IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.12468 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SUN PHARMACEUTICAL INDUSTRIES LTD. - Petitioner(s)
Versus
DY.COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR, SR. ADV. WITH MRS SWATI SOPARKAR for Petitioner(s) : 1,
MR MR BHATT, SR. ADV WITH MRS MAUNA M BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 31/07/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioner has challenged a notice dated 25.2.2004 issued under section 148 of the Income Tax Act, 1961 ('the Act' for short). By such notice issued by the Assessing Officer, the respondent herein, assessment of the petitioner Company for the assessment year 1997-98 is sought to be reopened.

2. Briefly facts may be noted, at the outset. The petitioner is a company registered under the Companies Act and is regularly assessed to tax under the Act. For the year 1997-98, the petitioner filed its return of income on 28.11.97 declaring total income of Rs.3,93,08,107/- under section 115JA of the Act. The return was taken in scrutiny and the assessment order was passed on 23.3.2000 under section 143(3) of the Act. The Assessing Officer computed total income of the Company at Rs.4,92,57,450/-.

3. Such scrutiny assessment was sought to be reopened by the Assessing Officer for which purpose, the impugned notice came to be issued on 25.2.2004. In the notice, the Assessing Officer called upon the petitioner to file return of income within 30 days from the date of service of notice.

4. At the request of the petitioner, the Assessing Officer supplied the reasons recorded by him for reopening the assessment. We will take note of such reasons in detail later, which can be broadly divided into six separate grounds. At this stage, suffice it to notice that the main plenary ground

taken in such reasons was that the Assessing Officer while scrutinizing the return of income of the assessee for the subsequent years, found that the assessee's claims were not proper. He noted that the assessee had submitted voluminous records along with the return of income which were not required. Various details were confusing which complicated the matter. Those details were supplied with an object to “frustrate quick understanding”. On these plenary grounds, the Assessing Officer noted, in the reasons recorded, six different grounds on which he believed that income chargeable to tax in the case of the assessee had escaped assessment.

5. The petitioner raised several objections to the Assessing Officer's action of reopening the assessment under communication dated 10th May 2004. The assessee contended that notice under section 148 of the Act was without jurisdiction. It was primarily contended that there was no failure on the part of the petitioner to disclose truly and fully all material facts. The petitioner also individually replied to each specific head of the reasons where the Assessing Officer believed that income chargeable to tax had escaped assessment. We will advert to details of such objections at an appropriate stage, later on.

6. The respondent, however, disposed of such objections by order dated 20th August 2004. He gave brief, but separate reasons for dealing with each disputed item on what he believed was the case of income escaping assessment. At that stage, the

petitioner filed the present petition and challenged the notice of reopening.

7. Learned Counsel Shri Soparkar for the petitioner contended that notice under section 148 of the Act was wholly without jurisdiction. The petitioner had made full disclosures in the return of income filed. In absence of any failure on the part of the petitioner to disclose truly and fully all material facts, assessment which was previously framed after scrutiny cannot be reopened beyond the period of four years from the end of relevant assessment year.

8. Counsel submitted that in the reasons recorded also, the Assessing Officer has not shown how income chargeable to tax had escaped assessment which was on account of the assessee failing to disclose truly and fully all material facts.

9. Counsel further submitted that the Assessing Officer at the time of original assessment had carried out detailed scrutiny of various claims put forth by the assessee. Some of the claims were disallowed. Adjustments as found necessary were made. This was thus not a a case where any income chargeable to tax had escaped assessment due to failure on the part of the assessee. Any attempt on the part of the Assessing Officer to reopen such assessment would only be on the basis of a mere change of opinion.

10. Counsel further submitted that upon receipt of the reasons recorded by the Assessing Officer, the

petitioner had raised detailed objections. While dealing with such objections, the Assessing Officer by his order dated 20th August 2004, dropped certain grounds of reopening. He pointed out that certain objections with respect to specific grounds which the petitioner had raised were not refuted by the Assessing Officer in the said order. The Assessing Officer, therefore, should be deemed to have dropped such grounds.

11. Counsel further took us through various documents and made detailed submissions with respect to each separate ground of the reasons recorded by the Assessing Officer. We would advert to such contentions while dealing with each ground separately.

