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

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\+ **ITA 356/2013**

COMMISSIONER OF INCOME TAX – II ..... Appellant

versus

M/S MULTIPLEX TRADING & INDUSTRIAL CO. LTD. ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr Kamal Sawhney, Senior Standing Counsel with Mr Raghvendra Singh, Junior Standing Counsel.

For the Respondent : Mr Ved Jain and Mr Pranjal Srivastava.

CORAM:
HON'BLE DR. JUSTICE S.MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

% O R D E R
22.09.2015

VIBHU BAKHRU, J

1. This appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act') has been preferred by the Revenue impugning an order dated 9th November, 2012 passed by the Income Tax Appellate Tribunal (hereafter the 'Tribunal') in ITA No.1202/Del/2011. The said appeal (ITA

No.1202/Del/2011) was preferred by the Revenue to impugn an order dated 23rd December, 2010 passed by the Commissioner of Income Tax (Appeals) [hereafter the 'CIT(A)] allowing the appeal preferred by the Assessee against an assessment order dated 31st December, 2008 passed by the Assessing Officer (hereafter 'AO') in respect of Assessment Year 2001-02 pursuant to reopening of the assessment under Section 147 of the Act.

2. The controversy involved in the present appeal relates to the action of the AO in reopening the assessment in respect of transactions that had been examined and verified by the AO during the initial assessment proceedings which culminated in the assessment order dated 31st December, 2003. The assessment was re-opened based on information received by the AO from the Investigation Wing that the Assessee had obtained accommodation entries from certain entry operators during the relevant period. The Assessee's challenge to the initiation of re-assessment proceedings as well as the addition made to the Assessee's taxable income pursuant thereto, was sustained by the CIT(A) as well as the Tribunal.

3. This appeal was admitted on 6th January, 2014 and the following questions were framed for consideration:-

"(a) Is the impugned decision of the ITAT justified and correct inasmuch as it holds that the reopening of assessment of the petitioner was not in accordance with law; and

(b) Whether the ITAT fell into error in not upholding the Revenue's contentions that the other accounts have to be added on merits under Section 68 of the Income Tax Act."

4. Briefly stated, the relevant facts necessary to consider the controversy involved in the present appeal are as under:-

4.1 The Assessee filed its return of income for the Assessment Year (hereafter the 'AY') 2001-02 declaring an income of ₹27,83,483/- under Section 115JB of the Act. The said return was picked up for scrutiny and the AO issued notice under 143(2) of the Act on 11th October, 2002. Thereafter, the Assessee was issued a questionnaire on 7th November, 2002. Subsequently, another questionnaire was issued to the Assessee on 21st March, 2003. The return filed by the Assessee was discussed and the Assessee was also called upon to file details of the unsecured loans. In response to the queries, the Assessee sent a letter dated 12th December, 2003 enclosing therewith the details of unsecured loans alongwith copies of confirmation, copies of income tax returns and copies of ledger accounts pertaining to the unsecured loans. This also included details pertaining to

Richie Rich Overseas Pvt. Ltd. (hereafter 'Richie Rich'). During the course of the assessment proceedings, the Assessee was also called upon to explain its agreement with Mahan Enterprises Ltd. In response thereto, the Assessee filed the Agreement entered into with Mahan Enterprises. The Assessee explained that it had entered into an arrangement with Mahan Enterprises Ltd., whereby, the said company had agreed to finance the cost and expenses required to be incurred by the Assessee in relation to an assignment from Gujarat Electricity Board. The issue as to sharing of revenue between the Assessee and Mahan Enterprises Ltd. was also debated before the AO.

4.2 During the course of the proceedings a letter dated 18th December, 2003 was filed by Mahan Enterprises Ltd. with the AO which, *inter alia*, confirmed that certain investments had been arranged by Mahan Enterprises Ltd. and out of the loans so arranged the Assessee had, subsequently, returned back loans to the extent of ₹1.07 crores. The said amount also included loan received from Richie Rich, which is sought to be taxed as unexplained credit in the re-assessment proceedings.

4.3 The AO received information from the Investigation Wing of the Income Tax Department that the Assessee had obtained accommodation

entries from certain entry operators during the financial year 2000-01. This included a sum of ₹55,15,400/- from Richie Rich and ₹2 Lacs from Adam Impex Pvt. Ltd. On receiving this information, the AO recorded as a reason to believe that the income of the Assessee for AY 2001-02 had escaped assessment and, accordingly, issued a notice dated 31st March, 2008 under Section 148 of the Act. Thereafter, the AO issued a notice dated 7th November, 2008 under Section 143(2) of the Act. In response to the aforesaid notice, the Assessee requested the AO to treat the return as originally filed as a return in response to the notice under Section 148 of the Act. The Assessee also sought the reasons for the re-opening of the assessment.

