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

ITA NO. 464 of 2010
ITA NO. 465 of 2010
ITA NO. 473 of 2010

Judgment Reserved on: December 2,2010
% Judgment Delivered on: January 14, 2011.

(1) ITA NO. 464 of 2010

CENTRAL WAREHOUSING CORPORATION . . . APPELLANT

Through : Mr. M.S. Syali, Sr. Advocate with Ms. Mahua Kalra, Mr. Mayank Nagi, Ms. Husnal Syali and Mr. Sumit K. Singh, Advocates.

VERSUS

ASSTT. COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Ms. Prem Lata Bansal, Sr. Standing Counsel.

(2) ITA NO. 465 of 2010

CENTRAL WAREHOUSING CORPORATION . . . APPELLANT

Through : Mr. M.S. Syali, Sr. Advocate with Ms. Mahua Kalra, Mr. Mayank Nagi, Ms. Husnal Syali and Mr. Sumit K. Singh, Advocates.

VERSUS

ASSTT.COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Ms. Prem Lata Bansal, Sr. Standing Counsel.

(3) ITA NO. 473 of 2010

CENTRAL WAREHOUSING CORPORATION . . . APPELLANT

Through : Mr. M.S. Syali, Sr. Advocate with Ms. Mahua Kalra, Mr. Mayank Nagi, Ms. Husnal Syali and Mr. Sumit K. Singh, Advocates.

VERSUS

COMMISSIONER OF INCOME TAX . . .RESPONDENT

Through: Ms. Prem Lata Bansal, Sr. Standing Counsel.

CORAM:-

HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE SURESH KAIT

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

1. Appellant in all the three appeals is Central Warehousing Corporation (hereinafter referred as the 'assessee'). All these three appeals raise common questions of law. Three appeals are because of the reason that these common questions arise in three different assessment years namely, 1995-96, 1996-97, 1997-98. However, the Tribunal has decided these appeals by common order dated 31st March, 2008. Therefore, it is this decision of the Tribunal which is under challenge in all these three appeals and that was the reason to hear these three appeals together which are being decided by this common judgment.

2. Before we take note of the questions of law, we reproduce the relevant facts herein.

3. The appellant is a Government of India Undertaking, established under Section 3 of the Warehousing Corporations Act, 1962 and for the purpose of the Income Tax Act it is deemed to be a company within the meaning of the Act. It is an Authority constituted under law for the marketing of commodities. The appellant derives income from letting-out of godowns or warehouses for storage, processing or facilitating the marketing of commodities.

Assessment Year 1995-96

4. The appellant filed its return of income declaring a loss of Rs.1,078,36,6,678/-. In this return, the assessee had claimed Rs. 1514168354/- as exemption under Section 10 (29) of the Income-Tax Act, (hereinafter referred to as the 'Act'), being income derived from the letting of godown or Warehouses for storage purpose for facilitating the marketing of the commodities. This return was process under Section 143 (1) (a) of the Act and accepted. Vide assessment order dated 22nd January, 1999, after some time i.e 10th September, 1999 the Assessing Officer issued notice under Section 147 read with section 148 of the Act thereby seeking to reopen the assessment. The reasons for reopening were furnished to the assessee on 14th January, 1999. These reasons disclosed that the assessment was reopened in view of the decision of Hon'ble Supreme Court in the case of ***Orissa State Warehousing Corporation*** Vs. ***Commissioner of Income Tax***, 237 ITR 589 wherein it was held that only the income derived from the letting-out of godowns or warehouses is exempted since according to the respondent a substantial part of business of the appellant was with regard to handling of Container Freight Stations which is a separate business, claim for exemption u/s 10 (29) of the Act was wrongly allowed. Further according to the respondent the appellant was having more than one distinguishable business and hence the expenses could not in totality be set off against its taxable receipt.

5. The Assessing Officer completed the reassessment for the assessment year under consideration on 28th March, 2002 holding that the appellant was originally set up for warehousing of agricultural products but during 1984, it diversified its operations and

started the new line of business of running Container Freight Stations (CFS) and Inland Container Depots (ICD) inspite of the appellant/assessee submitting vide its letter dated 7th March, 2002 the list of ICD/CFS and date of its operation which clearly mentioned as September, 1982. The Assessing Officer further held that since the appellant is incorporated and constituted under Warehousing Corporations Act, 1962 and as per the provision of Section 10 (29) of the Act read with Section 11B of the Warehousing Corporations Act, 1962, the appellant income is exempted only to the extent it is derived from letting of godowns of warehousing for storage, processing or facilitating the marketing of agricultural products and notified commodities, the activities of running CFS/ICD do not constitute statutory functions under the Warehousing Act of 1962. The profit generated therefrom does not qualify for exemption under Section 10 (29) of the Act. The Assessing Officer also did not allow exemption under Section 10 (29) of the Act on the receipts of interest on fixed deposit, agency commission and miscellaneous receipts. The Assessing Officer also alleged non-cooperation in bifurcating income exempt and not-exempt as such application of Section 14A could not be applied. The entire exemption was disallowed.

