IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2639 OF 2007

GKN Sinter Metals Ltd.
(formerly Mahindra Sintered Products Ltd.) .. Petitioner.
V/s.
Ms. Ramapriya Raghavan
The Assistant Commissioner of Income Tax
Circle 2(1) & Others .. Respondents.

Mr. F. V. Irani with Mr. Jitendra Jain i/b. Mr. A. K. Jasani, for the Petitioner.
Mr. P. C. Chhotrary, for the Respondents.

CORAM: M.S.SANKLECHA, &
G.S. KULKARNI, JJ.
DATE : 6th JANUARY, 2015.

ORAL JUDGMENT (Per M. S. Sanklecha.J.):-

This Petition under Article 226 of the Constitution of India challenges the notice dated 14th March, 2007 issued under Section 148 of the Income Tax Act, 1961 (the Act) by the Assessing Officer, seeking to re-open the assessment for the Assessment Year 2002-03.

2 The Petition was admitted on 18th December, 2007. At the time of admission, the impugned notice dated 14th March, 2007 was stayed.

3 The brief undisputed facts leading to this Petition are as under:-

(a) The Petitioner has three manufacturing units – one located at Pimpri and two at Ahmednagar. At all times relevant to this Petition, two manufacturing units of the Petitioner were located at Ahmednagar were entitled to the benefit of tax under Section 80IA/ 80IB of the Act as they were situated in a backward region;

(b) On 30th October, 2002, the Petitioner filed its Return of Income for the Assessment Year 2002-03, declaring total income of Rs.6.89 Crores. In its Return of Income, the Petitioner claimed deduction under Section 80IA/80IB of the Act in respect of two manufacturing units situated at Ahmednagar aggregating to Rs.2.86 Crores;

(c) Along with its Return of Income, the Petitioner had filed two Auditor Certificates both dated 26th October, 2002 in respect of its two manufacturing units situated at Ahmednagar, claiming the benefit of Section 80IA/IB of the Act. The Auditor's certificate was given in terms of Section 80IA(8) of Act as then existing for claiming the deduction. Along with the Auditor's report, the Petitioner had also filed a note indicating the manner in which it had worked out its claim for deduction under Section 80IA of the Act. The note indicated that the expenses were allocated between the three manufacturing units on its turnover, actual basis and time spent depending upon the nature of expenses ;

(d) During the regular assessment proceedings, the Assessing Officer by a communication dated 27th December, 2004 inter alia sought the following information/ clarification in respect of the working of its claim for deduction under Section 80IA/IB of the Act:

....

"13 From the working of deduction u/s. 80IA in respect of Ahmednagar unit, it is soon the profit of this unit includes interest of Rs.17.14 lakhs. As interest not derived from such business of the undertaking, please explain why same should not be excluded for the profit of Industrial Undertaking.

14 File the Profit and Loss Account of each unit giving the details of expenditure actually incurred and also the common expenditure allocated against and also give the basis for allocating the expenditure.
15 Details of Power and Fuel unit wise.
16 Please submit depreciation chart as per unit wise.
17 Details of inventories unit wise.
18 Details of stores consume unit wise.
19 Details of consumption of tools/materials etc. unit wise."

(e) The Petitioner by its letter dated 25th January, 2005 responded to the queries raised by the communication dated 27th December,2004. In its response dated 25th January, 2005 the Petitioner in particular gave details of the manner in which the expenses had been allocated amongst the three manufacturing units i.e. two in the backward region and one at Pimpri;

(f) On 9th March, 2005, the Assessing Officer passed an order for Assessment Year 2002-03 in regular assessment proceedings under Section 143(3) of the Act. The income was determined at Rs.7.13 Crores while accepting the Petitioner's claim for deduction under Section 80IA/IB of the Act of Rs.2.08 Crores in the order dated 9th March, 2005;