4.4 Thereafter, the AO proceeded with the reassessment proceedings and called upon the Assessee to furnish details in respect of certain transactions reflected in its bank account. Subsequently, the AO also provided the Assessee with the reasons for initiating proceedings under Section 147/148 of the Act.

4.5 The Assessee objected to the reopening of the assessment vide a letter dated 12th December, 2008. According to the Assessee, the reasons

recorded were wrong; without application of mind; and there was no tangible evidence, which indicated that income of the Assessee had escaped assessment.

4.6 The Assessee also filed a detailed response enclosing all evidence that was readily available with it to support the genuineness of the entries pertaining to the transaction with Richie Rich. This included the Ledger Accounts of Richie Rich in the books maintained by the Assessee; a bank statement; and confirmation of accounts. Subsequently, before the CIT(A), the Assessee also produced a copy of the income tax return filed by Richie Rich for the AY 2001-02; copy of the balance sheet of Richie Rich for the AY 2001-02; copy of the bank statement of Richie Rich; copy of the 'company master details' of Richie Rich with the Registrar of Companies.

4.7 The AO did not dispose of the objections filed by the Assessee and proceeded to reassess the income of the Assessee for the relevant assessment year. The AO passed an assessment order dated 31st December 2008, whereby the AO made a further addition of ₹55,15,400/- on account of unexplained cash credit in the name of Richie Rich.

4.8 The Assessee preferred an appeal against the re-assessment order before the CIT(A). The Assessee challenged the action of the AO in reopening the assessment under Sections 147/148 of the Act as well as challenged the addition of ₹55,15,400 on merits. The Assessee prevailed before the CIT(A). The CIT(A) held that the AO had not been able to make out the case to sustain the reopening of assessment under Section 147 of the Act. The CIT(A) noted that the notice under Section 148 of the Act had been issued after a lapse of 4 years from the end of the relevant assessment year and in the circumstances, reopening of assessment was permissible only if the proviso to Section 147 of the Act was satisfied; that is, income chargeable to tax had escaped assessment by reason of failure on the part of the Assessee to disclose fully and truly all material facts necessary for his assessment. The CIT(A) observed that the Assessee had provided all material in support of the loan availed from Richie Rich and the same was ignored by the AO. The CIT(A) was of the view that the Assessee had duly explained the entries in question and, therefore, the addition made by the AO to the assessable income of the Assessee under Section 68 of the Act, was erroneous.

4.9 The Revenue, being aggrieved by the decision of CIT(A), preferred an appeal before the Tribunal, which was rejected by the order dated 9th November, 2012 – the order impugned in the present appeal. The Tribunal had held that the Assessee had disclosed all the relevant material at the time of original assessment and, therefore, the pre-condition under the proviso to Section 147 of the Act had not been met. The Tribunal further held that the reopening of assessment was not based on any fresh material but material disclosed by the Assessee during the initial assessment. The Tribunal also observed that the reasons recorded by the AO for reopening of assessment did not contain any allegation that there was any failure on the part of the Assessee to disclose all material facts. The Tribunal relied upon the decisions of this Court in ***Wel InterTrade P. Ltd. & Anr. v. ITO*****: 308 ITR 22 (Del.)** and ***Haryana Acrylic Manufacturing Company v. CIT & Anr.*****: 308 ITR 38** in support of its view that the reopening of assessment could not be sustained as the necessary condition for invoking Section 147 of the Act had not been met. The Tribunal was also of the view that the addition had been made on account of a change in AO's opinion, which was not permissible.

5. Mr Sawhney, learned counsel appearing for the Revenue, contended that the Tribunal had erred in observing that no fresh material had been relied upon for reopening of assessment. He contended that the AO had proceeded to reopen the assessment on the basis of information obtained from the Investigation Wing and the same constitutes fresh material that was not available with the AO at the time of initial assessment. He also pointed out that the observation of the Tribunal that the reasons recorded by the AO did not contain the allegation that there was a failure on the part of the Assessee to disclose all material facts, was factually incorrect. He further contended that the Tribunal had not examined the issue regarding addition made under Section 68 of the Act on merits.