6. Aggrieved, the appellant challenged the order of the Assessing Officer before the Commissioner of Income Tax (Appeals), New Delhi questioning the reopening of the assessment. It also contested the treatment of the activity of CFS/ICD as a distinct line of business and denial of exemption u/s 10 (29) of the Act. The appellant submitted that the Assessing Officer erred in reopening the assessment under Section 147 of the Act because reassessment was possible just on mere change of opinion. Since all relevant material to enable the

Assessing Officer to determine the income was already forming part of the assessment records and Assessing Officer in its original order under Section 143 (3) of the Act had deliberated on the exemption to be allowed under Section 10 (2() of the Act and further there was no failure on the part of the appellant, the reopening as such was bad in law.

7. As regards, activity of CFS/ICD as a distinct line of business, it was submitted, that, the appellant has been carrying out this activity since 1983-84 and this position has been accepted by the department as a part & parcel of the warehousing activity of the corporation. The Supreme Court in ***Orissa State Warehousing Corporation*** case (supra) has only held that exemption is not available where income has not been derived by warehousing activity. Since CFS/ICD is integral to warehousing activity, the decision does not negate the claims. It was submitted that the condition precedent for setting up of CFS/ICD is to have a godown and CFS/ICD are set up only after taking necessary permission from the Government of India at the Inter-ministerial meeting. The activities performed are as follows:-

(i) Receipt and dispatch of containerisable export cargo;

(ii) Stuffing/de-stuffing and aggregation/delivery of import cargo;

(iii) Custom clearance and examination of export cargo;

(iv) Safe and scientific storage of valuable cargo and containers; and

(v) Storage of de-stuffed cargo.

8. The appellant further submitted that there is a clear distinction maintained in respect of income from warehousing activity and other activity.

9. The CIT (A) vide his consolidated order dated 28th March, 2003 repelled the challenge laid to the reopening of the assessment and held that the Assessing Officer was justified in terms of the decision of the Supreme Court in the case of Orissa State Warehousing Corporation 237 ITR 589. The CIT (A) held as under:-

> **"**Coming to the first ground relating to the validity of the reopening of assessment proceedings; it is pertinent that the appellant has vehemently contended that the AO erred in reopening the assessment U/s 148 because reassessment was not possible beyond the time limit of 4 years. The appellant further contended that all the relevant material to enable the AO to determine the income was already forming part of the assessment record and there had been no failure on the part of the appellant to disclose fully and truly all the material facts necessary for the assessment. The crux of the matter is that the provision of Section 10 (29) have been subjected to interpretation by the Hon'ble Supreme Court in the case of Orissa State Warehousing Corporation Vs. CIT in 237 ITR 589, as per which it has been held that the entire income of the Corporation cannot be exempted as income derived from the letting out of godowns only qualifies for exemption U/s 10 (29) OF THE INCOME-TAX ACT, 1961. On the basis of the decision of the Hon'ble Supreme Court in the case of Orissa State Warehousing Corporation, income in the nature of interest on fixed deposits, agency commission, misc. receipts and other income which have been derived outside the activities of warehousing should be subjected to tax. As the AO had not brought

> some of the income to the tax on the basis of the then Supreme Court decision, action was taken U/s 148 to bring to tax the same in view of the latest Supreme Court decision. This decision of the AO appears to be in order and it is evident that he was justified in taking recourse to the provision of Section 148 for reopening the assessment"

10. The respondent/Revenue challenged the aforesaid order of the CIT (A) on merits. In the appeal the assessee herein filed cross objections challenging that part of the order of the CIT (A) vide which CIT (A) had upheld the reopening of the assessment under Section 147 of the Act. The Tribunal vide consolidated order dated 31st March, 2008 held at the outset that the basis of reopening by the assessing officer as evident from the reasons recorded for the assessment years 1989-90 to 1996-97 was the ground that the decision of the Supreme Court in the case of ***U.P. State Warehousing Corporation*** 187 ITR 55 has been overruled in the case of ***Orissa State Warehousing Corporation*** (supra). The Tribunal recorded the following factual brief history:-

> "The brief history of assessments made in these years states that in the return of income storage charges falling in warehousing activities were claimed as exempt u/s 10 (29) and the income from handling charges, an activity incidental to warehousing activity, though claimed as exempt but the department had chosen to tax them. There was no material change with reference to treatment of such income both by the Corporation and by the department. In assessment years 1989-90 and 1993-94, the returns of income were processed under Section 143 (1) (a). The assessments for assessment years 1990-91, 1991-92, 1992-93, 1994-95, 1995-96 & 1996-97 were

made u/s 143 (3) of the Act. The activity of CFS/ICD carried on by the Corporation since 1983-84 and had never been questioned by the department and all along the exemptions have been given both on the basis of circular issued by CBDT and on the basis of decision of Hon'ble Supreme Court in the case of U.P. State Warehousing Corporation (supra)"