(g) On 14th March, 2007, the impugned notice under Section 148 of the Act was issued by the Assessing Officer, seeking to re-open the

assessment for the Assessment Year 2002-03. The relevant portion of the letter dated 6th August, 2007 containing the reasons recorded in support of the impugned notice dated 14th March, 2007 reads as under:

"2 Assessment in your case for A. Y. 2002-03 was originally completed u/s. 143(3) on 09.03.2005 at an income of Rs.7,13,08,960/-. In theh said assessment, the Assessing Officer had asked you to furnish details in support of your claim of exemption u/s. 80IA. You had furnished expenses as per which it has been observed that there is a dis-appropriate allocation of expenses between the various units eligible and those not eligible for deduction u/s. 80IA in view of the above, the Assessing Officer has re-opened your proceedings u/s. 148, the reasons for which are being provided to you as under:

" The assesssee in this case filed Return of Income on 30/10/2002 declaring income of Rs.6,89,93,550/. The assessment was completed u/s. 143(3) on 09/03/2005, assessing the income at Rs.7,13,08,960/-.

The assessee company is engaged in the business of manufacturing and sale of sintered automotive parts, sintered bearings and parts, fittings and mental powders.

The assessee is claiming deduction u/s. 80IA for its unit located at Ahmednagar for manufacturing (i) Bearing and Parts (year of commencement 1994-95) & (ii) Metal Powder (year of commencement 1992-93).

The comparative figures for the turnover and profit in respect of the assessee's 80 IA units and non 80IA units is as per Annexure 'A' enclosed herewith.

Prima facie it appears that while preparing the accounts, the assesee has claimed most of its expenditure in the units which are not eligible for 80IA deduction, thereby inflating the profits of the units which are eligible for deduction. To highlight this fact, the following expenses are compared:

S. No.	*Expenses Head*	*Total Amt.*	*Allotted % to Bearing Unit*	*Allotted % to Powder Unit*	*% allotted to other units*
1	*Misc. Expenses*	*2.57 Cr.*	*24.50%*	*5.22%*	*70.28%*
2	*Employee Cost*	*12.36 Cr.*	*15.25%*	*3.68%*	*81.07%*
3	*Stores Consumed*	*2.75 Cr.*	*49.78%*	*7.01%*	*43.21%*

If the above expenses are re-allotted correctly in ratio of the respective turnover, then the assessee's claim of deduction u/s. 80IA will decrease and correspondingly the profits of non 80IA units would be increased as under:

1	*Ratio of turnover of non 80IA unit to Total turnover*	=	*49.83%*
2	*Misc. Expenses allotted to non 80IA Unit*	=	*70.28% of Rs.2,57,16,581/-*
		=	*Rs.1,80,73,613/-*
3	*Misc. Expenses allocable in ratio of Turnover*	=	*49.83% Rs.2,57,16,581/-*
		=	*Rs.1,28,14,572/-*
4	*Excess Misc. Expenses allotted to non 80IA unit (2 – 3)*	=	*Rs.52,59,040/-*

The profits of 80IA unit needs to be reduced by Rs.52,59,040/- and accordingly corresponding 80IA deduction @ 30% i.e. Rs.15,77,712/- needs to be reduced.

In view of the above facts, I have reason to believe that the assessee's income has been escaped assessment and accordingly request for permission u/s. 151(1) to issue notice u/s. 148 in this case."

(h) On 3rd September, 2007, Petitioner's filed its objections to the reasons recorded by the Assessing Officer in support of the impugned notice dated 14th March, 2007. In its objections, the Petitioner contested the impugned notice essentially on the ground that the same is issued on change of opinion. It was pointed out that during the regular assessment proceedings under Section 143(3) of the Act, the Assessing Officer had formed an opinion that the allocation of expenses between the three units was proper. This on the basis of not only the complete disclosure of the allocation of expenses but also in view of specific enquiry into the same by the Assessing Officer during regular assessment proceedings before accepting the same. Thus, it was submitted that there is no reason to believe on the part of the Assessing Officer to acquire jurisdiction to issue the impugned notice dated 14th November, 2007; and

(i) The Assessing Officer by an order dated 14th November, 2007 rejected the Petitioner's objections to the reasons recorded. This inter alia, on the ground that income had escaped the assessment and post the amendment to Section 147 of the Act w.e.f. 1st April,1989, the power of Assessing Officer to issue notice under Section 148 of the Act is much wider then that existing under the earlier provisions.