6. Mr Sawhney relied upon the decision of the Supreme Court in ***Phool Chand Bajrang Lal v. Income-Tax Officer*****: 2003 ITR 456** in support of his contention that information obtained by the AO subsequent to the assessment could lead to a belief that income chargeable to tax had escaped assessment even though the transaction in question had been examined during the assessment proceedings.

7. Countering the arguments made by Mr Sawhney, Mr. Ved Jain, learned counsel appearing for the Assessee, contended that the Assessee had disclosed fully and truly all material facts during the initial assessment proceedings and, therefore, reopening of the assessment could not be sustained. He referred to the decision of this Court in ***Haryana Acrylic Manufacturing Company*** *(supra)* in support of his contention that the provisions of Section 147 of the Act could not be invoked after the expiry of four years from the relevant assessment year unless the AO came to the conclusion that the income had escaped by reason or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for the assessment. He submitted that in the present case the Assessee had provided all necessary material and, thus, the reopening of assessment under Section 147 of the Act could not be sustained.

8. He also submitted that the judgment of ***Phool Chand Bajrang Lal*** *(supra)* was not applicable as the provisions of Section 147 had undergone a change. He drew the attention of this Court to paragraph 25 and 26 of the decision in ***Haryana Acrylic Manufacturing Company*** *(supra)* in support of this contention.

9. We have heard the learned counsel for the parties.

10. The first and foremost issue to be addressed is whether the AO could assume jurisdiction to reopen the assessment based on the information received from the Investigation Wing of the department. It is now well settled that the AO can reopen the assessment if he has reason to believe the Assessee's income has escaped assessment. However, his reasons to believe must not be based on surmises, conjectures or occasioned by change in opinion but must be based on some tangible and credible material on the basis of which a reasonable belief could be formed that income of an assessee has escaped assessment. The language of Section 147 requires the AO to have a reason to believe and not a reason to suspect. The reason to believe that income of an Assessee has escaped assessment must be *bonafide* and reasonable. It is also settled that the material on which the AO forms his opinion must not be the same material which had been considered at the time of the initial assessment, as in that case, the proceedings under Section 147 of the Act would amount to reviewing the assessment order merely on a change of opinion, which is not permissible.

11. By virtue of the proviso to Section 147 of the Act, an assessment, which has been concluded under section 143(3) of the Act - that is, the return filed by the Assessee was scrutinised and verified by the AO - cannot be reopened after the expiry of four years from the end of the relevant assessment year unless the condition as specified under the proviso to Section 147, is met; that is, the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return, either under Section 139(1) of the Act or pursuant to a notice under Section 142(1) of the Act, or is occasioned by the failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment.

12. Indisputably, the entries relating to funds availed by the Assessee from Richie Rich during the relevant year had been scrutinised by the AO during the regular assessment proceedings and had been explained by the Assessee. In the circumstances, it would be impermissible for the AO to reopen the assessment unless the AO, on the basis of credible and tangible material, which was not in his possession during the initial assessment, believes that income of the Assessee has escaped assessment.

13. The Supreme Court in ***CIT v. Kelvinator of India Ltd.***: **320 ITR 561 (SC)** emphasised that the expression "reason to believe" as used in Section 147 of the Act must be read in context of the scheme of the Act and cannot be interpreted in a manner as conferring arbitrary power on the AO. Thus, such 'reason to believe' must be based on 'tangible material' and not on a change of opinion. The relevant extract from the said decision is quoted below:

> "6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words " reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of " mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of " change of opinion" is removed, as contended on behalf of the

> Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of " change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is " tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words " reason to believe" but also inserted the word " opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words " reason to believe", Parliament reintroduced the said expression and deleted the word " opinion" on the ground that it would vest arbitrary powers in the Assessing Officer.

14. In the present case the material on the basis of which the AO has formed such opinion is a report from the Investigation Wing of the department. This would certainly be fresh material and cannot be considered to be the same material which was available with the AO at the time of initial assessment proceedings.

15. In ***Phool Chand Bajrang Lal*** *(supra)*, the Court had explained as under:-

> "Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment

> which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the ITO at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be a disclosure of the 'true' and 'full' facts in the case and the ITO would have the jurisdiction to reopen the concluded assessment in such a case."