11. The Tribunal further observed that the decision in the case of Orissa State Warehousing Corporation (supra) is the first decision of the Supreme Court laying down the law that the exemption of income of a Warehousing Corporation is exempt only in respect of letting out of godowns for specified purposes and the Apex Court has distinguished its decision in the case of ***UOI*** Vs. ***UP State Warehousing Corporation*** (supra) on facts. The Tribunal thereafter held as under:-

"It is a settled law that the decision declared by the Apex Court is applicable from the date when a particular statute came into existence. Therefore, decision of apex Court laying down a legal proposition will be a material on record on the basis of which an assessment can be reopened or rectified under Section 154 of the Act provided the relevant conditions specified relating thereto are satisfied. In other words for reopening of assessment in the cases falling in the main provisions of Section 147, the assessments can be reopened within the period of four years from the end of assessment year in which the income was first assessable. In the cases falling in proviso to Section 147 i.e. beyond the period of four years, there should be failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment. If the assessee had disclosed all material facts necessary for his assessment in the return of income and the assessing

officer after considering them took a conscious decision to allow the claim of the assessee, the assessments cannot be reopened in respect of the cases falling in proviso to section 147 of the Act. Likewise, the mistake of law can be rectified u/s 154 within the period of four years from the end of financial year in which the order sought to be amended was passed but not thereafter."

12. The Tribunal on the above reasoning held for the year under consideration, the return was processed under Section 143(3) and the notice under Section 148 of the Act was issued within four years. The tribunal held that the decision of the Supreme court in the case of Orissa State Warehousing Corporation (supra) constitute fresh information in the possession of the Assessing Officer, therefore, reopening is valid. The Tribunal also relied upon the judgment of Calcutta High Court in the case of ***Indra Co, Ltd***. Vs. ***ITO***, 80 ITR 559 for the above proposition.

13. The Tribunal held that income from CFS/ICDs activities to the extent of it relates to letting down of godowns and Warehouses for storage for specified purpose itself will be exempt under Section 10 (29) of the Act and CIT (A) was right in principle while directing the Assessing Officer to reduce the profits determined as per provisions of Companies Act by the amount of exemption under Section 10 (29) of the Act. On merits the Tribunal concluded with direction to the Assessing Officer to reduce the profits determined as per the provision of Companies Act by amount of exempted income to be determined by him under Section 10 (29) of the Act.

14. The assessee in the present appeal has not challenged the order of the Tribunal on merits. Entire thrust of the challenge is on the validity of the notice under Section 147/148 of the Act thereby

reopening the assessment. According to the assessee, proceedings could not be reopened and, therefore, the question of law which is proposed is as under:-

> "Whether the Tribunal was right in law in upholding the assessment of jurisdiction to re-assess for the year 1995-96."

Assessment year 1996-97 and 1997-98

15. In this year also, the assessee had claimed certain income as exempt under Section 10 (29) of the Act. This return for this year was also processed under Section 143 (1) (a) of the Act under similar circumstances and for same reasons assessment for this year was reopened and by common order of CIT (A) as well as ITAT , the validity of notice of reopening the assessment has been upheld. Therefore, the question of law which arises for this year is also the same.

16. Mr. Syali, learned Senior Counsel appearing for the assessee submitted that notice under Section 147 read with Section 148 of the Act was unsustainable in law. For this purpose, he referred to the 'Reasons to Believe' recorded by the Assessing Officer as per which reasons for reopening the assessment was on the premise that Container Freight Station of the assessee is a separate business. He argued that this very fact was specifically discussed in the original assessment and after due application of mind, the Assessing Officer in the original assessment order had come to the conclusion that the assessee was entitled to exemption under Section 10 (29) of the Act. He argued that the assessee has as many as eight activities in respect of the Container Freight Station business but the Assessing Officer had granted exemption under Section 19 (29) of the Act only

in respect of two activities enlisted at sl. No. (i) and (v). This, according to Mr. Syali, clearly showed the application of mind. Therefore argued, the learned Sr. counsel, the assessment was clearly reopened on the same ground which was discussed and it would amount to change in opinion of the Assessing Officer to reopen the assessment, whereas change of opinion cannot be the ground for reopening of the assessment. He also argued that there was factually erroneous presumption in the 'Reasons to Believe' recorded by the Assessing Officer that that CFS is an independent business. He submitted that it was within the knowledge of the Income-Tax Department that since 1992-83, the assessee was running the Container Freight Station and which was treated as separate business and right from the beginning till 1988 this position was accepted by the Department as well. He also argued that as per the Tribunal, the judgment of Supreme Court in ***Orrisa State Ware Housing Corporation*** (supra) provided the opinion which became the cause of reopening of the assessment ignoring the fact that what is laid down in the said judgment was already considered by the Assessing Officer while passing the assessment order and this will also demonstrate that it would be a case of mere change of opinion. On the same material if other opinion is formed this would be a impermissible ground to reopen the proceedings. He referred to the judgment of Supreme Court in the case of ***Standard Refinery and Distillery Ltd.*** *Vs.* ***CIT*** *79 ITR 589* for the following proposition laid down therein:--

