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IN THE HIGH COURT OF DELHI AT NEW DELHI

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**W.P.(C) 6729/2011**

**SUN PHARMACEUTICAL INDUSTRIES LTD.**

..... Petitioner

Through Mr M.S. Syali, Senior Advocate with Mr V.P. Gupta, Mr Mayank Nagi, Mr Arunav Kumar and Ms Husnal Syali, Advocates with Mr Subir Kachroo, Manager Taxation.

versus

DEPUTY COMMISSIONER OF INCOME  
TAX & ANR.

..... Respondents

Through Mr P. Roy Chaudhuri, Senior Standing Counsel.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**ORDER**

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**14.01.2016**

**Dr. S. Muralidhar, J.:**

1. The Petitioner, Sun Pharmaceutical Industries Ltd. (earlier known as Ranbaxy Laboratories Ltd.) , has filed this writ petition seeking quashing of a notice dated 30<sup>th</sup> March, 2011 issued to it under Section 148 of the Act as well as the proceedings initiated thereunder for the Assessment Year ('AY') 2004-05.

2. The Petitioner is engaged in the business of manufacturing and trading of pharmaceutical products. For AY 2004-05, the Petitioner filed its return of income on 20<sup>th</sup> October, 2004 declaring an income of Rs. 330.64 crores.

Along with its return, the Petitioner submitted, *inter alia*, a copy of the annual accounts, a copy of the Tax Audit Report under Section 44AB of the Act, a copy of the report under Section 115JB of the Act, a copy of the report for arm's length price (ALP) for the international transactions in Form 3CEB, a copy of the reports under Sections 80 HHC, 80 IB and 80-O of the Act and other supporting documents.

3. The return was picked up for scrutiny and a notice was issued by the Assessing Officer ('AO') on 24<sup>th</sup> December, 2004 under Section 143(2) of the Act enclosing a detailed questionnaire. During the assessment proceedings the AO issued another questionnaire dated 25<sup>th</sup> February, 2005 seeking further details. In response to these questionnaires, the Petitioner addressed various letters dated 31<sup>st</sup> January 2005, 28<sup>th</sup> February 2005, 16<sup>th</sup> March, 2005 and 24<sup>th</sup> March, 2005 to the AO. Thereafter, an assessment order was passed on 30<sup>th</sup> March, 2005 under Section 143 (3) of the Act.

4. The Petitioner received a notice dated 25<sup>th</sup> January, 2011 from the Assistant Director of Income Tax (Investigation) Unit-III (3), New Delhi requiring the appearance of the Petitioner on 4<sup>th</sup> February, 2011. The ADIT sought confirmation from the Petitioner in respect of 2 transactions of receipts in foreign currency from M/s Ranbaxy Pharmaceuticals Inc. USA ('Ranbaxy USA') of USD 1,13,17,472 and USD 1,03,69,250. By the letter dated 11<sup>th</sup> February 2011, the Petitioner informed the ADIT that it had received an aggregate amount of USD 1,13,17,472/- vide seven remittances on different dates. It was stated that USD 1,03,69,250/- was a total of six of the seven receipts and was, therefore, included in the sum of USD

1,13,17,472/-.

5. The reasons for reopening of the assessment for AY 2004-05 read as under:

“Reasons for the belief that income has escaped assessment:-

The assessment for AY 2004-05 was completed u/s 154 / 143(3) on 5.04.2005 determining an income of Rs.3,63,45,44,931/-. After verifying the records, the following points are noted:

1. The assessee company has claimed an amount of Rs.2,15,99,534/- as "Provision for Doubtful Debts and Advances". This amount had to be added back for the purposes of calculation of Book Profit u/s 115JB. This is as per clause (i) of Explanation 1 to Section 115JB of the I.T. Act, 1961. This has not been done. Omission to do so has resulted in underassessment of income amounting to Rs.2,15,99,534/-.
2. Secondly, the assessee company has earned a dividend of Rs.1,85,30,220/- which has been treated as exempt u/s 10(34) of the Act. However, no disallowance of expenditure have been made u/s 14A neither has assessee produced any details to show that no expenditure was incurred on earning of this exempt income. This is in spite of the fact that the assessee company has paid interest amounting to Rs.109.95 million on borrowed fund. The investments made are 30.75% of total assets. 30.75% of interest paid works out to be a figure of Rs.36.65 crores. This is liable to be disallowed. Over and above the interest expenses, other common expenses like managerial, administrative expenses also have to be apportioned. Omission to do so has resulted in escapement of income. Apportionment of expenses would imply a disallowance of Rs.36.65 crores as expenses relatable to earning exempt income and this escapement should be brought to tax.