12. In support of his contentions, counsel relied on the following decisions :

12.1 In the case of **Calcutta Discount Co. Ltd. v. Income-Tax Officer,** 41 ITR 191, wherein the Apex Court held that to confer jurisdiction to issue notice for reopening the assessment beyond the period of four years, two conditions are required to be satisfied. First, the Income Tax Officer must have reason to believe that income, profits and gains chargeable to income tax have been under-assessed and second, that he must have also reasons to believe that such under-assessment had occurred by reason of either omission or failure on the part of an asssessee to make a return of his income or omission or failure on the part of an assessee to disclose

fully and truly all material facts necessary for his assessment. It was held that both these conditions are conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue a notice for reopening the assessment beyond the period of four years. In the said decision, it was further held that the responsibility of the assessee is to disclose primary facts and on disclosure of such facts, what further facts should be inferred and what proper legal inferences the authority had to draw are not the concerns of the assessee.

12.2 In the case of **CIT v. Bhanji Lavji**, 79 ITR 582, the Apex Court observed that it is not for the assessee to satisfy the Income Tax Officer that there was no concealment with regard to any question, it was for the Income Tax Officer to establish that the assessee had failed to disclose fully and truly certain facts material to the assessment of income which had escaped assessment.

12.3 In the case of **Gemini Leather Stores v. I.T.O.**, 100 ITR 1, the Apex Court referring to the decision of the Calcutta Discount Company Ltd. (supra), reiterated that once the Assessing Officer had in possession of primary facts, it was for him to make necessary enquiries and draw proper inferences.

12.4 In the case of **Parashuram Pottery Works Co. Ltd. v. ITO,** 106 ITR 1, the Apex Court finding that certain claim which was made at the rate higher than what was legally permissible, assessment with respect

to the same was sought to be reopened beyond the period of four years. In that context, the Apex court quashed the notice holding that there was no omission or failure on the part of the assessee to disclose truly and fully all material facts.

12.5 Counsel also relied on a Division Bench order dated 16.8.2007, passed in Special Civil Application No.9008 of 1997 in the case of **TJ Agro Fertilizers Pvt. Ltd. v. Dy. Commissioner of Income Tax,** wherein this Court quashed the notice for reopening observing that though there was no discussion regarding the specific claim, at the most it may be a case of wrong claim made by the assessee, but relevant material was there before the Assessing Officer to disallow the claim. It was further observed that when material facts were before the Assessing Officer, there was no jurisdiction to issue notice under section 148 of the Act after expiry of four years from the end of the assessment year.

13. On the other hand, learned Senior Counsel Shri Manish Bhatt for the Department opposed the petition contending that the assessee had produced voluminous documents and details which were not necessary and thereby deliberately created confusion. Such complex data which included accounting entries made the task of verifying the validity of various claims difficult. He submitted that mere placing on record certain details would not absolve the assessee from the responsibility of truly and fully disclosing all material facts necessary for

assessment.

14. He submitted that with respect to certain grounds raised in the reasons recorded there was total non-disclosure on the part of the assessee. He reiterated that there was deliberate attempt on the part of the assessee to prevent the Assessing Officer from discerning true facts.

15. In support of his contention, counsel relied upon the following decisions :

15.1 In the case of **Kantamani Venkata Narayana & Sons v. 1st Addl. I.T.**, 63 ELT 638 wherein the Apex Court discussed the aspect of true and full disclosures in the context of the assessee contending that all material in the form of production of books of accounts was before the Assessing Officer.

15.2 In the case of **Indo-Aden Salt Mfg. & Trading Co. Ltd. V. CIT,** 159 ITR 624, wherein the Apex Court rejected the assessee's contention that the Income Tax Officer could have found out the correct position by further probing. The Apex Court observed that this would not exonerate the assessee from the duty to make full disclosure truly.

15.3 In the case of **Phool Chand Bajrang Lal v. I.T.O.,** 203 ITR 456, wherein it was observed that acquiring fresh information specific in nature, reliable in character, relating to concluded assessment which went to expose the falsity of the

statement made by the assessee at the time of original assessment was different from drawing a fresh inference from the same facts and material available with the Assessing Officer at the time of original assessment proceedings. The Apex Court further observed that the belief that income chargeable to tax had escaped assessment is that of the Income Tax Officer and sufficiency of the reasons for forming such a belief is not for the court to judge. However, it is open to the assessee to establish that there in fact existed no belief or that the belief was not a bona fide one or was based on vague, irrelevant and non-specific information.

15.4 In the case of **GVK Gautami Power Ltd v. Asstt. CIT (OSD),** 336 ITR 451, wherein a Division Bench of the Andhra Pradesh High Court had occasion taking of the various judgments on the issue to cull out certain principles applicable to reopening of assessment in general.

15.5 In the case of **Dishman Pharmaceuticals and Chemicals Ltd v. Deputy Commissioner of Income Tax,** 2011 (2) GLH 699, wherein, a Division of this Court had in the context of reopening of assessment beyond a period of four years culled out certain principles emerging from various decisions of the Apex Court.

