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

\+ **ITA Nos.1391/2009, 1362/2009 & 1130/2009**

% **Date of Decision: 09.03.2011**

Commissioner of Income Tax .... **APPELLANT**
Through: MS.Prem Lata Bansal, Sr. Advocate with Mr.Deepak Anand, Advocates

Versus

The Simbhaoli Sugar Mills Limited .... **RESPONDENT**
Through: Mr.Ajay Vohra, Advocate

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

1.	Whether reporters of Local papers 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.

M.L. MEHTA, J. (ORAL)
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1. The aforesaid three appeals are being disposed of by this common order as these relate to same assessee, for the same assessment year and have common questions of law.

2. The facts leading to filing of these appeals in brief are that for the assessment year 1997-98, assessee filed return at a total loss of about Rs.17.20 crores. This return was processed under Section 143(1)(a) of the Income Tax Act (hereinafter referred to as "the Act"). Subsequently, the case was selected for scrutiny and assessment was completed under Section 143(3) of the Act on 26th November, 1999 at a total loss of about Rs.5.28 crores after making certain additions and unabsorbed losses and depreciation. The assessee preferred appeal before the Commissioner, Income Tax (Appellate) [hereinafter referred to as "CIT(A)], who allowed certain reliefs to the assessee and after giving effect to the appellate order, the assessment order for the year under consideration was revised on a net loss of about Rs.5.33 crores. Subsequently, after expiry of four years, on the basis of information available with the Department primarily based on the audit report, it surfaced that certain income chargeable to tax has escaped assessment for the assessment year under consideration and based on this, the Assessing Officer issued a notice dated 31.03.2004 under Section 148 of the Act followed by another notice under Section 143(2) read with section 148 of the Act dated 20.10.2004. Accordingly, re-assessment proceedings were completed on a total income of Rs.56,23,890/-. Simultaneously, penalty proceedings were also

initiated against the assessee under Section 271(1)(c) of the Act allegedly for furnishing inappropriate particulars of income and a penalty of Rs.2.54 crore was imposed by the Assessing Officer. The assessee preferred an appeal before the CIT(A), Ghaziabad, who vide his order dated 19.10.2005 dismissed the appeal and confirmed the additions made by the Assessing Officer. The two main additions were – (i) excise duty payable on stock of finished goods amounting to Rs.3,89,33,833/-, (ii) interest incurred on the term loan to the tune of Rs.1,99,96,463/-. It was observed by CIT(A) that as per note (V) and (9) of the Audit Report, the duty which has already been paid on unsold stock forms part of the closing stock and, therefore, amount of Rs.3,89,33,833/- should have formed part of closing stock as liability to pay the same has already arisen during the course of year though the same was paid by the assessee before the filing of the return of the assessment year under consideration. Based on this opinion, the said amount was added to the income of the assessee. Likewise, with regard to the deduction of Rs.1,99,96,463/- claimed by the assessee as interest on term loan, the CIT(A) upheld the view of the Assessing Officer that the assessee had incurred the said expenditure for the acquisition of fixed assets, which is directly attributable to the cost of the plant/fixed asset and, hence, any interest payable thereof is of the nature of the

capital expenditure and not revenue expenditure. Consequently, this was also added to the income of the assessee. The assessee filed appeal against this order before the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"), which allowed the appeals holding as under:

> "4. We have carefully considered the rival contentions and gone through the records. In our view, the proceedings for re-assessment u/s 148 cannot be sustained for more than one reason. First of all, the original assessments were completed u/s 143(3) of the Act on the basis of the return filed and the re-assessment proceedings are initiated beyond the expiry of 4 years from the end of the AY in question. In respect of each of the issues that were subject matter of re-assessment proceedings, the assessee has made full and complete disclosure and the AO framed opinion of those issues. Except for the audit objection, there appears to be no material whatsoever for issuance of the notice u/s 147 of the Act. So, in these circumstances, we accept the contention of the assessee that re-assessment proceedings are based on mere change of opinion and not on any valid material and it is now sell settled that an opinion of an internal audit party of the I.T. Deptt. on a point of law cannot be regarded as an information within the meaning u/s 147 of the Act. Having regard to these discussions, we cancel the re-assessment proceedings framed u/s 148 of the Act. As we have cancelled the reassessment on the point of jurisdiction, we do not find it necessary to go into the merits of the case. Accordingly, appeal is allowed."

3. Against this order, the Revenue has come in appeal in ITA No.1391/2009.

4. In the appellate penalty proceedings, CIT(A) vide its order dated 15.12.2006 following the order of quantum proceedings

cancelled the penalty with reference to the first addition, viz., Rs.3,89,33,833/- in respect of excise duty but sustained the penalty with reference to the second addition, namely, Rs.1,99,96,463/- in respect of interest on capital borrowed for acquiring assets for business purpose. The CIT(A) while disposing of the two appeals, recorded as under:

> "….. After considering all the facts and circumstances of the case, as discussed above, in this case there is no element of mensrea pertaining to either concealment or furnishing of inaccurate. It is only the consistent view of the Department pertaining to treatment of excise duty payable, it has been looked at differently in the assessment order. As such, penalty levied on the addition made of Rs.3,89,33,833/- on account of treatment of excise duty payable is cancelled."

> "….. The facts on record establish that the appellant has furnished in accurate particulars to the extent of Rs.1,99,96,463/- by claiming the same as revenue expenditure. As such it is held that the AO was justified in levying penalty u/s 271(1)(c) on the addition of Rs.1,99,96,463/- by holding that the assessee has furnished in accurate particulars thereof. The penalty levied u/s 271(1)(c) on this account is confirmed."

