IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.06.2015

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUDHAKAR**
and
THE HONOURABLE Ms.JUSTICE **K.B.K.VASUKI**

Tax Case (Appeal) No.217 of 2015

The Commissioner of Income Tax
Chennai. .. Appellant

versus

M/s.Schwing Stetter India P. Ltd.,
Plot No.F71 SIPCOT Indl. Park
Irrungattukottai, Sriperumbudur
Kancheepuram District – 602 105.
.. Respondent

PRAYER: Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 as against the order dated 12.08.2011 made in I..T.A..No.24/Mds/2011 on the file of the Income Tax Appellate Tribunal, Madras 'A' Bench for the assessment year 2001-2002.

For Appellant : Mr.T.Ravikumar
Standing Counsel for Income Tax

J U D G M E N T

(Judgment of the Court was delivered by **R.SUDHAKAR,J.)**

This Tax Case (Appeal) is filed by the Revenue as against the order of the Income Tax Appellate Tribunal raising the following substantial question of law:

> "1. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in upholding the order of the CIT(A) who held that the reassessment proceedings made was not valid?
>
> 2. Is not the finding of the Tribunal bad especially when the assessee had not furnished the details relating to working of MODVAT which resulted in failure on the part of the assessee by not disclosing fully and truly all material facts that was necessary for assessment?"

2. The brief facts of the case are as follows:

The assessment in this case relates to the assessment year 2001-2002. The assessee is engaged in the business of manufacture of concrete mixtures, concrete pumps, concrete mixing plants components and software development. The assessee company had filed its return of income for the assessment year admitting a total income of Rs.1,36,15,445/-. The return was processed under Section

143(1) of the Income Tax Act and subsequently assessment under Section 143(3) of the Income Tax Act was made by the Assessing Officer determining the total income at Rs.1,40,40,250/-. Thereafter, the Assessing Officer had issued notice under Section 148 of the Income Tax Act for initiating proceedings under Section 147 of the Income Tax Act. In response to the said notice, the assessee filed a letter dated 16.4.2008 requesting to treat the original return filed as the return filed in response to the notice issued under Section 148 of the Income Tax Act. Thereafter, notice under Section 143(2) was issued to reopen the assessment. The assessee had asked for reasons for reopening the assessment and it appears the reasons were communicated to the assessee on the same day. In the return of income filed, the assessee had arrived the MODVAT Credit utilization during the current year. According to the Assessing Officer, as per memo of computation of income, the excise duty debited to Profit and Loss Account which was actually payable after adjustment of MODVAT Credit was Rs.3,73,70442/- and the same would be paid at the time of removal of finished goods and collected from purchasers. Hence, the Assessing Officer took the view that there was no question of adjustment of excise duty paid on finished goods upto the date of filing the return. Accordingly, the Assessing Officer issued show cause

notice calling for explanation from the assessee as to why the excess claim made by the assessee to the tune of Rs.22,60,275/- has to be rejected. In response to the same, the assessee had replied that the working of MODVAT credit had correctly made and submitted a detailed working sheet justifying the correctness of the claim. However, the Assessing Officer did not accept the said explanation and came to hold that excise duty on finished goods had to be included in the total income, since, the value of closing stock of finished goods represented value as on 31st March of each year ready for removal but not removed from the factory. Thus, the Assessing Officer was of the view that the excise duty did not get crystallised as on 31st March and it would get crystallised only at the time of actual removal and based on the closing stock, no provision for payment of duty could be created and therefore, a sum of Rs.22,60,275/- was added to the total income of the assessee. Accordingly, he made re-assessment disallowing the excess MODVAT Credit.

3. Aggrieved by the same, the assessee had filed an appeal before the Commissioner of Income Tax (Appeals), who was of the view that the workings pertaining to the MODVAT Credit had already available before the Assessing Officer at the time of passing an order

under Section 143(3) of the Income Tax Act and the re-assessment proceedings have been initiated on a mere change of opinion on the same material on record. Reliance was placed by the assessee before the Commissioner of Income Tax (Appeals) the decision of this Court in the case of *CIT V. Cholamandalam Investment and Finance Company* reported in *309 ITR 110; CIT V. Tamilnadu Transport Development Finance Corporation Limited* reported in *306 ITR 136 and CIT V. Kelvinator of India Ltd. r*eported in *320 ITR 561(SC).* After hearing both sides, the Commissioner of Income Tax (Appeals) allowed the appeal in favour of the assessee holding as follows:

> *"4.2. I have carefully considered the facts of the case and the submission of the ld. AR. I have also gone through the decisions relied on by the ld. AR. In this case return was filed on 29.10.2001. It was processed on 02.01.2003. Subsequently, assessment order u/s. 143(3) was passed on 31.03.2004. Notice for reopening the assessment u/s 148 has been issued on 28.03.2008. Thus it is clear that the notice was issued beyond four years from the end of the relevant assessment year. The appellant has claimed that the original assessment was completed after obtaining all the details required for the purpose of assessment. It is seen that the AO has reopened the assessment to disallow the excess claim made by the appellant in respect of MODVAT Credit. The appellant has stated*

that the details of MODVAT credit was given in Annexure 1(A) of the Tax Audit Report. Further, the appellant itself has disallowed the amount in computing the total income for the year. Therefore, the ld. AR has stated that the addition made by the AO actual tantamount to duplication of disallowance. Regarding the reopening the appellant has relied on the decision in the case of CIT V. Cholamandalam Investment and Finance Company 309 ITR 110; CIT V. Tamilnadu Transport Development Finance Corporation Limited 306 ITR 136 and CIT V. Kelvinator of India Ltd. 320 ITR 561(SC). He has also given the decision of the ITAT, Mumbai dated 29.03.2010. After perusing the details I am of the opinion that the AO could not have reopened the assessment because of the details required for the assessment were available on record at the time of passing the original order u/s 143(3). The details of MODVAT working for the purpose of s.145A was provided by the appellant in Annexure 1(A) at point No.12(b) of the return of income. Therefore, as the details pertaining to MODVAT were already available to the AO during the assessment proceedings u/s 143(3), the reassessment proceedings have been initiated on mere change of opinion on the same material on record and, therefore, would amount to review of earlier assessment which is not permissible. This view is supported by decision of Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Ltd

(supra) where it was held that AO can reopen the assessment only if there is tangible material to come to the conclusion that there is escapement of income. Reopening cannot be done on change of opinion only. The AO does not have power to review and has power only to reassess. I am of the opinion that the ratio of this decision is applicable to the facts of the case. I also find that the Hon'ble ITAT, Mumbai in the case of Modepro India Private Limited (supra) has allowed the appeal of the appellant under similar facts. In the above case the AO completed the assessment u/s 143(3). Subsequently, on the perusal of records the AO noticed that the assessee had failed to include Modvat credit in its closing stock in contravention of the provisions of section 145A. The AO issued notice u/s 148 after the expiry of four years from the end of the relevant assessment year and completed assessment after making addition on account of Modvat credit. The CIT(A) directed the AO to verify the facts and make addition if there is difference in the figure. The ITAT, under the above circumstances, held that there was no failure on the part of the assessee to disclose fully and truly all material facts qua the Modvat credit as the same was part of Tax Audit Report annexed to the Balance sheet filed along with the return of income. The notice being beyond the period of four year was obviously time barred. The assessment flowing out of such time barred notice

cannot stand and was therefore quashed. In view of the above precedents and the facts of the case, it is held that the reopening is not valid and hence the ground is allowed."

4. On the issue of disallowance of MODVAT credit on opening stock, the Commissioner of Income Tax (Appeals) held that it has become academic in nature, as he found that the reopening of assessment by the Assessing Officer was not valid.

5. Aggrieved by the said order of the Commissioner of Income Tax (Appeals), the Revenue pursued the matter before the Income Tax Appellate Tribunal. The Tribunal, after hearing both sides, concurred with the view of the Commissioner of Income Tax (Appeals), thereby, dismissed the appeal holding as follows:

"11. We have heard both the sides and considered the material on record and find that the return of income for the year under consideration was filed on 29.10.2001, which was first processed under section 143(1) on 02.01.2003 and subsequently assessment was framed under section 143(3) on 31.03.2004, whereas, notice under section 148 was issued on 28.03.2008, which period is beyond four years from the end of assessment year and no fresh material or evidence is found to have come in the possession of the Assessing Officer when