16. The next aspect to be examined is whether the material which was forwarded to the AO i.e. report of the Investigation Wing could reasonably lead to the inference that the income of the Assessee had escaped assessment. A copy of the said information has been placed on record. The Investigation Wing had reported that one Late Sanjay Mohan Aggarwal was one of the oldest and the most savvy entry operators and had been providing entries to several individuals and companies. It was also informed that S.M. Aggarwal had been summoned and his statement had been recorded. Though he had not accepted he was engaged in entry business but in an informal chat he had admitted to carrying on entry business. The Investigation Wing had detected the accounts and the entities, which were allegedly used for the entry business. The same included Mahan Enterprises Ltd. as well as Richie

Rich. A list of entries had also been provided, which included certain bank transactions with the Assessee. The investigation report also indicated that the entries were provided as gifts or subscription to share capital.

17. Section 147 of the Act does not postulate that the AO arrives at a final conclusion and ascertains, as a fact, that the income of the Assessee had escaped assessment. All that is required at the stage of initiation of proceedings for reassessment is for the AO to form a reasonable belief on tangible material that the income of the Assessee has escaped assessment. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.*: 291 ITR 502**, the Supreme Court explained the above in the following words:-

> "16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central

> Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. P. Ltd. [1996] 217 ITR 597 (SC) ; Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).”

18. In our view, once the tangible material available with the AO provides a live link with him forming a belief that income of an Assessee had escaped assessment, he would, subject to other statutory requirements, be entitled to reopen a concluded assessment. The question whether the AO has reason to believe that income has escaped assessment and is liable to be reopened under Section 147 of the Act has also to be viewed from the standpoint of the AO. Thus indisputably, in certain circumstances, such information as was received by the AO in this case may have provided the AO with a reason to believe that income of the Assessee had escaped assessment. In our view, the Tribunal erred in observing that the AO had reopened the

assessment on the same material as was available during the initial assessment proceedings.

19. It is also relevant to note that, in the present case, the AO has sought to reopen the assessment beyond the period of four years. As indicated hereinbefore, the same would not be permissible unless the condition as specified in proviso to Section 147 was met and the income of the Assessee had escaped assessment on account of Assessee's failure to disclose truly and fully all material facts for assessment of its income. Indisputably, the issue regarding unsecured loans from Richie Rich had been examined by the AO in the initial assessment and the Assessee had provided all the necessary evidences to establish the genuineness of the transactions. In view of the same, it has been contended that the conditions as contained in the proviso to Section 147 have not been met as there has been no failure on the part of the Assessee to either file the return of income or to disclose fully and truly all material facts.

20. In ***Calcutta Discount Company v. Income Tax Officer*****: 41 ITR 191** the Supreme Court considered the import of the words "omission or failure

to disclose fully and truly all material facts necessary for his assessment" and observed as under**:**

> "The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts 'are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession whether on disclosure by the assessee, or discovered by him on the basis of the facts disclose, or otherwise, the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

21. In ***CIT v. Burlop Dealers Ltd.*****: (1971) AIR 1635,** the Supreme Court referred to the above passage from its decision in ***Calcutta Discount Company*** *(supra)* and held that if an Assessee has disclosed primary facts relevant to the assessment, he is under no obligation to instruct the Income Tax Officer about the inference, which the Income Tax Officer may draw from those facts. The Court further held that :

> "mere production of the books of account or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure within the meaning of Section 34(1), but where on the evidence and the materials produced the Income-tax Officer could have reached a conclusion other than one which he has reached, a proceeding under Section 34(1)(a) will not lie merely on the ground that the Income-tax Officer has raised an inference which he may later regard as erroneous."

22. The aforesaid decision was followed by the Supreme Court in a later decision in ***ITO v. Madnani Engineering Works Ltd.*: (1979) 118 ITR 1 (SC)**.

23. The aforesaid decisions of the Supreme Court in ***Burlop Dealers Ltd.*** *(supra)* and ***ITO v. Madnani Engineering Works Ltd.*** *(supra)* were noticed by this Court in ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd.*** *(supra)*. The Court has held that once the Assessee had disclosed all facts which have been examined by the AO during the assessment proceedings, it would not be open for the AO to allege that the Assessee had not truly and fully disclosed all material facts. In our view, the decision in the case of ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd.*** *(supra)* must be understood in the context of the facts of that case. It is also relevant to note that in ***M/s***

Haryana Acrylic Manufacturing Co. (P) Ltd. *(supra)* the reasons recorded by the AO did not even mention that the Assessee had failed to disclose truly and fully all material facts necessary for the assessment. The said decision cannot be read as an authority for the proposition that if the AO, based on tangible material obtained subsequent to the conclusion of the assessment, forms a belief that the income of an Assessee has escaped assessment on account of bogus entries passed by the Assessee in its books of accounts, the AO would, nonetheless, be precluded from reopening of the assessment after expiry of four years from the end of the relevant assessment year since the issue had been examined in the initial assessment.