5. Both Revenue and the assessee filed cross-appeals before the Tribunal against the aforesaid order dated 15.12.2006 of the CIT(A). Both the cross-appeals were disposed of vide second impugned order also dated 07.11.2008 by the Tribunal. Vide this impugned order, the appeal of the assessee was allowed,

i.e., the penalty in relation to Rs.1,99,96,463/- was also cancelled. The appeal of the Revenue against the CIT(A)'s order relating to cancellation of penalty with reference to addition of Rs. 3,89,33,833/- in respect of excise duty was dismissed. The Tribunal held as under:-

> "3. The issue with regard to the claim of interest on monies borrowed for acquiring the fixed assets for business purposes, although, the CIT(A) has upheld the penalty in respect of the addition, the same is subject matter of contest before the ITAT. The assessee has filed before us, the copy of the order of the Tribunal wherein the issue of allowability of the interest in respect of the assessee in the AY 2001-02 has been decided in favour of the assessee. This clearly shows that this is not an addition in respect of which a penalty can be validly levied u/s 271(1)(c) of the Act, on the charge of concealment. Therefore, in our considered opinion, penalty cannot be levied even in respect of the second addition u/s 271(1)(c). We, therefore, cancel the penalty sustained by the CIT(A)."

6. From the above chronological narration of facts and the findings recorded by the authorities below, it is seen that the basis of issue of notice under Section 148 for re-assessment for the assessment year under consideration was nothing but the internal audit report. In the Reasons to Believe as recorded by the AO, he had mentioned about the objections as raised in the audit report. Based on this audit report, a review was sought to be made by the AO under the name of re-assessment alleging escape of income in the assessment already concluded. With

regard to the aforesaid two entries, the particulars were already available before the AO. The assessee had made complete disclosure of the particulars before the AO in the proceedings of assessment under Section 143(3).

7. Reopening of assessment after four years was apparently not permissible. There is a catena of judgments with regard to the proposition of law that assessment cannot be reopened under Section 147 of the Act merely on the basis of change of opinion beyond the period of four years when there was no fault on the part of the assessee to disclose, truly and completely the material particulars. Reference in this regard can be made to some of the judgments of our own High Court and that of Supreme Court. In ***Commissioner of Income Tax v. Goetze (India) Ltd.***, (2010) 229 CTR 167, reliance was placed on the judgment of ***CIT v. Kelvinator of India Ltd.***,(2002) 174 CTR (Del) 174, a judgment of our High Court wherein 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 AO 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 AO to initiate reassessment proceedings upon a mere change of opinion. It is obvious that the Full Bench Decision holds the field.

8. It may also be noted that appeal arising out of the aforesaid Full Bench decision of this Court has also been dismissed by the Supreme Court in the case of ***Commissioner of Income Tax V. Kelvinator of India Ltd.***, (2010) 228 CTR (SC) 488. 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 AO 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 AO 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 inbuilt test to check abuse of power by the AO.

9. In another case of our High Court entitled ***Commissioner of Income Tax v. Eicher Ltd.,*** (2007) 294 ITR 310 (Delhi), after making reference to different judgments of various High Courts, it was observed that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.

10. In the case of ***Commissioner of Income Tax, Delhi-XI v. Batra Bhatta Company,*** (2008) 174 Taxman 444 (Delhi), another Division Bench of our High Court held as under:-

> "7. We feel that the observations of the Supreme Court in the aforesaid decision clearly apply to the case at hand. Merely because the Assessing Officer felt that the issue required 'much deeper scrutiny, is not ground enough for invoking Section 147. It is not belief *per se* that is a pre-

> condition for invoking Section 147 of the said Act but a belief founded on reasons. The expression used in Section 147 is – "If the Assessing Officer has reason to believe" and not – "If the Assessing Officer believes". There must be some basis upon which the belief can be built. It does not matter whether the belief is ultimately proved right or wrong, but, there must be some material upon which such a belief can be founded. In the present case, the Commissioner Income-tax (Appeals) as well as the Tribunal have found as a fact that there was no material upon which the Assessing Officer could have based his belief that income had escaped assessment."

11. There is also catena of judgments to the effect that initiation of reassessment proceedings on the basis of audit report objections is bad in law. A reference in this regard can be made to judgment of our High Court titled ***Transworld International Inc. v. Joint Commissioner of Income Tax***, (2005) 273 ITR 242 and also judgments of Supreme Court in ***Indian and Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi***, (1979) 119 ITR 996 and ***Commissioner of Income Tax v. Lucas T.V.S. Ltd.***, (2001) 249 ITR 306.

12. The sum and substance of discussion is that reassessment proceedings under Section 147 read with 148 of the Act cannot be initiated merely based on the audit report . An audit is principally intended for the purpose of satisfying the auditor with regard to sufficiency of rules and procedures prescribed for the purpose of securing an effective check on the assessment,

collection and proper allocation of revenue. As per para (3) of the circular issued by the Board on July 28, 1960, also an audit department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties.

13. In view of our foregoing discussion, we are in complete agreement with the conclusion arrived at by the Tribunal in the impugned orders.

14. As we do not find any infirmity in the aforesaid impugned orders, no substantial question of law arises. Consequently, all the appeals are dismissed.

M.L.MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

MARCH 09, 2011
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