SUBMISSIONS:-

4 Mr. Irani, learned Counsel in support of the Petition submits as under:-

(a) The sine-qua-non for the issue of a notice to re-open the assessment even within the period of four years from the end of the relevant assessment year would be a reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped assessment. However, in the present case as the Assessing Officer had occasion to form an opinion on the very issue of allocation of expenditure during the regular assessment proceedings, the issue of impugned notice on the same facts being a change of opinion would not satisfy the test of reasons to believe on the part of the Assessing Officer;

(b) The impugned order dated 14th November, 2007 not dealing with the Petitioner's objection that the notice has been issued on account of mere change of opinion, is an implicit acceptance of the Petitioner's objection;

(c) In any event, the letter dated 6th August, 2007 by which the reasons recorded were furnished to the Petitioner itself indicates that during the regular assessment proceedings, specific questions were raised by the Assessing Officer with regard to the Petitioner's claim for deduction under Section 80IA/80IB of the Act and consequent to the explanation of the Petitioner, the same was accepted in regular assessment proceedings. It is on observations of those very facts that now an opinion is formed, that the allocation of expenditure among the three manufacturing units is dis-proportionate. Thus, the impugned notice is clearly based on change of opinion; and

(d) In any view of the matter, there is no universal method of allocation of expenditure between the distinct manufacturing units run by any assessee like the Petitioner. This allocation of expenditure could be done by adopting various methods and the Petitioner itself had adopted different methods of allocation depending upon the nature of expenditure incurred amongst the three manufacturing units. This basis was found acceptable in regular assessment proceedings under Section 143(3) of the Act.

In view of the above, it is submitted that the impugned notice is without jurisdiction.

5 Opposing the Petition, Mr. Chhotrary, learned Counsel appearing for the Revenue submits as under:-

(a) The Petitioner in its objections to the reasons recorded in support of the impugned notice dated 14th March, 2007 have not disputed the dis-proportionate allocation of expenses to its Pimpri unit (non 80IA/80IB unit) resulting in escapement of income. Thus, the escapement of Income having been accepted by the Petitioner, re-opening notice cannot be found fault with;

(b) In the present case, the issue of the impugned notice is not on the basis of any change of opinion but on the basis of tangible material namely – communication dated 15th January, 2007 received by the Assessing Officer from an Additional Commissioner of Income Tax who assessed the Petitioner to tax for Assessment Year 2004-05 indicating that the allocation of expenditure amongst thethree manufacturing units was dis-proportionate having

regard to its turn over, resulting in excessive allocation of expenditure to non-80IA/IB unit. It is settled position of law that the material obtained during the subsequent assessment proceedings would be a tangible material for the purpose of invoking a provisions of Section 147/148 of the Act for re-opening the assessment;

(c) Without prejudice to the above, it is submitted that in any view the Assessing Officer had formed no opinion in respect of the allocation of expenditure amongst the three manufacturing units while passing the Assessment Order on 9th March, 2005 under Section 143(3) of the Act. This is evident from the fact that no reference to the same is found in the Assessment Order dated 9th March, 2005. Moreover, the queries raised by letter dated 27th December, 2004 by the Assessing Officer were of a general nature and the response being voluminous, it did not indicate any application of mind by the Assessing Officer for forming an opinion in regular Assessment Proceedings; and

(d) At this stage, when, only a notice for re-opening has been issued, this Court should not interfere. At this stage, it is only a prima facie view and the Petitioner would during the regular assessment proceedings have sufficient opportunity to satisfy the authorities about the appropriates/ corrections of the allocation of expenditure amongst its three manufacturing units.

In view of the above, it is submitted that no interference with the impugned notice is warranted.