reopening was done to disallow the excess claim made by the assessee in respect of MODVAT credit and the assessee has stated that the details of MODVAT credit are given in Annexure 1(a) of the tax audit report. Further, the assessee itself is stated to have disallowed the amount in computing the total income for the year and further disallowance of the same amount in computing the total income for the year and further disallowance of the same amount, amounted to duplication of the disallowance and otherwise, all the details required for the assessment were available on record at the time of passing of the original order under section 143(3). when details of MODVAT working for the purpose of section 145A was provided by the assessee in Annexure 1(A) at point No.12(b) of the return of income. So, the reassessment proceeding initiated in the absence of any fresh material or evidence coming into the possession of the Assessing Officer has rightly been held to be mere change of opinion on the same material already on record as held by the Hon'ble Jurisdictional High Court in the case of CIT v. Cholamandalam Investment and Finance Company Limited (supra). Therefore, in view of the facts, circumstances and material on record, we hold that the issue is squarely covered in favour of the assessee and the ld. CIT(A) has exactly did the same thing to treat the reassessment to be not valid in law. Therefore, while, upholding the order of the ld. CIT(A), we dismiss the appeal of the Revenue being devoid of any merits."

6. Aggrieved by the said order of the Tribunal, the Revenue is before this Court.

7. Mr.T.Ravikumar, learned Standing Counsel appearing for the Revenue tried to distinguish the decision of this Court in the case of ***CIT v. Cholamandalam Investment and Finance Company Limited*** reported in ***309 ITR 110*** by placing reliance on the decision of the Bombay High Court in the case of ***Dr.Amin's Pathology Laboratory V. P.N.Prasad, Joint Commissioner of Income Tax and others (No.1)*** reported in ***[2001] 252 ITR 673***. He laid emphasis on this decision to state that the mere production of balance sheet and profit and loss account will not amount to disclosure within the meaning of first proviso to Section 147 of the Income Tax Act. He submitted that Explanation 1 and 2(c)(i) and (iii) to Section 147 of the Income Tax Act would get attracted to the facts of the case and hence, the Assessing Officer is correct in initiating re-assessment proceedings.

8. Heard Mr.T.Ravikumar, learned Standing Counsel appearing for the Revenue at length and perused the materials placed before this Court.

9. Before going into the merits of the case, for better appreciation, we first consider the scope of Section 147 and the first proviso. The said provision reads as follows:

> "***Income escaping assessment.***
>
> ***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, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in 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.***
>
> *Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has*

escaped assessment.

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 under assessed ; 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.

(emphasis supplied)

10. A plain reading of the above provision reveals that if the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment, in exercise of his power under Section 147 of the Income Tax Act, he may pursue the matter in accordance with the said provision by issuing notice to the assessee within a period of four years. Admittedly, in the present case, the proceedings initiated is beyond the period of four years from the end of the relevant assessment year. It is not the case of the Department that the assessee has failed to file a return under Section 139 or failed to respond to the notice issued under Section 142 or Section 148 of the Income Tax Act . The only other issue is whether there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year.

11. Before the Commissioner of Income Tax (Appeals), the assessee had argued and filed written submissions, which were extracted in the order of the Commissioner of Income Tax (Appeals). For better clarity, we extract the same hereunder:

"a. The assessment was reopened after a lapse of four years from the end of the assessment year vide notice u/s 148 of the Act, dated 28th March, 2008. The appellant humbly submits that the initial assessment by the learned AO was completed after obtaining all details required for the purpose of assessment. Hence, the assessment cannot be reopened.

b. In this regard, the appellant relates to the decision of jurisdictional High Court in the case of CIT v. Cholamandalam Investment and Finance Company Limited 209 ITR 110 and case of CIT v. Tamil Nadu Transport Development Finance Corporation Limited 306 ITR 136.

c. The assessment having been completed under scrutiny u/s 143(3), any further reopening would amount to only a change of opinon.

d. Details with respect to MODVAT working was specifically given in Annexure 1(A) to the Tax Audit report, which is intended exclusively for the purpose of scrutiny and assessment proceedings.

e. The Supreme Court of India in the case of CIT v. Kelvinator of India Ltd. Civil -2010-TIOL-06-SC-IT-LB held that it was not open to the assessing officer to review his own decision as the learned Assessing Officer has not demonstrated any fresh material that has been received after completion of assessment."

12. Having furnished the details of the working of the MODVAT Credit in Annexure 1(A) to the Tax Audit Report, which is a mandate as per the provisions of the Act and the Assessing Officer has considered the said issue in the order passed under Section 143(3) of the Income Tax Act, the Commissioner of Income Tax (Appeals) has given a clear finding that the details of MODVAT credit working were considered by the Assessing Officer during the assessment proceedings under Section 143(3) and the re-assessment is initiated on a mere change of opinion on the same material on record. Such being the case, the issue is whether there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The answer is a clear 'no'. The Department, at the threshold, has to cross the first proviso to Section 147 of the Income Tax Act before proceeding further to reopen the assessment on the ground of income escaping assessment.