15.6 In the case of **Honda Seil Power Products Ltd v. Deputy CIT,** 340 ITR 53 (Delhi), a Division Bench of the Delhi High Court observed as under:

> "The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse effect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omissions or failure on the part of the assessee. The later confers jurisdiction to reopen the assessment."

Special Leave Petition against the said decision came to be dismissed by the Apex Court, which order is reported in 340 ITR 64.

16. Having thus heard the learned counsel for the parties, we may proceed to examine the material on record more closely. In the reasons recorded by the Assessing Officer, he had stated as under :

> "I. The scrutiny assessment U/s.143(3) was completed in this case on 22.03.2000. While scrutinizing the return of income for assessment of subsequent years, it is seen that the assessee's claims are not proper. It is seen that the assessee has submitted voluminous details along with the return of income which are not at all required to be filed along with the return of income. What is required is the Tax Audit Report, Profit and Loss Account and Balance Sheet, Other Statutory Reports pertaining to deductions u/s.80HHC and 80IA, Computation of income, Proof of payment of Advance Tax and TDS Certificates. The various details submitted by the assessee are very confusing and complicate the matter pertaining to the assessment. The details filed by the assessee under 456 heads are such as filing of which are necessitated with the object to create confusing in the matte and

frustrate quick understanding. The assessee has furnished the branches details. The statements furnished are not straight forward e.g. Please refer to the profit calculation sheet/statement u/s.80IA (copy enclosed) for a period of April,1996 to March 1997. Though the name of the statement is profit calculation u/s.80-IA, but I do not find anywhere figure of the profit which has been determined for the purpose of 80-IA. Thus the assessee has deliberately presented the facts in such a manner so that it is not understood by the Tax Authority easily. For example, as per the Tax Audit Report, the R&D expenses are as under:-

Capital Expenses	Rs.4,48,34,893/-
Revenue Expenses	Rs. 78,93,309/-
Deferred Revenue Ex.	Rs.1,72,60,819/-
Total	Rs.6,99,89,021/-.

The Schedule 17 of the Annual Account shows R & D expenses of Rs.64.81 lacs whereas in the computation of income the assessee has claimed R & D capital expenses of Rs.4,48,34,893/- and R & D Revenue expenses of Rs.1,72,60,819/-. The Tax Audit Report shows revenue expenditure of Rs.78,93,309/- whereas the details of operational expenses given in schedule 17 of the annual accounts shows R & D expenses at Rs.64.81 lacs. Thus, it is not clear which figure is correct.

II. Details of fixed assets given in the annual accounts and shows addition to P & M of Rs.11.57 crores which is inclusive of capital expenditure on R & D equipments. On this addition, the assessee has claimed depreciation. In addition to that on capital expenditure pertaining to R &D the assessee also claimed deductions u/s.35. Thus there is double deduction not permitted under the Act. This has resulted into improper appreciation of the facts by the Assessing Officer.

III. While completing the assessment u/s.143(3) of the act in the case of Aditya

Medisales Ltd., a sister concern of the Sun Group, it was found that the profit of the Industrial Unit of Silvasa of the assessee has been inflated because the same is exempt u/s.80IA, by giving more interest on overdue bills by Aditya Medisales Ltd. Aditya Medisales Ltd. has been given the task of distributing the formulation drugs produced by the units of Silvasa and Vapi on Sun Pharma Industries Ltd. It pays the interest @ 24% to the latter on the overdue bills which is much more than the prevailing market rate of interest in this line of business which varies from 15% to 18%. By adopting this modus operandi, the Sun Group has reduced the taxable profit of M/s.Aditya Medisales Ltd. and at the same time it has increased the profit of Silvasa Unit because the interest income is directly added to the sales figure, on which the deduction u/s 80IA is available. These facts are not clear from the working of deduction u/s.80IA given by the assessee along with the return of the income. This is not permissible as per the provisions of Section 80IA(10) of the Act and the rate of interest payable to SPIL has to be restricted @ 15% to 18% which will automatically reduce the profits of units entitled for 80IA deduction and consequently the deduction u/s.80IA claimed by the assessee will be reduced.

IV. In the assessment order passed, the A.O. had not added the following amounts.

1. It has been mentioned in the Auditor's Report in 10CCAC form that Rs.3,03,970/- of foreign exchange had not been brought inside India till the statutory time limit available. As per this certificate, the deduction u/s.80HHC should be reduced from Rs.1,11,92,131/- to Rs.1,11,44,567/-. The assessee has brought nothing on record to show that the amount of Rs.3,03,970/- has been brought inside India within the statutory time limit. Hence, the deduction u/s.80HHC has been allowed in excess.

