as assessee had disclosed the enhanced amount of compensation received in the relevant assessment year. Just because the appellant could avail of the benefit of the then existing provisions of Section 54–E by depositing the amount and, thus, not incur the liability of capital gains would not imply that the same can be reason to re-open the closed chapter of the assessment year 1965–66.

12. To support its various pleas, the appellant relied upon various judgments. The judgment in Calcutta Discount Co.

Ltd. v. Income Tax Officer, Companies District I, Calcutta & Anr., (1961) 41 ITR 191 (SC) was relied upon to support the plea that the pre-requisite of non-disclosure has to be there for the ITO to exercise the power. In this behalf, an important judgment referred to was in the case of CIT v. Shri Tirath Ram Ahuja (HUF), (2008) 306 ITR 173 (DEL) where it was emphasized that the facts, which have not been disclosed, must be such facts which exist at all material times between the filing of the return and the order of the assessment. The relevant portion is extracted as under :-

> "14. The language employed in proviso to Section 147 of the Act shows that the disclosure thereby contemplated is to be with regard to material facts and, therefore, must necessarily be in respect of such facts which exists at all material times between the filing of the return and the order of assessment. A material fact which is not in existence right up to the time of assessment cannot possibly be disclosed. Therefore, a fact which comes into existence subsequent to the making of the assessment cannot be a material fact within the purview of Section 147 of the Act. Further, the duty to disclose material facts necessarily postulates existence of a thing or material. If a material is not in existence or if a material is such of which the assessed had no knowledge there would be no duty to disclose such material."
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> (emphasis supplied)

13. In P.C. Gulati, Voluntary Liquidator, Panipat Electric Supply Co. Ltd. v. CIT, Delhi, (1972) 86 ITR 501 (DEL), the Government acquired an electricity supply undertaking in 1954, but the compromise regarding compensation was reached only in 1962. It was held that even though by

acquiring an undertaking, the Government may have been vested with the possession, unless the price is settled, the transaction does not become a sale and only after the price had been settled that it becomes due to the assessee. Thus, the amount did not become taxable in the assessment year 1955-56, but became assessable only in the previous year relevant to the assessment year 1963-64 when such price was settled.

14. A judgment commonly relied upon by both the sides was Harish Chandra & Ors. v. CIT, (1985) 154 ITR 478 (DEL) on the issue of year of chargeability in case of compulsory acquisition. In our considered view, the relevant ratio of the judgment, which would apply to this case, is that in case of such compulsory acquisition, no debt is due or was due until the amount of compensation is judicially determined at all stages provided in the Land Acquisition Act, 1894. It was, thus, observed that a claim made by the assessee was in respect of an inchoate right and unless the question of payment of enhanced compensation was decided and the amount of enhanced compensation became determinable and payable, the amount could not be said to arise or accrue. The observations made in Topandas Kundanmal v. CIT, (1978) 114 ITR 237 (GUJ) were also quoted with approval.

15. In CIT, West Bengal II v. Hindustan Housing & Land Development Trust Limited, (1986) 161 ITR 524 (SC), the

Supreme Court considered the issue as to when the income could be said to accrue or arise for purposes of income-tax. It was held that unless and until a debt is credited in favour of an assessee by somebody, he cannot be said to have acquired a right to receive the income or the income has accrued to him. In the facts of that case, the appeal regarding compensation was still pending. Relying upon various judgments, it was held that if the actual amount of compensation had not been fixed, no income could accrue to him and a mere claim by the assessee could not be said to be a certain sum of compensation. In New Friends Co-operative House Building Society Ltd. v. CIT & Anr., (2010) 327 ITR 39 (P&H), it was held that the amount received by an assessee was taxable only after attaining finality from the highest Court.

16. A reference was also made to ITO, Calcutta & Ors. v. Lakhmani Mewal Das, (1972) 103 ITR 437 (SC) where it was emphasized that there are two conditions, which should be satisfied before the ITO acquires jurisdiction to issue notice under Section 148 in respect of the assessment beyond the stipulated period, i.e., there must be a reason to believe that income chargeable to tax has escaped assessment and the ITO must also have reason to believe that such escapement of income from assessment is by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment of

that year. The duty of the assessee was held not to extend beyond making a true and full disclosure of primary facts. Once he has done that, his duty ends and it is for the ITO to draw correct inference from the primary facts. It is not the responsibility of the assessee to advise ITO with regard to the inference, which should be drawn from the primary facts and if an ITO draws an inference, which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for re-opening of assessment.

17. Learned counsel for the appellant also relied upon three judgments to show why on the principles laid down therein, the conduct of the Board would show non-application of mind. In Chuggamal Rajpal v. S.P. Shaliha & Ors., (1971) 79 ITR 603 (SC), the report submitted by the ITO under Section 151(2) did not mention any reasons for coming to the conclusion that it is a fit case for issue of the notice under Section 148 of the IT Act. This judgment was relied upon in Chanchal Kumar Chatterjee v. Income Tax Officer, 'B' Ward, Central Salaries Circle, Calcutta & Ors., (1972) 93 ITR 130 (CAL). In this case, there was only a rubber stamp above the signature of the Commissioner and no other relevant material was produced before the Court even when asked for. This was held to be a case of non-application of mind. The judgment in Govinda Choudhury & Sons v. Income Tax Officer, Ward 'A', Berhampur & Ors., (1975) 109 ITR 370

(ORI) was once again relied upon the judgment in Chuggamal Rajpal's case (supra).