> It was urged by Mr. Mitra, learned Counsel for the Revenue that from the facts found by the Tribunal, it is not possible to conclude that there was any inter-connection, inter-lacing, interdependence and

unity between the transactions of the assessee company relating to the shares as well as its other business and therefore the two activities cannot be considered as "the same business". He contended that this Court in Prithvi Insurance Co. Ltd's case [1967] 63 ITR 632 (SC) has accepted the correctness of the decision of the King's Bench in Scales v. George Thompson, Co., Ltd. 13 T c 83 and in that case Rowlatt J. had held that before two or more businesses can be considered as 'the same business' they should not be easily separable and there must be a dovetailing of the one with the other. According to Mr. Mitra the transactions relating to the shares could have been easily separated from the other business of the company and therefore there is no inter-connection; equally there is no inter-lacing because the share transaction business does not dovetail itself into the other business of the assessee company. Further there is neither inter-dependence or unity between the two businesses. The concepts of inter-connection and inter-lacing, inter-dependence and unity are not free of ambiguity. But this Court has laid down certain objective tests for finding out the existence of inter-connection, inter-lacing interdependence and unity between two or more businesses. In Commissioner of Income-tax, Madras v. Prithvi Insurance Co. Ltd. [1967] 63 ITR 632 this Court ruled that inter-connection, inter-lacing, inter-dependence and unity were furnished by the existence of common management, common business organisation, common administration, common fund and a common place of business. This conclusion was reiterated by this very bench in Produce Exchange Corporation Ltd. v. Commissioner of Income-tax, (Central Calcutta), [1970] 77 ITR 739. Therein the assessee company carried on business as a dealer in diverse

commodities and also stock and shares. In the year of account 1949, it had suffered loss of Rs. 3,71,700/-in the sale of shares which the company claimed to carry forward and set off against the profits of subsequent years from transactions in other commodities. The Tribunal found that there was complete unity of control and shares were one of a number of commodities in which the company dealt in the ordinary course of business and that there was no element of diversity or distinction or separateness about the transaction in shares, and accordingly upheld the claim, On a reference the High Court held that the essential matter to be considered was the nature of the two lines of business and not merely their unity of control and that therefore the Tribunal erred in holding that the whole trading activity formed one business. Reversing the decision of the High Court this Court ruled that the decisive test was unity of control and not the nature of the two lines of business.

For the reasons mentioned above we allow this appeal, discharge the answer given by the High Court and answer the reframed question in the affirmative and in favour of the assessee. The Revenue shall pay the costs of the assessee both in this Court and in the High Court."

17. He also relied upon the following observation in the matter of ***Jindal Photo Films Ltd.*** *Vs.* ***DCIT & Anr.*** 234 ITR 170:-

"The power to re-open an assessment was conferred by the legislature but not with the intention to enable the ITO 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. (See CIT Vs . Rao Thakur Narayan Singh [1965] 56 ITR 234.

In Phool Chand Bajrang Lal, [1993] 203 ITR 456 their Lord-ships have held while interpreting Section 147 as it stood in the assessment year 1963-64 :-

"An Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the Assesses to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information., Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an asses- see to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from

which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction; (See- Siesta Steel Construction Pvt Ltd Vs . K.K.Shikare & Ors [1985] 154 ITR 547, Satpal Automobile Co. ITR [1983] 141 ITR 450, Gopal Films Vs. ITO . [1983] 139 ITR 566, CWT Vs . Manilal C. Desai [1973]91 ITR 135(MP)"

18. His last submission was that in any case ***Orissa Ware Housing*** (supra) could not be made the foundation for reopening the assessment. According to Mr. Syali, the decision in the case of ***Orissa Warehousing*** (supra) was concerned with the following two questions:-

"(1) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the interest received by the assessee from the banks on fixed deposits was exempt under Section 10 (29) of the Income-Tax Act, 1961?

(2) Whether, on the facts and in the circumstances of the case, the Tribunal was justified in holding that the interest received from the banks on fixed deposits was incidental to or consequential to the activities of the business of the

> assessee and was not taxable under the head 'Income from other sources' and, thus exempt under Section 10 (29) of the Income-Tax Act, 1961?"