3. While allowing deduction u/s 80IB, the Assessing Officer omitted to apportion R&D capital expenses in the separate account of the new undertakings though the same were claimed in the computation of income of the company as a whole.

Under the Income Tax Act 1961, where the gross total income of an assessee includes profits and gains derived from a newly established undertaking the assessee is entitled to a deduction of 25% of such profits and gains derived from that undertaking. The deductions equal to 30 percent / 100 percent of such profit is allowable to these units which are established after 31<sup>st</sup> March 1990. It has been judicially held that the use of the term 'derived from' in the relevant provisions of the Act indicates the restricted meaning given by the legislature to cover only the profits and gains directly accruing from the conduct of the business undertaking.

The omission resulted in excess allowance of deduction of Rs.67,91,538/-.

4. Further, it is noted that the assessee claimed and was allowed deduction of Rs.7,10,64,204/- on account of product registration and regulatory expenses. These expenses were incurred to enable the company to market its products in different countries as applicable money for grant of licenses with regulatory authorities of the concerned countries. These expenses gave enduring benefits to the assessee, therefore they were capital in nature and required to be capitalized.

Section 37 of the Income Tax Act 1961, provides that any expenditure not being expenditure of capital nature, laid out wholly or exclusively for the business is allowable as deduction in computation of the income chargeable under the head 'profits and gains of business or profession'.

The omission resulted in excess allowance of deduction / under assessment of income of Rs.7,10,64,204/-.

5. Further, it is also noted that while computing the deduction u/s 80-HHC, trade discount and R&D (Capital) expenses was not included in the indirect cost. The omission resulted in excess allowance of deduction of Rs.93,75,342/- involving tax effect of Rs.33,63,618/-.

Section 80 HHC of the Income Tax Act, 1961, provides that there being an assessee being an Indian Company or a firm whose residence in India is engaged in the business of export out of India of any goods or merchandise, there shall be allowed, in accordance with and subject to the provision of this section in computing the total income of the assessee, a deduction to the export of such goods or merchandise. Where the export out of India is of goods or merchandise manufactured or processed by the assessee and also of trading goods the profit derived from such export shall be the aggregate of the adjusted profit in preparation to the export turnover in relation to the manufacturing / processing of goods and in relation to the trading activity the amount arrived after deducting the direct and indirect costs of the trading from the export turnover of the activity.

6. While claiming deduction u/s 80-IB, the assessee had apportioned and was allowed by the Assessing Officer 30% of R&D (Revenue) expenses and 75% of head office expenses in the separate accounts of the individual undertaking in the ratio of sales whereas 100% expenses were required to be apportioned.

Under the Income Tax Act 1961, where the gross total income of an assessee includes profits and gains derived from a newly established undertaking the assessee is entitled to a deduction of 25% of such profits and gains derived from that undertaking. The deductions equal to 30 percent / 100 percent of such profit is allowable to these units which are established after 31st March 1990. It has been judicially held that the use of the term 'derived from' in the relevant provisions of the Act indicates the restricted meaning given by the legislature to cover only the profits and gains directly accruing from the conduct of the business undertaking.

The omission resulted in excess allowance of deduction of Rs.13,28,16,481/-.

7. As per return filed by the assessee the gross total income included dividend income of Rs.39,84,537/- and instead of restricting the Chapter VIA deduction to the extent of income from profits & gains of business, deduction were allowed on income which included dividend income also.