24. In our view, the question whether the Assessee could have been stated to disclosed fully and truly all material facts have to be examined in the light of facts of each case and also the reasons that led the AO to believe that income of an Assessee has escaped assessment. In a case where the primary facts have been truly disclosed and the issue is only with respect to the inference drawn, the AO would not have the jurisdiction to reopen assessment. But in cases where the primary facts as asserted by the Assessee for framing of assessment are subsequently discovered as false, the reopening of assessment may be justified.

25. In ***Phool Chand Bajrang Lal*** *(supra),* the Supreme Court had observed as under:-

> "The judgment in Burlop Dealers' case (supra) cannot be understood as laying down any such proposition that even where the ITO gets some fresh information which was not available at the time of the original assessment, subsequent to the conclusion of the original assessment proceedings, which enables him to form a reasonable belief that the income of the assessee had escaped assessment because of the omission or failure of the assessee to disclose true and full facts during the assessment proceedings, he cannot reopen the assessment. The observations in Burlop's case, noticed above, were made in the peculiar fact-situation of that case and cannot be construed to be of universal application irrespective of the facts and circumstances of the particular case.

26. The decision in the case of ***Burlop Dealers Ltd.*** *(supra)* had been rendered in the context of Section 34(1)(a) of the Income Tax Act, 1922 and the decision of the Supreme Court in ***Phool Chand Bajrang Lal*** *(supra)* was delivered in the context of Section 147(a) of the Act as it existed prior to the amendment introduced w.e.f. 1st April, 1989, which was similarly worded as section 34(1)(a) of the 1922 Act.

27. Section 147 as it existed prior to 1st April 1989 read as under:-

"147 If-

(*a*) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(*b*) notwithstanding that there has been no omission or failure as mentioned in clause (*a*) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1: for the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(a) where income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (11 of 1922); or

(*d*) where excessive loss or depreciation allowance has been computed.

Explanation 2: Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this section."

28. Section 147 after the amendment w.e.f. 1st April, 1989 reads as under:-

> "147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section and in sections 148 to 153 referred to as the relevant assessment year):
>
> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section(1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.
>
> Explanation 1: Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.
>
> Explanation 2: For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—
>
> (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum

amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.]"

29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO to have a reason to believe that (a) the income of the Assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the Amendment, only one singular requirement is to be fulfilled under Section 147(a) and that is, that the AO has reason to believe that income of an Assessee has escaped assessment. However, the proviso to Section 147 of the Act provides a complete bar for reopening an assessment, which has been made under Section 143(3) of the

Act, after the expiry of four years. However, this proscription is not applicable where the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this Court in ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd.*** *(supra)* explained that the ratio of the decision in ***Phool Chand Bajrang Lal*** *(supra)* may not be entirely applicable since the same was in respect of Section 147(a) as it existed prior to the amendment.

30. In the present case it is difficult to accept that reasonable conclusion could be drawn that the Assessee had failed to disclose truly and fully all material facts necessary for its assessment. In the facts of this case, where the AO had already in the initial round examined and verified the entries in question, it would only be reasonable for the AO to examine the information received and to at least verify the same with the records of the concluded assessment proceedings. A plain examination of the same would have

revealed that the Assessee had not claimed to have received any funds from Richie Rich as share capital. Further, the Assessee had also provided confirmation of the loans received as well as other details, during the said proceedings. It would also be relevant to note that the loans availed had been returned through banking channels during the period and this was also confirmed independently to the AO. In the given circumstances, the least that was required for the AO was to independently apply his mind to ascertain that the information provided was credible and sufficient for drawing a reasonable inference that the income of the Assessee had escaped assessment on account of failure on the part of the Assessee to disclose truly and fully all material facts. Clearly, the examination of facts required at the threshold to form such a belief would be more detailed if the said transaction in question had already been subjected to scrutiny during the initial assessment.

31. In the present case, it does not appear that the AO applied its mind to the material available including the records of the earlier assessment proceedings. This is also apparent from the fact that during the assessment proceedings, the AO did not confront the Assessee with any new material or examine any other evidence other than what was already available in the

initial assessment period.