19. Emphasizing on the word "derived" used by the legislature in Section 10 (29), It was held that the interest on fixed deposit does not qualify for exemption. In the process, their Lordships discussed the case of U.P. State Warehousing Corporation and distinguish it. Again, the law is emphasized with reference to the income that qualifies for section 10 (29). The Court was not concerned with and did not adjudicate on the issue of expenditure.

20. Emphatic endeavour was made by Ms. Bansal, counsel appearing for the Revenue to demolish the aforesaid arguments of the assessee. Apart from relying upon the reasons given by the CIT (A) as well as ITAT in conforming the authority of the notice under Section 147 read with Section 148 of the Act, she emphasized that while examining validity of proceeding u/s 147 of the Act, it is only to be seen by the Hon'ble court as to whether there was any material before the AO to form a belief based on reasons that any income chargeable to tax in the case of assessee had escaped assessment. Since the action had been taken by the AO within 04 years, it is not necessary to see as to whether income chargeable to tax had escaped assessment due to failure on the part of assessment to make a return or to disclose fully and truly all material facts necessary for his assessment. She also argued that in such cases the court was not supposed to go into the sufficiency of grounds as held by the Apex Court in the case of ***ITO*** Vs. ***Lakhmani Mewal Dass,*** *103 ITR 437:-*

“The grounds or reasons which lead to the formation of the belief contemplated by Section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the Court to investigate. The sufficiency of grounds which induce the income-tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a Court of law (see observations of this Court in the case of Calcutta Discount Co Ltd. v. Income-tax Officer [1961]41ITR191(SC) and Narayanappa v. Commissioner of Income-tax. [1967]63ITR219(SC) while dealing with corresponding provisions of the Indian Income-tax Act. 1922)”

21. She also referred to another judgment of the Apex Court in ***Raymonds Woolen Mills Ltd.*** *Vs.* ***ITO***, *236 ITR 34* for the proposition that the Court was required to see only as to whether there was prima facie some material on the basis of which the Department could reopen the case and not the correctness or sufficiency of the material. Resting her case on the aforesaid principle of law, she submitted that in the present case, reasons recorded by the Assessing Officer would reveal that the AO had reopened the assessment mainly on two grounds (i) assessee had set off entire business expenses against the taxable income of ₹ 5,49,10,026/-. The method of computation followed by the assessee was based upon the decision of ITAT in the case of same assessee for AY 1976-77 to 1979-80. In the said decision, ITAT had held that the business of the assessee was indivisible and, therefore, expenses incurred by the assessee cannot be apportioned between the taxable and non-taxable income.(ii) The Supreme Court in the case of Orissa State Warehousing Corporation Vs. CIT, 237 ITR 589 have held that as per the provisions of Section 10 (29), exemption is available only to that part of income which is derived from letting of godowns or the warehouses, if the income is derived from any other sources then it would not possibly come within the ambit of Section 10 (29). Since the assessee was having more than one business i.e. warehousing and Container Freight Station (CFS), the expenses are to be apportioned. Income from CFS, being the separate business cannot be said to be rental receipt from warehousing. Accordingly, in view of the judgment of Supreme Court, AO had reason to believe that income of assessee from CFS had escapement and that the entire expenses were allowed only against taxable income without

apportioning the same between taxable and non-taxable receipts; hence he had issued notice u/s 148 of the Act.

22. Refuting the plea of the assessee predicated on 'change of opinion', Ms. Bansal submitted that CFS facility was started by the assessee only w.e.f. AY 1985-86 and therefore, earlier order of ITAT for AY 1976-77 to 1979-80 would not be applicable. The assessee had claimed exemption U/s 10 (29) even with respect to the income from CFS stating it to be the warehousing income from CFS. As stated by the assessee himself, it was appointed as custodian for ICDs/CFS on behalf of Custom Authorities u/s 8 of the Customs Act and its functions included:

(i) Transporting the container from one port to ICD/CFS
(ii) Stuffing the containers,
(iii) Getting them inspected from the custom authorities,
(iv) Clearing the goods to the clients,
(v) Storing the empty containers

Thus the activities of ICD/CFS were quite distinct and separate from warehousing activity of the assessee and, therefore, was not eligible for exemption u/s 10 (29) of the Act. She argued that this aspect had not been considered at all by the AO while passing the original assessment order. No query had been made and, therefore, no reply had been filed in this regard. She thus submitted that judgment of the Supreme Court in the case of ***Orrisa Ware Housing*** (supra) constitutes valid material for forming belief 147 of the Act and it was very well within the powers of the Assessing Officer to base his 'Reasons to Believe' on a judgment of the Court as held in ***ITO*** Vs. ***Sharad Bhai M Lakhani,*** 243 ITR 01**.**

23. We have gone through the orders passed by the authorities below and have also given our due consideration to the arguments of both the parties.