2. The assessee has shown export of Rs.43.17 lacs out of goods produced from the Silvasa

> Unit. This amount has been considered for working out the deduction u/s.80HHC. Again, deduction u/s.80IA has been claimed @100% on this amount. This means that more than 100% deduction has been claimed on the export of Rs.43.17 lacs from the Silvasa Unit, which is not correct as per the provisions of section 80AB.
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> 3. While scrutinizing the assessee's working u/s 115JA vis-a-vis the order of CIT(A), it is seen that the assessee has debited lease equalization amount of Rs.1,77,48,070/- in the Profit and Loss Account. It has not submitted the details regarding the nature of this expense. While calculating the normal business profit, the assessee has added back lease equalization amount of Rs.1,77,48,070/-. However, while calculating the book profit, u/s.115JA, the assessee has not added back this amount. This issue has been decided by the CIT(A) against the assessee for A.Y.2000-01 and A.Y.2001-02. Hence, Rs.1,77,48,070/- is left to be added while computing the book profit u/s.115JA.
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> V. In view of the above, I have reason to believe that the above incomes chargeable to tax have escaped assessments. Hence, notice u/s.148 of the Act is issued."

From such reasons, it can be seen that the foundation of the Assessing Officer to assert that there was failure on the part of the assessee to disclose fully and truly all material facts was that according to the Assessing Officer, the assessee had filed voluminous details along with the return which were not necessary. Such details made the matter confusing and complicated. In fact, such extra details were provided with an object to create confusion and to frustrate quick understanding. In addition to such allegations, there were six different heads under which the Assessing Officer believed that income

chargeable to tax had escaped assessment. We may briefly put them in different compartments.

(1)Claim of R & D expenditure which was bifurcated into capital expenses and revenue expenses. According to the Assessing Officer, the claim did not tally with the Tax Auditors Report.

(2)With respect to R & D expenditure where the Assessing Officer believed that the assessee had made double claim of deductions, once by way of depreciation on the capital expenditure pertained to R & D under section 35 of the Act and for the same amount, once again, depreciation of capital expenditure on R & D by forming the same part of the fixed assets.

(3)Higher deduction under section 80-IA of the Act by collecting interest at the rate of 24% from a sister concern, namely, Aditya Medisales Ltd.

(4)Excess claim of deduction under section 80HHC of the Act to the extent of Rs.3,03,970/- since the assessee had not been able to show that such amount was remitted in foreign exchange within the statutory time limit.

(5)Excess deduction under section 80-IA of the Act with respect to Silvasa unit on which deduction under section 80HHC was also claimed.

(6)With respect to computation under section 115JA

of the Act wherein, the assessee had debited lease equalization amount of Rs.1,77,48,070/- in the Profit and Loss Account.

17. We may deal with each ground separately.

18. Insofar as ground Nos.1 and 2 are concerned, they overlap. We, therefore, discuss them together. In response to such reasons recorded, the petitioner had in connection with these grounds, specifically raised objections and pointed out that all figures tally and that there was no double deduction claimed. It was contended that there was no failure on the part of the assessee to fully and truly disclose all material facts. In particular, with respect to the claim of double deduction of the fixed assets and R & D expenses by way of depreciation and thereafter under section 35 of the Act, it was pointed out that the assessee had claimed deduction under section 35 of the Act towards R & D expenses. On such expenses, no depreciation by way of fixed assets was claimed. In short, the case of the assessee is that there was no double deduction. Along with such objections, the petitioner had produced certain annexures to establish its case of reconciliation of the accounts and of not having claimed any double deductions. With respect to the first ground, the assessee reconciled the accounts in following manner:

“Assessment Year: 1997-1998
Financial Year : 1996-1997

Reconciliation of R & D Revenue expenses as per Annual Report, 3CD and claimed in the Income Tax Return

Sr. No.	Particulars		Rs. In lacs
1	R & D Revenue expenses as per Schedule-17 of the Annual Report		**64.81**
2	R & D Revenue expenses as per III of Form No. 3CD- Debited to P & L A/c : Break up:	[A]+[B]+[C]	251.54
[A] Accd	Nature of Expenses		
3252	Clinical Trials	0.29	
3611	Repairs R & D Building	5.15	
3612	Repairs R & D Equipment	18.97	
3613	Insurance R & D Building	1.82	
3615	Repairs-Furniture & Fixture	2.18	
3616	Repairs Elect. Fittings- R & D	1.66	
3617	Repairs Office Equipment R&D	0.14	
3618	Repairs & Maint-R&D A.C.& Refgretation	0.50	
3621	Material consumption	23.87	
3622	Testing Charges	5.16	
3623	Demurrage Charges (R &D)	0.19	
3625	Purchase of Patents	1.76	
3627	Product Developments Charges	1.08	
3628	Misc. Expenditure for R & D	0.91	