Under the provision of Chapter VIA of the Income Tax Act, 1961, certain deductions are admissible from the gross total income of an assessee in

arriving at the total income chargeable to tax. The Act further provides that where deduction is required to be made of any income, under any section included under Chapter VIA, and which is also included in the gross total income, for the purpose of computing the deduction under that section, the amount of that nature (before making any deductions under Chapter VIA) shall alone be deemed to be the income of that nature which is received by the assessee and included in the assessee's gross total income.

The omission resulted in excess allowance of deduction/under assessment of income of Rs.39,84,537/-.

8. Further, the department received information from Foreign Tax Authorities under the Automatic Exchange of Information provisions of the respective Double Taxation Avoidance Agreements of India with various foreign Countries. Thus information was received by the CBDT regarding India Residents Tax Payers who have received income from these foreign countries.

In particular information was received regarding some remittances received by M/s Ranbaxy Laboratories Ltd. from Ranbaxy Pharmaceuticals Inc., U.S.A. Queries were raised from the assessee company regarding the same. However despite numerous opportunities given, the assessee company was unable to reconcile receipts amounting to US Dollars 10369250. The average rate of exchange during 2003 was Rs.46.6 for every 1 USD. Therefore, income amounting to Rs.48,32,07,050/- should have been added to the income of the assessee. ”

6. Towards the end of these reasons it was stated as under:-

“Thus the assessee has failed to disclose all material facts truly and fully that were necessary for assessment. Here it is relevant to mention the explanation 1 in section 147 that states that “production before the AO of account books or other evidence from which material evidence could with the diligence have been discovered by the AO will not necessarily amount to disclosure with the meaning of the provision in section 147”.

7. The AO, accordingly, concluded that he had reason to believe that income chargeable to tax amounting to Rs.109,53,38,686/- has escaped assessment in the case and the same had to be brought to tax under Section 147/148 of the Act.

8. The Petitioner submitted a letter dated 26<sup>th</sup> April, 2011 listing out its objections to the aforementioned notice. By an order dated 29<sup>th</sup> July, 2011/01<sup>st</sup> August, 2011 the AO rejected these objections. It was stated by the AO, in response to the objection that there was no fresh material on the basis of which a belief could be formed by the AO regarding income having escaped assessment, that "the AO had fresh material in the form of Audit Memos which were analysed by the AO and only after properly recording the reasons for the same, AO issued notice u/s 148 of the Act." The other objection regarding the pendency of proceedings under Section 154 at the time of issuance of notice under Section 148 of the Act was negated since the proceedings under Section 154 stood automatically abated once proceedings under Section 147 were initiated.

9. Thereafter, the present writ petition was filed. In response to the notice issued on 15<sup>th</sup> September 2011, the Respondent filed a reply. It may be mentioned, at this stage, that while issuing notice, the Court directed that the AO will not frame the assessment order till the next date. That interim order has continued thereafter.

10. This Court has heard the submissions of Mr M.S. Syali, learned Senior Advocate for the Petitioner, and Mr. P. Roy Chaudhuri, Senior Standing

Counsel, for the Revenue.

11. It has been pointed out that five of the eight reasons for reopening, viz., reasons at Serial Nos. 3 to 7 above are only as a result of the audit objections raised. It has been pointed out that these audit objections were not accepted by the AO as was evident from five separate letters dated 10<sup>th</sup> February, 2006 written by the Deputy Commissioner CIT (1) Delhi to the Deputy Director Revenue Audit. Nevertheless, the order under Section 148 was issued as result of Instruction No. 9/2006 dated 7<sup>th</sup> November, 2006 issued by the Central Board of Direct Taxes ('CBDT').

12. In para 15 of the writ petition it is stated that the Petitioner inspected the file of the Department on 16<sup>th</sup> and 17<sup>th</sup> June, 2011 and this "revealed that in respect of five issues out of eight issues raised for reassessment respondent himself had replied to the Audit Party that there has been no underassessment in respect of the issues and claim had been allowed after fully examining the facts and the legal position in this regard". In ground (v) of the writ petition this has further been reiterated.

13. In the counter affidavit, in specific reply to ground (v) it is averred by the Respondent as under:

“v. That the contents of Para-V are repetitions of earlier Paras hence denied in their corresponding Paras. Hence need no further reply. However, it is submitted that the part replies were sent to the audit on the basis of the submission made by the assessee. But the audit has not settled these objections. Remedial action has to be taken compulsorily as per Instruction No. 9/2006.”