24. We would like to start our discussion by reproducing the 'Reasons to Believe' recorded by the Assessing Officer as that was the starting point and it is those reasons which are subject matter of scrutiny:-

> " On perusal of assessee's return it is seen that the assessee has claimed exemption u/s 10 (29) amounting to Rs. 151,41,68,354/- against the book profit of Rs. 38,00,13,987/-. The return of income has been computed at a loss of Rs. 107,8366678/-. The assessee has, at the time of computation, set off the entire business expenses against the taxable income of Rs. 54910026/-. The method of computation being followed by the assessee was based upon the decision of the ITAT 'C' Bench, Delhi in ITAT No. 696, 697, 698 & 699 (Delhi/83 for AYs 1976-77 to 1979-80. In the said decision, the ITAT had held that as the business of the assessee was indivisible, hence, it was not correct to apportion the expenses between the taxable and nontaxable receipts. Hence "the entire expenditure claimed by the assessee I each of the years under consideration" was deductible. It is now gathered that a substantial part of assessee's business is with regard to handling of Container Freight Stations at various ports in India. The assessee has wrongly shown the receipts from this business as part of receipt from warehousing in its accounts and claimed exemption u/s 10 (29) on the same. The Supreme Court in the case of Orissa State Warehousing Corpn. Vs. CIT and Rajasthan Warehousing Corpn. Vs. CIT (237 ITR 589, 1999) has clearly held as under:-

"Having due regard to the language used (in Section 10 (29)), the question of exemption would arise pertaining to that part of the income only which arises or is derived from the letting of godown or the warehouses and for the purposes specified in Section 10 (29) of the IT Act.... if income is derived from any other sources, then and in that even such an income cannot possibly come within the ambit of Section 10 (29)."

It is now clear that the assessee is having more than one business i.e. warehousing and Container Freight Stations. Consequently, the computation made by the assessee, in the light of ITAT decision, is incorrect. The assessee has, therefore, wrongly computed the total income by not correctly disclosing the fact that it was having a separate business in the shape of Container Freight Stations. Moreover, in the light of the above decision of Supreme Court the receipts from Container Freight Station business is not eligible for deduction u/s 10 (29) as this cannot be said to be rental receipt from warehousing.

It is also seen from the perusal of 143 (3) order dated 22.1.198 that income amounting to Rs. 248240042/- (54910026 + 193254161) has already been treated as not exempt u/s 10 (29). Keeping in view the above fact that assessee is having more than one distinguishable business, the expenses cannot be wholly set off against the taxable receipt of Rs. 248240042/- plus the receipts from Container Freight Stations which needs to be quantified.

Since, I have reasons to believe that income chargeable to tax amounting to Rs. 248240042/- plus income from Container Freight Station has escaped assessment on account of the failure of the assessee to disclose truly and fully the material fact that it was having more than one distinguishable business during the previous year. Even otherwise, the Supreme Court, in its decision, cited supra, has

held that receipts not derived from warehousing were taxable, thereby implying the expenses were to be apportioned between the taxable and the non-taxable receipts."

25. These reasons can be dissected in the following manner:-

(a) In the first instance, the Assessing Officer records the manner in which exemption under Section 10 (2() of the Act was claimed in the original return and the method of computation followed by the assessee which was based on the decision of ITAT in ITA 696-699 for the assessment year 1976-77 and 1977-78 wherein it was held that the business of the assessee was indivisible

(b) It was now gathered that a substantial part of the assessee's business was with regard to handling of Containers Freight Stations at various Ports in India and the assessee had wrongly shown the receipt of this business as part of receipts from Ware Housing in its accounts and claim exemption under Section 10 (29) of the Act of the same.

(c) The method followed by the assessee was clearly wrong having regard to the judgment of the Supreme Court in Orrisa Ware Housing (supra) wherein it was held that receipt not derived from Warehousing were taxable thereby implying that expenses were to be apportion between the taxable and non-taxable receipts, inasmuch as the assessee was having more than one business i.e. Warehousing Business and also Container Freight Stations. For this reason, the computation made by the assessee in the light of ITAT decision was incorrect. This has resulted in income from Container Freight Station escaping the assessment.

26. We may point out at this stage that as far as business of handling of container Freight Station is concerned, that was started by the assessee in the year 1985. This becomes clear from the report of the Board of Directors for the year 1984-85. Therefore, the Assessing Officer was right in observing that the ITAT orders in respect of assessment years 1976-77 and 1977-78 and 1979-80 which was made as the basis for seeking exemption was not proper.

27. We would also like to observe at this stage that judgment of the Court can be a valid basis for reassessment proceedings by issuing notice under Section 147 of the Act. This is so held in ***Shard Bhai*** (supra) and it could not be disputed by the learned counsel for the appellant.