3713	Gas Cylinder Refiling Charges	1.12	**64.81**
[B] Sch. No.	Nature of Expenses		
16 & 17	**Personnel Cost & consultancy Charges**	14.12	**14.12**
[C]	R & D Expenses which were deferred and amortized over a period of 5 years in the books:	172.61	172.61
3	R & D Expenses claimed in Income Tax Return	[a]+[b]	620.96
	[a] Deduction @ 100% on Deferred Revenue expenses as mentioned in above u/s 35(i) of the Income Tax Act, 1961		172.61
	[b] Deduction @ 100% on Capital expenditure U/s. 35(i) of the Income Tax Act, 1961		**448.35**

Assessment Year: 1997-1998
Financial Year : 1996-1997

Reconciliation of Addition to Fixed Assets as per Working of Book Depreciation-[Schedule 5 of Annual Accounts] and as per Income Tax Depreciation workings and as per R & D additions as per Form No. 3CD:		
[1]	Additions to Buildings as per Schedule 5 of Audited Annual Report:	711.15

Less	Addition to R & D building as per Annexure No. III of the Form No. 3CD		302.63
	Balance addition to Building which are considered in working of dep. As per Income Tax Act		408.52
	Break up:		
	[1] Addition to Housing Quarters	40.51	
	[2]Addition to Fac. & Off. Building	280.69	
	[3]Depreciation @ 100% claimed on Additions to P & M at Nagar of Rs. 132.97 lacs which includes additions to ETP building of Rs. 87.32 Lacs	**87.32**	408.52
[2]	Additions to Plant & Machineries as per Schedule 5 of Annual Report:		**1157.65**
Less	Addition to various R & D assets as per Annexure No. III of the form No. 3 LCD		
	Break up:		
	[1] R & D Equipment	136.93	
	[2] R & D Library	2.77	
	[3] R & D Office Equipment	3.31	
	[4] R & D Electrical Fittings	0.42	**143.43**

	Balance addition to Building which are considered in working of depreciation as per income Tax Act		1014.22
	Break up:		
	[1] Addition to P & M-Others	857.06	
	[2]Addition to P & M-Panoli	111.26	
	[3]Depreciation@100% claimed **on Additions to P & M at Nagar of Rs. 132.97 lacs** which includes additions to P & M of Rs. 45.90 Lacs	**45.90**	1014.22
[3]	Additions to Furniture & Fixtures as per Schedule 5 of Annual Report:		40.70
Less	**Addition to R & D Furniture & Fixture** per Annexure No. III of the form No. 3CD		**2.28**
	Difference in additions		0.06
	Balance addition to F & F which are considered in working of depreciation as per Income Tax Act		**38.48**

Having perused such detailed account, we find that the relevant entries have been properly explained and reconciliation has been satisfactorily explained. In particular, with respect to double deduction on R & D expenditure by way of depreciation on fixed assets and deduction under section 35AB of the Act, even the Revenue could not point out how the same amount

has been reflected in two separate claims. In fact, to the extent the R & D expenditure was presented before deduction under section 35AB of the Act, the same was reduced from the fixed assets drawing depreciation. More importantly and significantly, in the order that the Assessing Officer passed disposing of such objections, he did not dispute such reconciliation figures. He in fact stated as under :

> "On a deeper scrutiny of the schedule showing additions to the fixed assets, it is noticed that the depreciation has been claimed on a higher amount. As per Schedule-5 of Annual Accounts, the addition in plant and machinery is Rs.1157.65 lacs. As per 3 CD Report, addition of plant and machinery pertaining to R & D is Rs.143.44 lacs. Hence, the depreciation u/s.32 should have been claimed on addition of plant and machinery worth Rs.1157.65 lacs (-) Rs.143.44 lacs = Rs.1014.21 lacs. However, in the depreciation chart as per Income-tax Act, the depreciation has been wrongly claimed on addition of Rs.1101.29 lacs (Rs.857.06 lacs + Rs.111.26 lacs + Rs.132.97 lacs)."