6 The law on re-opening of an assessment under the Act, is fairly settled. An assessment once made, is final. The Assessing Officer can re-open an assessment only in accordance with the express provisions provided in Section 147/148 of the Act. This is for the reason that there is a finality / sanctity attached to an assessment order. It is only on the Assessing Officer strictly satisfying the provisions of Section 147 of the Act, that it acquires jurisdiction to re-open an assessment. Section 147 of the Act, clothes the Assessing Officer with jurisdiction to re-open an assessment on satisfaction of the following:

(a) The Assessing Officer must have reason to believe that

(b) Income chargeable to tax has escaped the assessment and

(c) In cases where the assessment sought to be re-opened is beyond the period of four years from the end of the relevant assessment year, then an additional condition is to be satisfied viz: there must be failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment.

7 Admittedly in this case, the impugned notice has been issued within a period of four years from the end of the relevant assessment year i.e. Assessment Year 2002-03. In such cases, the Assessing Officer would be clothed with jurisdiction to issue a notice for re-opening of an assessment if he has reason to believe that income chargeable to tax has escaped the assessment. The requirement of failure to make true and full disclosure as provided in the proviso to Section 147 of the Act is not to be satisfied for issuing of re-opening notice within the period of four years from the end of the relevant assessment year. Thus, in the absence of cumulative satisfaction of reason to believe and in the absence of any

income chargeable to tax escaping assessment, the Assessing Officer is not empowered with jurisdiction to re-open an assessment.

8 So far as true and correct meaning of the word 'reason to believe' is concerned, the Supreme Court in ***Commissioner of Income Tax v/s. Kelvinator of India Ltd., 320 ITR 561*** has after analyzing Section 147 of the Act explained the meaning of the words 'reason to believe' as:-

> *"* …. ….. ….. ….
>
> *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. Bur reassessment has to be based on fulfillment of certain pre-conditions 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."*

From the aforesaid observations of the Supreme Court, it is clear that the powers to re-open an assessment is not a power to review an order of assessment. Further, a change of opinion on the part of the Assessing Officer in issuing the re-opening notice, from the opinion formed on the very issue during regular assessment proceedings would result in the same ceasing to be a reason to believe.

9 Besides, this Court in cateina of decisions beginning with

Hindustan Lever Limited v/s. R. B. Wadkar 268 ITR 332 has taken a view that a notice for re-opening of an assessment would stand or fall on the basis of the reasons recorded at the time of issuing a notice for re-opening of an assessment. This Court had observed that the reasons are required to be read as recorded by the Assessing Officer and the same cannot be improved upon either by substitution, addition or deletion. In fact, in the above case, the Court observed as:

> *"* …. …. …. ….
> *The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the Court, on the strength of the affidavit or oral submissions."*

Thus, the validity of a notice for re-opening of an assessment is to be examined on the basis of the reasons recorded at the time of issuing the notice for re-opening an assessment. The impugned notice cannot be supported any additional material which does not find a place in the reasons recorded at the time while issuing the notice.

10 Keeping the above settled principles in mind, we shall now examine the rival contentions.

11 In this case, the impugned notice has been issued within a period of four years from the end of the relevant assessment year. In such a case, the Assessing Officer acquires jurisdiction to issue the impugned notice, if he has reason to believe that income chargeable to tax has escaped assessment. Mr. Irani submits that the objections taken by the Petitioner that the impugned notice has been issued on mere change of opinion, has not been dealt with in the order dated 14th November, 2007

which results in the Petitioner's submission of change of opinion, being accepted. It must follow that there is no reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped assessment. This submission is not factually correct. The order dated 14th November, 2007 has in fact, held that there is no change of opinion in issuing the impugned notice although not supported by reasons. Therefore, the contention of the Petitioner that the Petition be allowed only on the above basis cannot be accepted.