32. There is yet another safeguard provided to the Assessee which was sought to be side-stepped by the AO. The Supreme Court in the case of ***G.K.N Driveshafts (India) Ltd. v. ITO*: (2003) 259 ITR 19 (SC); (2003) 1 SCC 72** had held that if an Assessee if so desirous, could seek reasons for issuance of notice under Section 148 of the Act and the AO would be bound to furnish the same within a reasonable time. The Court further held that that the noticee would be entitled to file objections against the issuance of the notice and the AO would be bound to dispose of the same by passing a speaking order.

33. In the present case, the Assessee filed its objections by a letter dated 12th December, 2008 and requested the AO to drop the proceedings. The Assessee by its letter dated 18th December, 2008 sent in response to another notice, also provided its response in respect of the alleged accomodation entries, which were reported by the Investigation Wing. However, the objections filed by the Assessee were not disposed of by the AO and he proceeded to frame the assessment. This Court in ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd.*** *(supra)* had observed that the requirements

regarding recording the reasons to believe; communicating the same to the Assessee; permitting the Assessee to file the objections; and passing a speaking order disposing of the objections are all designed to ensure that the AO does not reopen assessments, which have been finalized, on his mere whim and fancy and that he does so only on the basis of lawful reasons. It was further held that a deviation from the directions issued by the Supreme Court in ***G.K.N Driveshafts (India) Ltd.****(supra)* would entail nullifying the proceedings. Although the AO is required to provide reasons, receive objections and pass a speaking order thereon, only after the notice under Section 148 of the Act has been issued; these requirements are an integral part of the safeguards which have been inbuilt for ensuring that the assessments are reopened only for lawful reasons and in a transparent manner. If the said safeguards are flouted, it would invalidate the exercise of jurisdiction under Section 147 and 148 of the Act.

34. Thus, although we are in agreement with the contention advanced by the Revenue that information received by the AO regarding passing of bogus entries in its books after the conclusion of the assessment proceedings could in certain circumstances, provide tangible material for AO to reopen assessment and assume jurisdiction, but, in the facts of the present case, we

are unable to accept that it would be open for the AO to proceed on the basis that income of the Assessee had escaped assessment on account of the failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment for AY 2001-02.

35. In view of the above, we find no infirmity with the conclusion of the CIT(A) and the Tribunal that AO could not have assumed jurisdiction to reopen the assessment under Section 147/148 of the Act.

36. The next issue to be examined is whether any addition could have been made to the taxable income of the Assessee as unexplained credit under Section 68 of the Act. At the outset, it is relevant to observe that although the AO had reopened the assessment, the AO did not produce any material or confront the Assessee with any credible evidence that could lead to the inference that the entries pertaining to the loan from Richie Rich were bogus or accommodation entries. In the absence of such material, it was clearly not permissible for the AO to take a view contrary to one taken by the AO during the initial assessment.

37. The Assessee on the other hand produced ample evidence to indicate that the entries in question were genuine. During the initial assessment, the

Assessee had filed a copy of the agreement between the Assessee and Mahan Enterprises Ltd., which indicated that certain activities of the Assessee were to be funded by Mahan Enterprises Ltd. Mahan Enterprises Ltd. had also directly filed a letter with the AO explaining an arrangement and had also confirmed that it had arranged funds for the Assessee and further, that the Assessee had also refunded sums to the extent of ₹1.07 crores. Indisputably, this included the amount obtained by the Assessee from Richie Rich. The Assessee also produced a copy of the Account of Richie Rich in its books, bank statements showing the transactions with Richie Rich, as well as confirmation from Richie Rich. The Assessee had also pointed out that the transaction in question had been examined during the regular assessment proceedings. The AO simply rejected the contention as non-tenable. The confirmation produced by the Assessee was faulted as not being of a current date. We are unable to find any justification for these views and, therefore, the assessment order cannot be sustained. The funds availed by the Assessee from Richie Rich had been returned several years ago and there was no justification for the AO to insist on a fresh confirmation. The Assessee had also produced the balance sheet and bank account of Richie Rich reflecting the entries. On examination of the

evidence, the CIT(A) rightly came to the conclusion that no addition under Section 68 of the Act in respect of the transaction was sustainable. The Tribunal also noted the evidence and material produced by the Assessee, which remained uncontroverted, and upheld the order passed by the CIT(A).

38. In view of the above, the second question is answered in negative, in favour of the Assessee and against the Revenue.

39. The appeal is, accordingly, dismissed.

40. In the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S. MURALIDHAR, J

SEPTEMBER 22, 2015
MK/RK