* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ WP(C)No.8902/2007 & CM No.16817/2007

\# JAL HOTELS CO. LTD. ..... Petitioner through
! Mr. N. Venkatraman, Sr. Adv.
with Mr. Achin Goel, Adv.

versus

$ ASSTT. DIR. OF INCOME TAX.....Respondent through
^ Mr. Sanjeev Sabharwal, Adv.

WITH

WP(C)No.8903/2007 & CM No.16818/2007

JAL HOTELS CO. LTD. ..... Petitioner through
Mr. N. Venkatraman, Sr. Adv.
with Mr. Achin Goel, Adv.

versus

ASSTT. DIR. OF INCOME TAX.....Respondent through
Mr. Sanjeev Sabharwal, Adv.

WITH

WP(C)No.8904/2007 & CM No.16819/2007

JAL HOTELS CO. LTD. ..... Petitioner through
Mr. N. Venkatraman, Sr. Adv.
with Mr. Achin Goel, Adv.

versus

ASSTT. DIR. OF INCOME TAX.....Respondent through
Mr. Sanjeev Sabharwal, Adv.

Date of Hearing: May 18th, 2009

Date of Decision: May 25th , 2009

WITH

ITA No.140/2009

CIT ..... Appellant through
Mr. Imran Khan for Mr. Shiv Charan Garg, Adv.

versus

SUDHIR ENGINEEIRNG CO .....Respondent through
Mr. K.R. Manjani with
Mr. Madhu Sudan Sahni, Advs.

% Date of Hearing: May 19th, 2009

Date of Decision: May 25th, 2009

CORAM:
* HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE RAJIV SHAKDHER

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

VIKRAMAJIT SEN, J.

1. The legal nodus that arises in these Appeals relates to the legal propriety of notices issued under Section 148 of the Income Tax Act, 1961 (Act for short). Briefly stated, Jal Hotels Company Ltd. had, along with its Returns, filed copies of four Agreements that it had entered into with Sunair Hotel Ltd. – viz. (a)Hotel Management Agreement, (b)Technical Services Agreement, (c)Marketing Service Agreement and (d)Licence Agreement. The Assessment Orders dated 28.3.2005 are in respect of three Assessment Years, that is, 2001-2002, 2002-2003 and 2003-2004 and specifically record the existence of these four Agreements. No

doubt, the Assessment Orders are remarkable for their brevity but it is well established that the Assessing Officer is not obligated to mention and discuss each and every argument or issue which has arisen in the course of Assessment. It has been opined in *CIT –vs-* ***Kelvinator*** *of India Ltd.*, [2002] 256 ITR 1 that –"We also cannot accept the submission of Mr.Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section(1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section(3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause(e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without any thing further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong". This is also the approach adopted by this Bench in ITA No.485/2008 titled CIT –vs-

Ashish Rajpal decided on 14.5.2009. We make mention of this position of the law because it has been contended before us that on a reading of Assessment Order it is not clear whether the Assessing Officer had cogitated upon these four Agreements.

2. The impugned Notice under Section 148 of the Act mentions these Agreements and observes that "the assessee is running, managing and operating Hotel through Permanent Establishment, the income that the assessee earned through Permanent Establishment, has escaped assessment". Predicated thereon, the Respondent has stated that she has "reasons to believe after thorough application of mind that income chargeable to tax has escaped assessment". Learned counsel for the Petitioners contends that the case manifests a change of opinion which, in a series of judgments, has been held not to be sufficient reason for reopening assessments already framed by resorting to Sections 147/148 of the Act. Learned counsel for the Revenue has sought to rely on two decisions to defend the impugned Order of the Respondent, dismissing the Objections against the proposed action. A complete discussion on these provisions is to be found in the decision of the Full Bench in ***Kelvinator*** which has, *inter alia*, analysed ***Calcutta Discount*** *Co. Ltd. –vs- Income Tax Officer*, [1961] 41 ITR 191(SC), *Indian and Eastern Newspaper Society –vs- CIT*, [1979] 119 ITR 996(SC), *Jindal Photo Films Ltd. –vs- Deputy CIT*, [1998] 234 ITR 170(Del) and ***Bawa Abhai Singh*** *–vs- Deputy Commissioner of*

Income Tax, [2002] 253 ITR 83(Del). The ratio of ***Sita World*** *Travels (India) Ltd. –vs- CIT*, [2005] 274 ITR186 which, without reference to the Full Bench decision in ***Kelvinator***, had opined that a decision may be right or wrong but that was none of the concern of the subsequent officers. So long as the Assessing Officer has consciously considered the facts, the decision cannot be reopened. Despite noting and extracting the passage from ***Techspan*** *India P. Ltd. –vs- Income Tax Officer*, [2006] 283 ITR 212 which elucidates that it is necessary for new material to come to light in order to justify the issuance of notice under Section 148, the Respondent has come to the contrary conclusion.