To our mind, this line of reasoning that the Assessing Officer took in the order disposing of the objections was entirely different from what emerged from the reasons recorded. As already noted, in the reasons recorded, he raised two contentions with respect to certain claims of deduction. Firstly, he contended that certain figures do not match with the Tax Audit Report and, secondly, that with respect to certain expenditure of R & D, double benefits were claimed in the form of depreciation as well as deduction under

section 35AB of the Act. When the assessee objected to such grounds and pointed out in detail that the claims were valid and that there was no double claims made, the Assessing Officer in the order rejecting the objections went on yet different aspect altogether. We are not commenting on the validity of this new angle sought to be brought in by the Assessing officer. Suffice it to note that the notice for reopening must fail or succeed on the basis of the reasons recorded. If a new ground occurs to the Assessing Officer after he recorded the reasons for reopening of assessment and issued notice for such purpose, surely this cannot be a ground to support the notice. Under the circumstances, ground 1 and 2 noted above would not form valid basis for reopening the assessment.

19. Ground No.3 pertaining to excess claim of deduction under section 80IA of the Act can be discussed later on.

20. We presently go to ground No.4 which pertains to non-remission of export sale proceeds. The case of the Assessing Officer was that a sum of Rs.3,03,970/- was not remitted in foreign exchange within the statutory time limit. To such ground, in the objections raised by the petitioner, it was pointed out that there was complete disclosure with respect to such non-remission. The assessee had also sought extension of time for such remission. Such extension application was neither allowed nor rejected. The assessee had therefore claimed

deduction on such basis with full disclosure. The assessee contended that when extension was sought which was pending, the assessee could raise a valid claim. Such objections were disposed of by the Assessing Officer observing as under :

> "2.4 Regarding deduction u/s.80HHC claimed in respect of unrealised exports to the tune of Rs.3,03,970/- it is mentioned that application was made to the CIT for extension of time. In the event of non grant of extension of time, the claim u/s.80HHC should have been revised."

From the above, it can be seen that the assessee had made full disclosure about the claim under section 80HHC of the Act including the the sum of Rs.3,03,970/- towards the export sale proceeds, for which the assessee had also also sought extension. When such material was placed before the Assessing Officer, at the time of original assessment, may be under law, he could have disallowed the same. However, by no stretch of imagination, it can be said that the assessee failed to fully and truly disclose all material facts. In fact, in the original assessment, the Assessing Officer scrutinized the claim of the assessee under section 80HHC of the Act. Even in the order disposing of the objections, the Assessing Officer has nowhere stated that the assessee failed to disclose full facts with respect to such claim. This ground also, therefore, is not valid.

21. Ground No.5 pertains to deduction 80-IA of

the Act in respect of Silvasa unit. The Assessing Officer, noted that the assessee had claimed exemption under section 80HHC of the Act on export of Rs.43.17 lacs. Once again on the same amount, deduction under section 80IA of the Act was also claimed. With respect to this ground, the assessee, in the objections, contended that full particulars were reflected in the return filed. Section 80AB of the Act does not mandate discarding deduction under section 80HHC of the Act while claiming deduction under section 80IA of the Act. The Assessing Officer had examined the claim and reopening of the same, therefore, would only amount to change of opinion. The objections of the petitioner were disposed of by the Assessing officer in the following manner :

> “2.5 The assessee has shown to have exported goods worth Rs.43.17 lacs from 'Silvasa Unit' claims exemption u/s.80IA. While scrutinizing deeply, the assessee's claim u/s.80HHC vis-a-vis unit wise allocation of receipt/expenses, it is noticed that export turnover of the 'Silvasa' Unit (exempt 100% u/s.80IA) is also included in the total export turnover, while calculating deduction u/s.80HHC, thus claiming double deduction u/s.80IA / 80HHC, which is contrary to the provisions of section 80AB and the decisions of Hon'ble Supreme Court in the case of Escorts Ltd v. Union of India – 199 ITR 43 and the case of M/s.IPCA Laboratories Ltd. v. DCIT, Mumbai 266 ITR 521(SC). These facts could not be readily discovered by the A.O. from the records submitted by the assessee along with the return of income and details filed during the course of assessment.”

From the above, it can be seen that full facts with respect to claim of deduction under section 80IA of

the Act were presented before the Assessing Officer. Neither in the reasons recorded nor in the order disposing of the objections, the Assessing Officer asserted that there was any failure on the part of the assessee to disclose truly and fully all material facts. He only, in the order disposing of the objections observed that these facts could not be readily discovered by the Assessing Officer from record submitted by the assessee along with the return of income. We are of the opinion that this is not sufficient to establish that the income chargeable to tax had escaped assessment due to failure on the part of the assessee to truly and fully disclose all material facts. Claim under section 80IA of the Act for Silvasa unit was presented before the Assessing Officer. Necessary details and documents in support of such claim available. Merely because the Assessing Officer did not disallow this claim for some reason or the other would not be a ground to permit reopening of such alleged under-assessed income beyond the period of four years.