28. In this case, in 'Reasons to Believe' the judgment of the Supreme Court in Orissa Warehousing (supra) was made as the basis for reopening the assessment. In that case, the Supreme Court held that as per the provisions of Section 10 (29) of the Act, exemption is available only to that part of the income which is derived from letting of godowns or Warehouses. Further, the Supreme Court held in no uncertain terms and categorically laid down the principle of law that if the income is derived from any other rouse then it would not possibly come within the ambit of Section 10 (29) of the Act. The Court spoke in the following language:-

> "In any event the factum of deposit of moneys with the bank does not take the matter any further by reason of the specific language and the expression used in Section 10(29) of the Act which reads as below:
>
> > "10. In computing the total income of a previous year of any person, any income

falling within any of the following clauses shall not be included.

(29) In the case of an authority constituted under any law, for the time being in force for the marketing of commodities, any income derived from the letting out of commodities, any income derived from the letting out of godowns or warehouses for storage, processing or facilitating the marketing of commodities."

On a plain reading of Section 10(29) of the Act as above, it appears that the pre-requisite element for the entitlement as regards the claim for exemption is the income which is derived from letting out of godowns or warehouses for storage, processing or facilitating marketing of commodities and not otherwise. The legislature has been careful enough to introduce in the Section itself, a clarification by using the words 'any income derived therefrom', meaning thereby obviously for marketing of commodities by letting out of godowns or warehouses for storage, processing or facilitating the same. If the letting out of godowns or warehouses is for any other purpose, question of exemption would not arise."

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Such a provision would be found in Clauses (20A), (21) and (22) of Section 10 of the Act. A perusal of these clauses would show that only such income as is derived from a particular source is exempted by Clause (29) of Section 10 of the Act. Therefore, to claim exemption, it must be proved that the income derived by an authority constituted for the marketing of commodities is income which is derived from the letting of godowns or warehouses for the purposes specified in Section 10(29), which are storage, processing or facilitating the marketing of commodities. If the letting of godowns or warehouses is for any other purpose, or if income

is derived from any other source, then such income is not exempt under that clause.

26. Further reliance was placed on the decision of this Court in the case of Commissioner of Income Tax v. P.J. Chemicals [1994]210 ITR 830. In our view, however, reliance thereon is totally misplaced and the same has relevance whatsoever. The decision of the Allahabad High Court in the case of Commissioner of Income Tax v. U.P. State Warehousing Corporation [1992] 195 ITR 273 in a similar vein also does not advance the case of the assessee any further, as such we need not dilate much on this excepting however recording that the same does not lend any assistance to the submissions of assessee-appellants.

Having due regard to the language used, question of exemption would arise pertaining to that part of the income only which arises or is derived from the letting of godowns or the warehouses and for the purposes specified in Section 10(29) of the Act - as noticed above. The statute has been rather categorical and restrictive in the matter of grant of exemption: storage, processing or facilitating the marketing of the commodities are definitely regarded as three different forms of activities which are entitled to exemption in the event of their being any income therefrom. We do lend our concurrence to the view expressed by the Madhya Pradesh High Court and record that in the event the letting of godowns or warehouses is for any other purpose or if income is derived from any other source, then and in that event such an income cannot possibly come within the ambit of Section 10(29) of the Act and is thus not exempt from tax. The facts in issue pertaining to the interest income on fixed deposit or ascribing the activities of the assessee being termed to be one integrated activity does not and

cannot arise. Mr. C. S. Vaidyanathan, Addl. Solicitor General rightly contended that the language being clear and there being no ambiguity, question of there being any integrated activity and reading the same in to the statue would be a violent departure from the intent of the legislature."

29. In fact, we are not required to go into the aforesaid decision minutely as that would touch upon the merits of the case namely exemption under Section 10 (29) of the Act is to be allowed to the assessee or not. What we have to examine is as to whether judgment in ***Orrisa Warehousing*** (supra) could be the basis for reopening the assessment order under Section 147 of the Act and answer to that is in affirmative.

30. The aforesaid observations of the Supreme Court are quoted just to demonstrate that prima facie, the aforesaid judgment afforded a good ground to the Assessing Officer to reopen the assessment proceedings. It would be also useful to refer to the following discussions contained in the order of the Tribunal:-

> "8. Now question arises whether an assessment can be reopened under Section 147 based on the decision of Hon'ble Supreme Court in the cases where the claim was allowed based on earlier decisions of Hon'ble Apex Court. Hon'ble Supreme Court in the case of Orissa State Warehousing Corporation (supra) at page 601 & 602 in the context of decision in the case of U.P. State Warehousing Corporation (supra) observed as under:-
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> > "Further reliance was also placed on the decision of the Allahabad High Court I the case of U.P. State Warehousing Corporation V/s I.T.O. (1974) 94 ITR 129. We, however, are not in a position to obtain support in any form whatsoever by reason of the fact that

the said matter pertains to the issue as to whether the assessee was an authority within the meaning of section 10 (29) of the Act and the High Court's judgment pertains to the same. This decision was, however, subject to scrutiny before this court as well and while it is true that there is concurrence of views but the same was, however, by reason of the factual status and not by reason of any interpretation of law as such, as would be evident from the observations in Union of India V/s U.P. State Warehousing Corporation (1991) 187 ITR 54, Suppl. 2 SCC 730 as below (page 56)

"The third test with regard to the exemptable income being in respect of letting of godowns or warehouses for storage, processing or facilitating the marketing of commodities presents no difficulty because it stands undisputed that the income derived by the assessee was from letting of godowns or warehouses".