18. We have given our thoughtful consideration to the rival pleas of learned counsel for the parties.

FIRST PLEA:

19. In respect of the first plea, if the judgments in Chuggamal Rajpal's case (supra); Chanchal Kumar Chatterjee's case (supra); and Govinda Choudhury & Sons's case (supra) are examined, the absence of reasons by the assessing officer does not exist. This is so as along with the proforma, reasons set out by the assessing officer were, in fact, given. However, in the instant case, the manner in which the proforma was stamped amounting to approval by the Board leaves much to be desired. It is a case where literally a mere stamp is affixed. It is signed by a Under Secretary underneath a stamped '*Yes*' against the column which queried as to whether the approval of the Board had been taken. Rubber stamping of underlying material is hardly a process which can get the imprematur of this Court as it suggests that the decision has been taken in a mechanical manner. Even if the reasoning set out by the ITO was to be agreed upon, the least, which is expected, is that an appropriate endorsement is made in this behalf setting out brief reasons. Reasons are the link between the material placed on record and the conclusion reached by an authority in respect of an issue, since they help in

discerning the manner in which conclusion is reached by the concerned authority. Our opinion is fortified by the decision of the Apex Court in Union of India v. M.L. Capoor & Ors., AIR 1974 SC 87 wherein it was observed as under :-

> "27. ... We find considerable force in the submission made on behalf of the respondents that the "rubber-stamp" reason given mechanically for the supersession of each officer does not amount to "reasons for the proposed supersession". The most that could be said for the stock reason is that it is a general description of the process adopted in arriving at a conclusion. ... ...
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> 28. ... If that had been done, facts on service records of officers considered by the Selection Committee would have been correlated to the conclusions reached. Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable. ..."
>
> (emphasis supplied)

This is completely absent in the present case. Thus, we find force in the contention of learned counsel for the appellant that there has not been proper application of mind by the Board and if a proper application had taken place, there would have been no reason to re-open the closed chapter in view of what we are setting out hereinafter.

SECOND & THIRD PLEAS:

20. The twin condition of the satisfaction of the ITO, i.e., (i) there must be a reason to believe that income chargeable

to tax has escaped assessment; and (ii) the ITO must also have reason to believe that such escapement of income from assessment is by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment of that year, have to be satisfied in view of the judgment in Lakhmani Mewal Das's case (supra).

21. In the present case, there was no lack of disclosure by the assessee. This is, of course, apart from the fact that the assessee could hardly disclose as to what would be the compensation, which he may get ultimately if the plea of enhancement is sustained. The fact remains that copy of the report of the Board of Directors was filed which set out the following :-

> "5. The M.P. Electricity Board has paid only Rs.2,85,000/- for Katni and Rs.3,00,000/- for Bilaspur in account as part payment and in spite of reminders to pay further sums according to their own estimates pending settlement of the market value of the assets have been referred to the Arbitrators appointed by both parties, but the arbitration proceedings have not started so far. Applications for appointment of Umpire are pending in Bilaspur and Jabalpur Distt. Courts. We have submitted statement of our market value of the assets to the Arbitrators, but in spite of demand by one of the Arbitrators, the Electricity Board has not submitted their figures to the Arbitrators and it appears that it will take time in getting the market value determined. New business can be started only when full payment is received from the Electricity Board."

22. As observed in Lakhmani Mewal Das's case (supra), it is not the duty of the assessee to pin-point what inference have to be drawn by the assessing authority as long as full,

complete and truthful disclosure has been made of '*primary facts*', which, in fact, was made in the present case. Thus, there was nothing, which was not set out, which ought to have been set out as the factum of appeal pending was disclosed.

23. As stated aforesaid, there is no finality emerging in matters of enhancement of compensation as none of the parties can contemplate in advance as to what would be the fate of the appeal proceedings. The facts of the present case show that the Award was interfered with in appeal and again by the Supreme Court. The final picture emerged only when the Supreme Court pronounced its judgment. On receipt of the enhancement compensation, the appellant disclosed the same in its return as was the case in P.C. Gulati, Voluntary Liquidator, Panipat Electric Supply Co. Ltd.'s case (supra); Harish Chandra & Ors.'s case (supra); Hindustan Housing & Land Development Trust Limited's case (supra); and New Friends Co-operative House Building Society Ltd. v. CIT & Anr.'s case (supra). That was the stage when enhanced compensation had to be included in the assessment year in question, which was done by the appellant.

FOURTH PLEA:

24. As noticed aforesaid, the appellant has made the relevant disclosure in the returns for the relevant assessment year when the enhanced compensation was received. The amount was invested by the appellant in Bonds, which

entitles him to certain benefits in view of the provisions of Section 54-E of the IT Act. Just because such benefit is available to the appellant for that year in question, which may not have been available for the assessment year 1965-66, cannot be a reason for the assessing authority to re-open the assessment for the year 1965-66.

CONCLUSION:

25. For all the aforesaid reasons, we find that the impugned order of the Tribunal is not sustainable and is accordingly set aside. The notice issued under Section 148 of the IT Act dated 15.12.1981 is quashed and all proceedings pursuant thereto are also accordingly quashed. Consequently, both the questions are answered in favour of the appellant / assessee and against the respondent / Department.

26. The appeal is allowed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

January 28, 2011
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RAJIV SHAKDHER, J.