14. Mr P. Roy Chaudhuri, learned counsel for the Revenue, submitted that the AO was constrained to take remedial action in terms of the binding CBDT Instruction No. 9/2006.

15. A copy of the said Instruction No. 9 of 2006 has been placed before the Court. The purpose of issuing instructions is "to set out the procedure to be followed at different stages of audit objections and for the appropriate remedial action to be taken thereon." The CBDT has issued these instructions so that "management and processes relating to audit objections are streamlined with a greater sense of accountability." Accordingly, the said instruction No. 9 of 2006 was issued "in supersession" of earlier instructions for "strict compliance by all concerned".

16. In terms of the said instructions remedial action is expected to be taken even where an objection raised by the audit is not accepted by the Commissioner of Income-tax (CIT). This is evident from para 4 of the instructions which reads as under:

“4. Remedial action:

- (i) An Audit objection should be accepted and remedial action should be taken in a case where the audit objection relating to an error of facts or an issue of law is found to be correct.
- (ii) Even if objection is not accepted by the CIT, remedial action should be initiated, as a precautionary measure, in respect of such audit objections, save as provided in para (v) below.
- (iii) Appropriate remedial action should invariably be initiated within two month of the receipt of the Local Audit

Report, and necessary orders should be passed within six months thereafter.

(iv) Remedial action should invariably be initiated in respect of the following circumstances,

- (a) where an assessment under section 143(1) was made and the objection pointed out by Audit could not have been considered under the provisions of section 143(1);
- (b) where the interpretation of fact or law by the audit is in conflict with any decision of a High Court (not being the jurisdictional High Court) which is squarely applicable to the facts of the case, or
- (c) where there are conflicting decisions of different High Courts (not being the jurisdictional High Court), or
- (d) where the matter involves interpretation of statute and there is no decision of any High Court on the matter.

However, in cases falling under (b), (c) and (d) above, the remedial action initiated can be dropped only with the prior approval of the Board. For this purpose, the CIT should immediately send a reference to the Board for decision, not later than three months from receipt of LAR by the CIT concerned, stating cogently therein the detailed reasons for consideration of the proposal for dropping of the remedial action initiated.

(v) Remedial action need not be initiated in a case where,

- (a) the CIT is of the view that the interpretation of fact or law by the audit is in conflict with a decision of the Supreme Court and the decision squarely applies to the facts of the case, or
- (b) the CIT is of the view that the interpretation of fact or law by the audit is in conflict with a decision of the jurisdictional High Court, which is squarely

applicable to the facts of the case and the operation of which has not been stayed by the Supreme Court, or

(c) the CIT is of the view that the Assessing Officer has acted in conformity with Board's Instruction/Circular, or

(d) the audit objection raised is on facts, and the CIT, after necessary verification, is of the opinion that the audit objection is factually incorrect.

However, considering that C.Cs/Ds.CIT are the competent authority for accepting or contesting adverse judgments of High Courts, in respect of (a) and (b) above prior approval of the C.Cs / Ds.CIT. concerned should be obtained for taking a decision for not initiating remedial action, and in respect of (c) above the matter should be referred to the relevant Divisions of the Board for examination and decision.

The CsIT should ensure that necessary reply/reference is sent to the AG (Audit) concerned/the Board within a month of the receipt of the Local Audit Report.”

17. It is submitted by Mr Syali, learned Senior counsel for the Petitioner on the strength of decisions in ***M.P. Tiwari v. Y.P. Chawla ( 187) ITR 506 (Del)***, ***Dr. M.L. Passi v. CBDT (188) ITR 685 (Del)*** and ***CIT v. Greenworld Corporation 314 ITR 81 (SC)*** that the decision to reopen the assessment had to be taken by the AO alone and no one else. In other words, the AO could not have been subject to any compulsion in the form of an instruction by the CBDT to take a decision with regard to reopening of the assessment in terms of Section 147 of the Act. The attention of the Court is drawn to proviso (a) to Section 119(1) of the Act which makes it clear that there cannot be any such orders, instructions or directions of the CBDT which “require any

income tax authority to make a particular assessment or to dispose of a particular case in a particular manner.” It is, accordingly, submitted that as far as reasons 3 to 7 above are concerned, since they were purely based on audit objections with which the AO/CIT did not agree, the persistence with the reopening of the assessment by issuance of notice under Section 147/148 of the Act was unsustainable in law.