22. Insofar as ground No.6 is concerned, the petitioner has given detailed reasons why, according to the petitioner the assessee had debited lease equalization amount in the profit loss and account. The assessee had also before us canvassed that such issue is covered by a decision of the Madras High Court in the case of **TVS Finance and Services Ltd v. Joint Commissioner of Income Tax,** 318 ITR 435 (Mad). Counsel for the Revenue, however, submitted that such issue has not achieved finality. The Revenue has not

accepted the judgment of the Madras High Court and the same has been challenged by filing Special Leave Petition before the Supreme Court and leave to appeal has been granted.

23. The prime contention of the assessee on this issue was that full details of lease equalization charge was on record. This was clearly mentioned in the annual accounts in Schedule 12 and the Assessing Officer made no disallowance on this ground. In the order of the Assessing Officer disposing of such objections, he mainly stated that the Assessing Officer had not examined this issue at all while framing assessment under section 143(3) of the Act. This can hardly be a ground for permitting reopening of a closed assessment, that too beyond a period of four years. The Assessing Officer did, however, state that there was nothing on record to show what was the nature of expenditure booked under lease equalization charge. However, there was no further elaboration on this aspect. Neither in the reasons recorded nor even in the order disposing of the objections of the petitioner, the Assessing Officer has been able to demonstrate that the assessee had failed to disclose truly and fully all material facts. On this ground, reopening of assessment would not be permissible.

24. We may now refer to ground No.3. In this respect, the stand of the Assessing Officer is that the assessee had sold certain goods to its sister concern Aditya Medisales during the year under

consideration. On delayed payments of such goods, Aditya Medisales paid interest at the rate of 24% which was much higher than the prevailing market rate of interest which varies between 15% to 18%. By adopting such modality, the assessee had reduced the taxable profit of Aditya Medisales and at the same time increased the profit of Silvasa unit of the assessee company which was eligible for deduction under section 80-IA of the Act. These facts were not clear from the working out of deductions under section 80IA of the Act along with the return of income. According to the Assessing Officer, case of the petitioner would be covered under section 80IA(10) of the Act. Therefore, interest payable to the petitioner company should be restricted to 15% to 18% which would reduce the profit of the said unit and resultantly deduction under section 80IA of the Act would also be reduced.

25. In the objections raised, the petitioner contended that details of interest charged on overdue sale proceeds were on record. In the original assessment, the assessee had dealt with such interest for the purpose of computation of deduction under section 80HHC of the Act. Thus there was no non-disclosure on the part of the assessee. It was further contended that interest was not on higher side looking to the fact that the debt was unsecured and the Company was exposing itself to higher risk. It was lastly contended that even if the interest was charged at a higher rate, the resultant income earned by the assessee was offered to tax.

26. Such objections of the petitioner were disposed of by the Assessing Officer in following manner :

> "2.3 Regarding the claim of higher deduction u/s.80IA by recovering higher interest from M/s.Aditya Medisales Ltd., it is stated that all the details are on record and there is no non-disclosure on this account. However, this is not correct. M/s.Aditya Medisales Ltd., a group concern, had paid interest @24% on the overdue bills, which is much more than the prevailing market rate of interest in in this line of business which varies from 15% to 18%. By adopting this modus operandi, the taxable profits of M/s.Aditya Medisales Ltd. on the one hand has been reduced and the profits of 'Silvasa Unit' of M/s.Sun Pharmaceuticals Industries Ltd. has been inflated which is exempt u/s.80-IA. This is a clear cut violation of section 80-IA(10) of the Act. The fact that M/s.Aditya Medisales Ltd. had paid interest @24% on over due bills is not available from the record of M/s.Sun Pharmaceuticals Industries Ltd. The interest component has been merged in the figure of sales of the Silvasa Units making it difficult for the A.O. to discover this modus operandi. This fact could be detected while verifying/examining the records for Assessment Year 2001-02 of M/s.Aditya Medisales Ltd. This issue is discussed in detail in the Assessment Order u/s.143(3) in the case of M/s.Aditya Medisales Ltd."

It is not in dispute that Aditya Medisales is the sister concern of the petitioner Company. It is also not in dispute that on the delayed payments of sales proceeds, Aditya Medisales paid interest at the rate of 24% to the petitioner Company. Section 80IA of the Act, as is well known, pertains to deduction in

respect of profits and gains from industrial undertakings engaged in infrastructural development. Section 80-IA(10) reads as under:

> "(10) Where it appears to the Assessing Officer, that owning to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer, shall in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived therefrom."