12 Similarly, the contention of Revenue that merely because Petitioner had not contested the fact of escapement of income in its objections to the reasons recorded, it must conclusively follow that the impugned notice is valid in law and this Court should not interfere is not acceptable. The Petitioner had in its objections questioned the jurisdiction of the Assessing Officer to issue the impugned notice on the ground that there was no reason to believe on the part of the Assessing Officer this on the basis of the impugned notice is a change of opinion. This is evident from the fact that the opinion on the issue of allocation of expenses for claiming deduction under Section 80IA/IB of the Act was formed during the regular assessment proceedings. As observed above, the jurisdiction to issue a notice is acquired on satisfaction of twin conditions i.e. reason to believe and escapement of income tax in case of assessment being sought be opened within a period of less then four years from the end of Assessment Year. Besides, the issue of escapement of income chargeable to tax is also an issue on merits and may not in particular facts establish ex-facie absence of jurisdiction.

13 In the present facts, the Petitioner had along with its Return

of Income filed its Computation of Income wherein claim for deduction under Section 80IA/IB of the Act was made. Besides the Auditor's certificate as required under Section 80IA(8) of the Act to claim to deduction was also filed along with a note indicating the basis of allocation of expenditure amongst its three manufacturing units was also filed. These were all primary documents which would not normally escape examination during the scrutiny proceedings. This is also evident from the fact that during assessment proceedings, the Assessing Officer had by letter dated 27th December, 2004 called upon the Petitioner to furnish details with regard to its claim for deduction under Section 80IA/IB of the Act including the method/ manner of allocation of expenditure amongst its three manufacturing units. The Petitioner by its letter dated 25th January, 2005 submitted various details of allocation of expenses supporting its note filed along with the Return of Income that the expenditure had been allocated actual basis, turn over basis and time spent basis amongst the three manufacturing units. The aforesaid allocation of expenses on different basis was on the basis of the nature of expenditure. The Assessing Officer was satisfied with the Petitioner's response and consequently in the assessment order dated 9th March, 2005 under Section 143(3) of the Act accepted the Petitioner's claim for deduction under Section 80IA/IB of Rs.2.08 Crores. This establishes that an opinion was formed in respect of allocation of expenses amongst the three manufacturing units for deduction under Section 80IA/IB of the Act while passing an order of assessment on 9th March, 2005.

14 However, Mr. Chhotrary, learned Counsel appearing for the Revenue submits that there has been no formation of opinion on allocation of expenditure amongst the three manufacturing units by the

Assessing Officer as the Assessment Order dated 9th March, 2005 passed under Section 143(3) of the Act contains no discussion on the same. According to the Revenue, it could only be when the assessment order contains discussion with regard to particular claim can it be said that the Assessing Officer had formed an opinion with regard to the claim made by the assessee. This Court in ***Idea Cellular Ltd. v/s. Deputy Commissioner of Income Tax 301 ITR 407*** has expressly negatived on identical contention on behalf of the Revenue. The Court held that once all the material was placed before the Assessing Officer and he chose not to refer to to the deduction/ claim which was being allowed in the assessment order, it could not be contended that the Assessing Officer had not applied his mind while passing the assessment order. Moreover in this case, it is evident from the letter dated 6th August, 2007 addressed by the Assessing Officer to the Petitioner containing the reasons recorded for issuing the impugned notice also record the fact that during the regular assessment proceedings, the Petitioner has been asked to furnish details in support of the claim for exemption under Section 80IA/IB of the Act. The letter further records that the details sought for were furnished and it is now observed that there has been a dis-proportionate distribution of expenses between various units belonging to the Petitioner for claiming deduction under Section 80IA/IB of the Act. This is a further indication of the fact that the Assessing Officer had during the regular assessment proceedings for Assessment Year 2002-03 sought information in respect of the allocation of expenses and the explanation offered by the Petitioner was found to be satisfactory. This is evident from query dated 27th December, 2004 and the Petitioner's response to the same on 25th January, 2005 explaining the manner of distribution of common expenses for delaying