18. That a quasi judicial authority, which is expected to exercise statutory functions on an objective criteria, cannot act on the dictates of any superior authority, or on any instruction that may be issued by an authority that may have administrative control over such quasi-judicial authority, is fairly well settled.

19. In ***Commissioner of Police Bombay v. Govardhan Dass Bhanji* AIR (1952) SC 16** the Supreme Court was examining the powers of the Licensing Authority under the Bombay Police Act, 1951 and the Rules thereunder. The Court noted that the discretion to issue or cancel licences was with the Commissioner of Police and not the State Government. It was held that "no other person or authority can do it".

20. In ***Sirpur Paper Mills v. Commissioner of Wealth-Tax* (1970) 77 ITR 6 (SC)** when a Commissioner of Wealth Tax (CWT) sought instructions from the CBDT on how an assessment should be framed, the court had no hesitation in setting aside the consequent orders passed by the CWT. It took exception to the CWT having merely "carried out the directions of the Board" instead of himself deciding the case.

21. In **Anirudhsinhji Jadega v. State of Gujarat (1995) 5 SCC 302**, it was reiterated by the Supreme Court that once a discretion is vested with a certain authority, he alone should exercise that discretion vested under the statute and if he acts in accordance with “the direction or any compliance with some higher authorities instruction” it would be a case of failure to exercise discretion altogether.

22. Recently in **Commissioner of Income Tax v. Greenworld Corporation (Supra)** the AO passed the order under Section 148 of the Act on the dictates of the CIT. The Supreme Court stated that without going into the question of the *bona fides* of the authorities under the Act, "the order of assessment passed by the Assessing Officer on the dictates of the higher authority, being wholly without jurisdiction, was a nullity".

23. In **M.P. Tewari v. Y.P. Chawla (supra)**, this Court was dealing with a circular issued by CBDT which sought to delineate certain offences which could not be compounded. The Court referred to Section 119 of the Act and held:

“in the exercise of its power to issue orders and circulars under Section 119 of the Income-tax Act, 1961, the Central Board cannot take away the judicial or quasi-judicial functions of the Commissioner and vest them in itself or put them under the overall supervision of itself or the Minister. The Board can relax the rigour of the law or grant relief to the taxpayers which is not to be found in the statute. But the Central board cannot dilute the discretion of the Commissioner which has been conferred by the statute.”

24. In **Dr. M.L. Passi v. CBDT (supra)** the above legal position was reiterated. In **CIT v. SPL's Siddhartha Ltd [2012] 345 ITR 223 (Del)** the

Court found that for the purposes of Section 151 (1) of the Act the approval for issuance of notice under Section 147 had to be given only by the Joint Commissioner or Additional Commissioner. Instead the approval was taken, in that case, from the CIT (3) who was not competent to approve the action even though he was a higher authority. When the Court examined the file, it found that although it was routed through the Additional Commissioner, he did not apply his mind for due sanction but instead requested the CIT to accord the approval. The Court observed:

“Thus, if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the Act authorised under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be “independent” and not “borrowed” or “dictated” satisfaction. Law in this regard is now well-settled. In *Sheo Narain Jaiswal v. ITO* [1989] 176 ITR 352 (Patna), it was held:

“Where the Assessing Officer does not himself exercise his jurisdiction under section 147 but merely acts at the behest of any superior authority, it must be held that assumption of jurisdiction was bad for non-satisfaction of the condition precedent.”

25. The Gujarat High Court in ***Raajratna Metal Industries Ltd. v. Asst. Commissioner of Income Tax*** (decision dated 30th July 2014 in SCA No. 7140 of 2014) set aside an order re-opening an assessment solely on the basis of audit objections, which had not in the first place been accepted by

the AO.