3. As has already been noted above, ***Bawa Abhai Singh*** in which D.K. Jain, J., as his Lordship then was, had spoken for the Division Bench [D.K. Jain, J. was also a member of the Full Bench in ***Kelvinator***] was duly considered in ***Kelvinator***. The Respondent has relied on ***Consolidated Photo*** *and Finvest Ltd. –vs- ACIT*, [2006] 281 ITR 394 which, being irreconcilable with the Full Bench view in ***Kelvinator,*** is *per incuriam* as has been so observed in *KLM Royal Dutch Airlines –vs- ADIT*, [2007] 292 ITR 49(Delhi). Regretfully, the Assistant Director of Income Tax has ignored the views of Division Benches in ***Techspan*** and ***Sita World,*** apart from the pronouncements of the Full Bench and Division Benches of the Delhi High Court. Furthermore, the view, which has been assailed before us, is contrary to ***Calcutta***

Discount in which the Constitution Bench opined that – "If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?" Our attention has been drawn to *CIT, Calcutta –vs- Burlop Dealers Ltd.*, 1971 (1) SCC 462, the relevant portion of which reads as follows:-

> 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 lay under Section 34(1)(a).

4. We think it appropriate to advert to *M/s. Kishanchand Chellaram –vs- CIT, Bombay City II, Bombay*, AIR 1980 SC 2117 which lays down that once the basic or primary facts have been disclosed,the burden to prove that amounts represents undisclosed income of the assessee is on the Revenue. Applying all these precedents to the case before us, we find it difficult to come to any conclusion other than that the case in hand represents those genre of cases in which there has been a change of opinion. One of the tests prescribed in ***Techspan*** was to investigate whether any new

material had come to the notice of the officer concerned which material would constitute “reason to believe”. This new material is wholly missing in the case in hand. Our study would become more comprehensive with the mention of *CIT –vs- P.V.S. Beedies Pvt. Ltd.*, [1999] 237 ITR 13. In that case, the internal audit party had pointed out that the Trust to which donations had been made by the assessee did not qualify for deduction under Section 80G as the recognition had expired. Their Lordships considered this to be sufficient reason for reopening of the case; the new material obviously was in the form of the Audit Report. In this connection, however, the Three-Judge Bench in *CIT –vs- Lucas T.V.S. Ltd.*, [2001] 249 ITR306 has affirmed the opinion of the Madras High Court expressed in *CIT –vs- Lucas T.V.S. Ltd.*, [1998] 234 ITR 296 to the effect that an audit opinion in regard to application or interpretation of law cannot be treated by the Income Tax Officer as information for reopening the assessment under Section 147B of the Act.

5. On the strength of this analysis, we are of the opinion that there was no new material in the hands of the Revenue leading to the view that there was reason to believe that income had escaped assessment. Instead, the case is a classic instance of a change of opinion. Consequently, the Writ Petitions are allowed and the impugned Notice vide dated 26.3.2007 under Section 148 of the Act is quashed.

6. This Appeal under Section 268 of the Act concerns the legal propriety of action taken under Section 147 of the Act in respect of interest amount to Rupees 12,99,917/- earned on Vikas Cash Certificate. After referring to *KLM Royal Dutch Airlines –vs- ACIT*, (2007) 208 CTR (Del) 3 the ITAT had applied ***Kelvinator*** and ITA No.309/2006 entitled *CIT –vs- Eicher Ltd.* decided on 22.5.2007. The Tribunal had declined to apply ***Consolidated Photo.*** It has not been controverted that, as recorded in the impugned Order, copies of the statement of income, trading account, profit and loss account, audit report etc. were appended to the Return filed by the Assessee. This being the factual position, the Tribunal has rightly concluded that taking resort to Sections 147/148 of the Act was unwarranted, as it constituted a change of opinion since the material acted upon had been made available along with the Return.

7. No substantial question of law arises for our consideration. Dismissed.

(VIKRAMAJIT SEN)
JUDGE

May 25th, 2009
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(RAJIV SHAKDHER)
JUDGE