the process of claiming deduction under Section 80IA/IB of the Act. All this would indicate that Assessing Officer had formed an opinion while passing the order dated 9th March, 2005. This Court in ***Aroni Commercials Ltd. v/s. Assistant Commissioner of Income Tax 367 ITR 405*** had occasion to consider somewhat similar submission made by the Revenue and negatived the same by holding that when a query has been raised with regard to a particular issue during the regular assessment proceedings, it must follow that the Assessing Officer had applied his mind and taken a view in the matter as is reflected in the Assessment Order. Besides, the manner in which an Assessing Officer would draft/ frame his order is not within the control of an assessee. Moreover, if every contention raised by the assessee which even if accepted is to be reflected in the assessment order, then as observed by the Gujarat High Court in ***CIT v/s. Nirma Chemicals Ltd. 305 ITR 607,*** the order would result into an epic tome. Besides, it would be impossible for the Assessing Officer to complete all the assessments which have to under gone scrutiny at its hand. In the above view, it is clear that once a query has been raised during the assessment proceedings and the Petitioner has responded to the query to the satisfaction of the Assessing Officer as is evident from the fact that the Assessment Order dated 9th March, 2005 accepts the Petitioner's claim for deduction under Section 80IA/IB of the Act. It must follow that there is due application of mind by the Assessing Officer to the issue raised.

15 Therefore, as there is a change of opinion in issuing the impugned notice having regard to the opinion formed while passing the assessment order under Section 143(3) of the Act, the Assessing Officer would cease to have any reason to believe as held by the Supreme Court

in Kelvinator of India Ltd. (supra). Moreover, the power to re-assess under Section 147/148 of the Act is not a power to review an order of assessment passed under Section 143(3) of the Act.

16 It is further submitted on behalf of the Revenue that so far as letter dated 27th December, 2004 issued by the Assessing Officer is concerned, same was of general nature and particulars furnished by the Petitioner in response to the same are voluminous and, therefore, not indicative of any application of mind on this issue by the Assessing Officer. Reliance was placed upon the decision of this Court in ***Export Credit Guarantee Corporation v/s. Additional CIT 350 ITR 651*** by the Revenue in support of its stand that as the issue of allocation of expenses was ignored/ overlooked while passing an assessment order, then in such case, it is open to an Assessing Officer to exercise its jurisdiction under Section 147/148 of the Act and re-open the assessment. In the above decision, during regular assessment proceedings, no query was made with regard to the issue on which the assessment was sought to be re-opened, and therefore, ex-facie indicative of non application of mind. In the present case, the Assessing Officer had raised queries with regard to the allocation for expenditure between the three manufacturing units of the Petitioner which could only be raised on consideration of the claim and consequently accepted on consideration of the reply. Thus, it is not a case where the Assessing Officer overlooked/ ignored the material and/or the issue which now forms the basis of issuing the impugned notice for re-opening of the assessment order for Assessment Year 2002-03.

17 Further, reliance is also placed by the Revenue upon the decision of the Bombay High Court in ***Sociedade De Formento Industrial***

P. Ltd. v/s. Assistant Commissioner of Income Tax 339 ITR 595 to relegate the Petitioner to the remedies available under the Act. In the above case, this Court refused to exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India and dismissed the Petition, challenging a notice under Section 148 of the Act at the stage of admission. This on the ground that whether or not there was a full and true disclosure, is a debatable issue and consequently, same could be appropriately be examined by the statutory authorities. In the present case, as pointed above, there has been a formation of opinion by the Assessing Officer, as is evident from the queries raised with regard to the allocation of expenses between the three manufacturing units by the Petitioner during the regular assessment proceedings. No debatable issue requiring examination into jurisdictional fact arises in this case. Therefore, above decision also does not assist the Revenue in the present facts. Further, the reliance was also placed by the Revenue upon by the Gujarat High Court's decision in ***Prafful C. Patel v/s. M.J.Makwana– Assistant Commissioner of Income Tax, 236 ITR 832*** to contend that where the Assessing Officer had overlooked something in the order passed in the regular assessment proceedings, there can be no question of any change of opinion. The aforesaid decision is not applicable to the present facts as in this case, queries were raised in respect of the allocation of expenditure during regular assessment proceedings. There was admittedly an application of mind to the facts involved and opinion formed by the Assessing Officer to allow the claim for deduction under Section 80IA/IB of the Act. In the Gujarat High Court's decision in Prafful C. Patel (supra), the observations were made in the context of the Assessing Officer admittedly not having formed an opinion on the issue on which a re-