26. Consequently, reasons 3 to 7 of the order dated 30<sup>th</sup> March, 2011, based as they are on audit objections, in terms of which the AO felt constrained as a result of the CBDT Instruction No. 9 of 2006, to reopen the assessment for the AY 2004-05, are unsustainable in law. The Court holds instruction No.9 of the CBDT dated 7<sup>th</sup> November, 2006 cannot possibly override the statutory powers to be exercised by an AO in terms of Section 147 of the Act. In other words the said instruction has to be read consistent with proviso (a) to Section 119 (1) of the Act and cannot, as was erroneously understood by the Respondent, compel the AO to issue the notice dated 30<sup>th</sup> March, 2011. If the CBDT Instruction No. 9/2006 is read to the contrary, it would fall foul of Section 119 of the Act.

27. Turning to reason (1), it is stated that an amount of Rs. 2,15,99,534 as "Provision for Doubtful Debts and Advances" had to be added back for the purposes of calculation of book profits in terms of clause (i) of the Explanation 1 to Section 115JB of the Act. It is pointed out by the Petitioner that the said clause was inserted with retrospective effect from 1<sup>st</sup> April, 2009. Clearly, the said clause did not exist at the time of filing of the return of income on 29<sup>th</sup> October, 2004. It is further pointed out that in **CIT v. HCL Comnet Systems and Services Ltd [2008] 305 ITR 409 (SC)**, the Supreme Court clarified that the question of adding back the provision for doubtful debts in terms of the said clause would not arise. It is further pointed out that in the subsequent AY i.e. 2005-06, this issue was discussed and the Assessee's claim was accepted in the light of the decision in **CIT v.**

***HCL Comnet Systems (supra).***

28. In ***CIT v. SIL Investments Ltd. [2011] 339 ITR 166 (Del)*** it was held by this Court that where a claim is rendered inadmissible on account of an amendment to the law introduced subsequently though with retrospective effect, which covers the relevant previous year, it cannot be said that there was any failure on the part of the Assessee to disclose truly and fully all the material facts.

29. In the present case, the Assessee had already made a full and true disclosure of all the relevant materials in the first instance when the original assessment was framed. This included the account books, tax audit reports etc. The return was picked up for scrutiny and after two questionnaires were answered to the AO's satisfaction by the Assessee, the assessment was framed under Section 143 (3) of the Act. In the circumstances, the reference by the AO to Explanation 1 to Section 147 of the Act is, misconceived for the simple reason that once the original return was picked up for scrutiny and the accounts and other documents were subjected to a detailed examination by the AO, the question of there being no full and true disclosure of the material facts did not arise. Significantly, the reasons for re-opening fail to mention which material was failed to be disclosed by the Assessee. In similar circumstances in ***Global Signal Cables (India) Pvt. Ltd. v. Dy. CIT [2014] 368 ITR 609 (Del)*** this Court invalidated the re-opening of the assessment under Section 148 of the Act.

30. Reason (2) for reopening of the assessment is that despite the Assessee

earning dividend of Rs. 1,85,30,220/- which was treated as exempt under Section 10 (34) of the Act, no disallowance of expenditure was made under Section 14-A of the Act. It is alleged that the Assessee failed to produce details to show that no expenditure was incurred on earning of the said exempt income.

31. It is seen that during the original assessment proceedings under Section 143(3) of the Act, there was a specific query raised by the AO in the letter dated 24<sup>th</sup> December, 2004 addressed to the Assessee. Question 8 required the assessee to give details of dividend exempt under Section 10 (34) received from HDFC along with copies of accounts. It is further seen that Question 9 of the AO's letter dated 25<sup>th</sup> February, 2005 was regarding the dividend of Rs.1.85 crores received from HDFC. The Assessee submitted detailed replies in this regard on 31<sup>st</sup> January, 2005 enclosing the complete details. Another reply was furnished on 16<sup>th</sup> March, 2005. Para 8 of the said reply deals with in detail with the query regarding the dividend of Rs.1.85 crores received from HDFC.