In view of the observations of this court as regards the undisputed facts, the question of drawing any inspiration or obtaining support from the decision does not and cannot arise and the same is thus clearly distinguishable".

9.From above as observed by Hon'ble Supreme Court it is clear that in that in the case of Union of India v/s U.P. State Warehousing Corporation there were two issues involved i.e. (i) relating to the status of assessee whether it was an authority within the meaning of section 10 (29) of the Act? and (ii) relating to exemption of income which was admittedly derived by the assessee from letting out of godowns and warehouses for storage, processing or facilitating the marketing of commodities. In this case the fact that the Corporation derived income from letting out of godowns and warehouses for storage, processing or facilitating the marketing of commodities, was not in dispute. Therefore in the case of U.P. State Warehousing Corporation (supra), there was no issue relating to exemption of other incomes earned by the assessee. Hence the decision of Hon'ble Supreme Court in the case of Orissa State

> Warehousing Corporation (supra) is the first decision according to which exemption of income of a Warehousing Corporation only in respect of letting out of godowns for specified purposes was delivered".

31. In the light of the aforesaid discussion, the only argument which needs consideration is as to whether it was merely a change of opinion of the Assessing Officer seeking to reopen the assessment proceedings and the issue was discussed in original assessment proceedings. In fact, as already pointed out above, this was primary attack and attempt of the assessee to shake the foundation of notice under Section 147/148 of the Act.

32. We find that while dealing with the assessment years 1989-90 and 1993-94 the Tribunal held that since return of income for these years were processed under Section 143 (1) 9a) of the Act. There was no occasion to form an opinion and, therefore, it could not be treated as change of opinion. However, in these appeals, we are not concerned with those assessment years. For the assessment years with which we are concerned, the Tribunal recorded as under:-

> "In assessment years 1995-96 & 1996-97, the notices u/s 148 have been issued within the period of four years. Therefore, for these years, decision of Hon'ble Supreme Court in the case of Orissa State Warehousing Corporation (supra) constituted information in the possession of assessing officer to initiate proceedings u/s 147 of the Act. Hon'ble Calcutta High Court in the case of Indra Company Ltd. (supra) held that the department would have been perfectly justified in taking proceedings u/s 147 (b) within four years from the end of assessment year, as undoubtedly, the decision of

> Supreme Court was information within that clause eve where the assessments were made u/s 143 (3) of the Act. The existing provisions of Section 147 were substituted by the Direct Tax Laws (amendment) Act, 1987, w.e.f. 1.4.1989. Clause (a) of old provisions of Section 147corresponds to the existing proviso and clause (b) to the main provisions of Section 147. Therefore, the assessing officer was justified to initiate the reassessment proceedings for assessment years 1995-96 and 1996-97 on the basis of decision of Hon'ble Supreme Court in the case of Orissa State Warehousing Corporation (supra) being fresh information in his possession."

33. The Tribunal has thus justified the action of the Assessing Officer only on the basis of that judgment of Supreme Court in the case of Orissa Warehouse (supra) provided fresh opinion. The question as to whether this very issue was discussed in the original assessment proceedings or not has not even been touched upon. As far as these assessment years are concerned, assessment was done under Section 143 (3) of the Act. Therefore, the argument of the assessee that it was a case of change of opinion has not been addressed at all by the Tribunal which should have been gone into when it was so specifically raised by the assessee. For this reason alone, we set aside the order of the Tribunal and remit the case back to the Tribunal for fresh consideration limiting its discussion only on the aspect as to whether the reason given by the Assessing Officer for reopening of the reassessment was the aspect considered earlier in the original assessment proceedings and it would be a case of mere change of opinion or this aspect was not considered at all and, therefore provided proper ground for reopening the assessment.

34. We are remitting the case back for this limited purpose for obvious reason that in so far as other grounds raised by the assessee for challenging the validity of notice under Section 147/148 of the Act are concerned, we have concurred with the views expressed by the ITAT hereinabove. The appeals stand disposed of in the aforesaid manner.

(A.K. SIKRI)
JUDGE

(SURESH KAIT)
JUDGE

JANUARY 14,2011
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