opening notice for re-assessment was issued. The aforesaid decision is also of no avail to the Revenue.

18 In was next contended by Mr. Chhotrary, learned Counsel appearing for the Revenue that in the present case, the impugned notice does not emante from any change of opinion but on account of communication dated 15th January, 2007 received by the Assessing Officer from Additional Commissioner of Income Tax who had assessed the Petitioner to tax for the Assessment Year 2004-05. The aforesaid communication dated 15th January, 2007 has been annexed to the affidavit in reply dated 11th January, 2008 filed by the Assistant Commissioner of Income Tax. The aforesaid communication dated 15th January, 2007 is not even referred to in the reasons recorded while issuing the impugned notice dated 14th March, 2007. On the contrary, the communication dated 6th August, 2007 which contains the reasons recorded at the time of issuing the impugned notice refers to the details furnished by the Petitioner during the regular assessment proceedings and it is now observed therefrom that the allocation of common expenses between the three manufacturing units belonging to the Petitioner is disproportionate.

19 As pointed out herein above, this Court in series of decision beginning with Hindustan Lever (supra) has taken a view that re-opening notice has to stand or fall on the basis of the reasons recorded at the time of issuing the notice for re-opening. It is not open to the Assessing Officer to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise. The tangible material i.e. letter dated 15th January, 2007 on which the

Revenue relies upon for issuing of the notice, could have undoubtedly been the basis for issuing the impugned notice even if the same has been obtained in assessment proceedings for a subsequent assessment year provided the same was the basis of the impugned notice and so recorded in the reasons in support of the impugned notice.

20 In these circumstances, the reliance by the Revenue upon the letter dated 15th January, 2007 from the Additional Commissioner of Income Tax cannot be read into the reasons recorded while issuing the impugned notice.

21 It was lastly contended by Mr. Chhotrary, learned Counsel appearing for the Revenue that the impugned notice is only for re-assessment for Assessment Year 2002-03. At this stage, the Revenue is not required to establish the case to the hilt, but only required to make out a prima facie case in support of its stand. In support of the above submission, reliance was also placed upon the decision of the Supreme Court in ***Assistant Commissioner v/s. Rajesh Jhaveri 291 ITR 520.*** There can be no dispute to the above proposition. It is submitted that during the course of re-assessment proceedings, the Petitioner would have opportunities to satisfy the authorities that there has been no escapement of income and the allocation of the common expenses between the three manufacturing units for the purposes of claiming deduction under Section 80IA/IB of the Act is in accordance with law. However, issue being examined is whether the Assessing Officer has jurisdiction to issue the re-opening notice. Once an assessment order is being passed, it has some sanctity. If the assessment order is to be disturbed, then the Assessing Officer must strictly satisfy the condition precedent as provided under

Section 147/148 of the Act before he can issue a notice, seeking to re-open an assessment. In this case, as we have pointed out herein above, there has been a change of opinion on the part of the Assessing Officer in issuing a notice and, therefore, he has no reason to believe that income chargeable to tax has escaped assessment. In these circumstances, the jurisdictional requirement for issuing a notice is not satisfied and, therefore, the impugned notice and the consequent order dated 14th November, 2007 disposing of the objections, are not sustainable.

22 For the reasons indicated herein above, we set aside the impugned notice dated 14th March, 2007 issued under Section 148 of the Act. **Petition allowed**. No order as to costs.

(G.S.KULKARNI,J.) **(M.S.SANKLECHA,J.)**