32. Here again it requires to be observed that the reason for re-opening the assessment, specific to reason (2), fails to spell out the material that was failed to be fully and truly disclosed by the Assessee. It is therefore, not possible to conclude that the jurisdictional 'trigger' for re-opening the assessment was present. As observed in ***Madhukar Khosla v. Asst. CIT [2014] 367 ITR 165 (Del)***:

"The foundation of the AO's jurisdiction and the *raison d'etre* of a reassessment notice are the "reasons to believe". Now this should have a relation or link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which

enables the authority to legitimately re-open the completed assessment. In absence of this objective 'trigger', the AO does not possess jurisdiction to re-open the assessment."

33. In ***CIT v. Kelvinator of India Ltd [2002] 256 ITR 1(Del)*** it was observed that an order that has been purportedly passed without application of mind could not itself confer jurisdiction upon the AO to reopen the proceeding "without anything further" as that would amount to "giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong". In ***CIT v. Usha International Ltd [2012] 348 ITR 485 (Del)*** a Full Bench of this Court observed that there can be cases where an AO may not raise any written query but still the Assessing Officer in the first round/original proceedings may have examined the subject matter because the aspect or question may be too apparent and obvious. In ***Swarovski India Pvt. Ltd. v. Deputy Commissioner of Income Tax 368 ITR 601 (Del)***, it was held that the escapement of income by itself is not sufficient for reopening the assessment in a case covered by the first proviso to Section 147 of the said Act and unless and until there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment. It was insisted that the reasons for reopening of the assessment should specifically indicate which material fact was not disclosed by the Assessee in the course of the original assessment under Section 143(3) of the Act failing which there should not be any reopening of the assessment. In ***Oracle Systems Corporation v Asst. DIT*** (decision dated 8<sup>th</sup> October, 2015 in Writ Petition Civil No. 12856/2009), this Court reiterated the settled legal position that once a regular assessment is completed in terms of Section 143 (3) a presumption can be raised that such

an order was passed by the AO on a proper application of mind.

34. In the present case apart from a bland statement at the end of the reasons that the assessee failed to truly disclose the material particulars, it is not pointed out which material particular was not disclosed in the course of the original assessment by the assessee. Consequently, the Court has no hesitation in holding that reason (2) for reopening the assessment is based merely on a change of opinion and not on any tangible material warranting reopening of the assessment under Section 147/148 of the Act.

35. Reason 8 is that the Assessee was unable to reconcile the receipts of USD, 10369250 from Ranbaxy USA despite various opportunities. In this regard the AO had sought an explanation from the Petitioner by issuing a notice dated 25<sup>th</sup> January, 2011 even prior to issuance of the notice under Section 147/148 of the Act. This information had been furnished to the AO by the Petitioner by its letter dated 11<sup>th</sup> February, 2011. It was explained that USD 1,03,69,250/- was a total of six of the seven receipts and was, therefore, included in the sum of USD 1,13,17,472/-. A certificate was also provided from Ranbaxy USA to the effect that no other amount was paid by them during the relevant period. In the counter affidavit filed by the Respondent, it is simply reiterated that the Petitioner had not reflected USD 948,222 as income in the relevant AY despite the fact that Ranbaxy USA has disclosed this in its return. As pointed out by Mr Syali, it was the above reason that prompted the AO to issue a letter in the first instance to the Petitioner on 25<sup>th</sup> January, 2011. The explanation offered by the Petitioner in its reply dated 11<sup>th</sup> February, 2011 that the said amount was included in the

amount already disclosed was obviously overlooked while seeking to re-open the assessment. Consequently, there appears to be no basis in the conclusion of the AO that Petitioner was unable to reconcile the receipts from Ranbaxy USA. The Court is, therefore, satisfied that reason 8 is also unsustainable in law.

36. For the above reasons, the impugned notice dated 30<sup>th</sup> March, 2011 issued by the respondent under Section 148 of the Act, the order dated 29<sup>th</sup> July/1<sup>st</sup> August, 2011 passed by the DCIT and all proceedings consequential thereto are hereby quashed.

37. The writ petition is allowed in the above terms but with no order as to costs.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**JANUARY 14, 2016/pkv**