13. For the purpose of assumption of jurisdiction under Section 147 of the Income Tax Act, the Officer must have reason based on materials that there has been an income escaping assessment, which warranted assumption of jurisdiction under Section 147 of the Income Tax Act. A perusal of the assessment order shows that the Assessing

Officer had not mentioned that there are materials for escapement of income. The Assessing Officer also did not record any reason that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

14. We find from the order of the Commissioner of Income Tax (Appeals) and the Tribunal and also on facts as has been culled out from the assessment order in question that there is no element of failure to disclose fully and truly all material facts necessary for assessment.

15. The reliance placed by the learned Standing Counsel appearing for the Revenue on Explanation (1) to Section 147 of the Income Tax Act cannot be pressed into service by the Department in the instant case, because the details of such claim has been revealed in the Tax Audit Report and apparently, the same has been considered by the Assessing Officer at the time of passing an order under Section 143(3) of the Income Tax Act. Therefore, Explanation (1) does not get attracted to this case. Explanation (2)(c)(i) and (iii) to Section 147 of the Income Tax Act, which is sought to be invoked in the present case, can arise only in a case where the Department is able to establish that

there is income escaping assessment and the proviso to Section 147 gets attracted. In this case, we find that the finding of the Commissioner of Income Tax (Appeals) and the Tribunal is that the Proviso to Section 147 of the Income Tax Act did not get attracted and it is a case of mere change of opinion of the Assessing Officer.

16. Our view is fortified by the decision of the Full Bench of the Delhi High Court in the case of **Commissioner of Income Tax V. Kelvinator of India Ltd. reported in [2002] 256 ITR 1 (Del),** wherein, the Delhi High Court held as follows:

> "We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been

passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding with out anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

17. The above said decision of the Full Bench of the Delhi High Court was upheld by the Supreme Court in the decision reported in **[2010] 320 ITR 561 (SC) COMMISSIONER OF INCOME-TAX** *v.* **(1) KELVINATOR OF INDIA LTD.,** wherein the Supreme Court held that the concept of "change of opinion" on the part of the Assessing Officer to reopen the assessment did not stand obliterated after the substitution of Section 147 of the Income Tax Act. The Supreme Court also held that the Assessing Officer has power to reopen the assessment, provided there is "tangible material" to come to a conclusion that there was an escapement of income from assessment. For better appreciation, the relevant portion of the said decision reads as follows:

"*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 herein above. 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. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1,29), which reads as follows :

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression ' reason to believe' in section 147.—A number of representations were received against the omission of the words ' reason to believe' from section 147 and their substitution by the ' opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, ' reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression ' has reason to believe' in place of the*

words ' for reasons to be recorded by him in writing, is of the opinion' . Other provisions of the new section 147, however, remain the same."

(emphasis supplied)

18. Similar view has been taken by this Court in the decision reported in **[2009] 309 ITR 110 (Mad) COMMISSIONER OF INCOME-TAX** *v.* **CHOLAMANDALAM INVESTMENT AND FINANCE CO. LTD. ,** wherein it was held as follows:

"In those circumstances, it could not be regarded that the assessee had failed to disclose fully and truly all material facts relevant for the assessment. As the facts revealed that the Assessing Officer who made the original assessment order has called for all the details regarding the case where 100 per cent. depreciation were claimed and the assessee had furnished the invoices for purchase of assets on which 100 per cent. depreciation were claimed, there was no failure on the part of the assessee and if at all there was any failure, according to the Commissioner of Income-tax (Appeals), it was on the part of the Assessing Officer, who made the original assessment without going behind the nature of the transactions accepting the details furnished by the assessee. The Tribunal also extracted that portion of the order and found on the fact that there was no fault on the part of the assessee so as to enable the Department

to reopen the assessment as the proviso to section 147 of the Income-tax Act would squarely apply to the case of the assessee. We find no infirmity in the order passed by the Tribunal. Hence, the appeal is dismissed."

19. In an identical circumstance, a learned single Judge of this Court had considered the issue in the decision reported in **[2000] 241 ITR 672 (Mad) FENNER (INDIA) LTD.** *v.* **DEPUTY COMMISSIONER OF INCOME-TAX**, wherein, it was observed as follows:

" *The pre-condition for the exercise of the power under section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that any income chargeable to tax has escaped assessment for that assessment year. However,when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further pre-condition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142 or section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding*

under section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. The relevant words in the proviso are,

". . . . unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee ... . ."

Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.

Whenever a notice is issued by the Assessing Officer beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons

referred to in the main paragraph of section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the Assessing Officer to record that any one or all the circumstances referred to in the proviso existed before the issue of notice under section 147.

After an assessment has been made, in the normal circumstances, there would be no reason for anyone to doubt that the assessment has been made on the basis of all relevant facts. If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice. As to whether the material facts disclosed by the assessee are full and true is always a question of fact and unless the facts disclosed had been examined in relation to the extent of failure if any on the part of the assessee, it is not possible to form the opinion that there had been a failure on the assessee's part to truly and fully disclose the material facts. A notice issued without a record of the Assessing Officer's reasonable belief that there was such failure on the part of the assessee would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts, and on that ground also the notice issued would be vitiated.

The reasons actually recorded and as set out by the officer in the counter affidavit are such that even after close scrutiny they do not establish even prima facie a failure on the part of the assessee to fully and truly disclose the material facts for the assessment.

.....

The duty of an assessee is limited to fully and truly disclosing all the material facts. The assessee is not required thereafter to prepare a draft assessment order. If the details placed by the assessee before the Assessing Officer were in conformity with the requirements of all applicable laws and known accounting principles, and material details had been exhibited before the Assessing Officer, it is for the Assessing Officer to reach such conclusions as he considered was warranted from such data and any failure on his part to do so cannot be regarded as the assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the Assessing Officer in understanding the details placed before him cannot confer a justification for reopening the assessment, long after the period of four years had expired. On the facts of this case, it is clear that the escapement of income, if any, on this account is not on account of any failure on the assessee's part to disclose the material facts fully and truly. The notice issued by the Assessing Officer in exercise of his power under section 147, therefore, cannot be sustained."

20. In the case of ***ICICI Securities Ltd. V. Assistant Commissioner of Income Tax 3(2), Mumbai***, the Bombay High Court vide order dated 22.08.2006 in W.P.No.1919 of 2006, while dealing with the issue on the reopening of assessment, held as follows:

> "*7. In the facts of the present case, there is nothing new which has come to the notice of the revenue. The accounts had been furnished by the Petitioner when called upon. Thereafter the assessment was completed under section 143(3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record.*
>
> *8. In the circumstances, we allow this petition in terms of prayer (a) and quash and set aside the notice dated 27th March 2006 directing reopening of the assessment for the year 1999-2000."*

21. The above-said view of the Bombay High Court was affirmed by the Supreme Court in Civil Appeal No.5960 of 2012.

22. In the light of the above, we hold that when the Assessing Officer had failed to record anywhere his satisfaction or belief that the income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for assessment, the notice issued under Section 147 of the Income Tax Act beyond the period of four years was wholly without jurisdiction and cannot be sustained.

23. Hence, we have no hesitation in holding that reopening is bad. Accordingly, we uphold the findings of the Tribunal that it is a case of mere change of opinion on the same material already available on record, which has been submitted by the assessee in Annexure 1A of the Tax Audit Report at Point No.12(b) of the return of income.

24. The reliance placed by the learned Standing Counsel appearing for the Revenue on the decision of the Bombay High Court in the case of ***Dr.Amin's Pathology Laboratory V. P.N.Prasad, Joint Commissioner of Income Tax and others (No.1) reported in [2001] 252 ITR 673*** cannot come to the aid of the Department, in view of the decision of the Supreme Court in the case of ***CIT V. Kelvinator of India Ltd.*** **Reported in** ***320 ITR 561(SC)***, which was

rendered subsequently; in any event, on facts, the said decision of the Bombay High Court stands distinguished.

25. In view of our finding that reopening of the assessment itself is bad, it is not necessary to go into the second question. Accordingly, the Tax Case (Appeal) stands dismissed. No costs.

Index: Yes / No (R.S.,J.) (K.B.K.V.,J.)
Internet: Yes / No 02.06.2015

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To

1. The Income Tax Appellate Tribunal, Madras 'A' Bench.

2. The Commissioner of Income Tax (Appeals), Large Taxpayer Unit, Chennai.

3. The Assistant Commissioner of Income Tax, Large Taxpayer Unit, Chennai.

R.SUDHAKAR,J.
AND
K.B.K.VASUKI,J.

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Tax Case (Appeal) No.217 of 2015

02.06.2015