Under section 80IA(10) of the Act, thus, if it appears to the Assessing Officer that owing to the close connection between the assessee carrying on the business eligible for deduction under such section, and any other person or for any other reason, the course of business between them is so arranged that the business transacted produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall in computing the profits and gains of such eligible business for deduction, take the amount of profits as may be reasonably deemed to have been derived therefrom. Under the circumstances, if it is found that the assessee had charged higher rate of interest from the sister concern and thereby, arranged its business in such a way that the eligible

profit for deduction under section 80IA of the Act was exaggerated, it was within the power of the Assessing Officer while computing the deduction to take amount of profit as may be reasonably deemed to have derived from such dealing. In exercise of such powers, therefore, when the Assessing Officer finds that there is exaggeration of income by an assessee, which is eligible for deduction 80IA of the Act dealing with closely associated entity, he would make necessary adjustments in this regard.

27. Thus, it cannot be said that belief of the Assessing Officer that income chargeable to tax had escaped assessment is baseless. As noted, at this stage, it is not necessary for this Court to ascertain whether such addition would ultimately succeed or not. Sufficiency of the reason on which the Assessing Officer forms such belief is also not for the Court to decide.

28. In the case of **Sri Krishna Pvt. Ltd. v. I.T.O.**, 221 ITR 538, the Apex Court reiterated the ratio laid down in the case of **Phool Chand Bajrang Lal** and observed that inquiry at the stage of finding out whether the reassessment notice is valid is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. Since the belief is that the Income Tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge.

29. In the case of **I.T.O. v. Selected Dalurband Coal Co. P. Ltd.,** 217 ITR 597, the Apex Court held that the formation of belief by the Income Tax Officer is essentially within his subjective satisfaction. At the stage of issue of notice, the only question is whether there was relevant material on which the reasonable person could have formed the requisite belief.

30. In the case of **Raymond Woollen Mills Ltd. v. ITO,** 236 ITR 34, the Apex Court observed that "in this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case".

31. In the case of **Asstt. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd.,** 291 ITR 500 (SC), the Apex Court observed as under :

> "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 Delhi High 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. Pvt. Ltd. [1996 (217) ITR 597 (SC)]; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)]."

32. In the case of Phool Chand Bajrang Lal (supra), the Apex Court observed as under :

> "From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen assessment under S. 147(a) read with S. 148 of the Income-tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income-tax has

> escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

33. In view of the above settled legal position, at this stage, we do not find that the reasons recorded lack validity. The above observations of various decisions noted would also be relevant when we examine whether such escapement of income was due to failure on the part of the assessee in truly and fully disclosing all material facts. In this respect, the assessee had disclosed that it had received interest of Rs.3,03,48,973/-. It is an admitted position that in the return filed, the assessee did not indicate whether the entire interest or part thereof was received from Aditya Medisales. Further, there is no indication that from Aditya Medisales, which was a sister concern, the assessee had received

interest at the rate of 24% on the outstanding amounts. Counsel for the petitioner, however, submitted that in the tax audit report, the petitioner had disclosed that the petitioner company and Aditya Medisales are closely associated. In our opinion, this would not be a sufficient disclosure. From the facts on record, it was not possible for the Assessing Officer to ascertain that the petitioner received interest from Aditya Medisales which was higher than the normal rate of interest. Three essential facts, namely, that the petitioner received interest on overdue payments from Aditya Medisales, that Aditya Medisales was a sister concern of the petitioner Company and that such interest was charged at the rate of 24% per annum, were not discernible from the record at all.

34. Under the circumstances, from the material on record, it was not possible for the Assessing Officer to make adjustment under section 80IA(10) even if it was required. It may be that the petitioner did give the total figure of interest received. However, from such figures, it was not possible for the Assessing Officer to ascertain these vital facts. Section 147 of the Act, explanation 1 provides that “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 foregoing proviso”. In the present case, even from the account books and other evidence which the assessee had produced,

even after due diligence, it was not possible for the Assessing Officer to discover these three vital facts.

35. In the case of **Sri Krishna Pvt. Ltd.** (supra), the Apex Court observed that obligation of the assessee is to disclose all material facts necessary for his assessment for that year fully and truly. It was further observed that the idea is to save the assessee from harassment resulting from mechanical reopening of reassessment. This protection avails only to those assessees who disclose all material facts truly and fully.

36. In the case of Phool Chand Bajrang Lal (supra), the Apex Court held as under:

> "Where the transaction itself, on the basis of subsequent information was found to be a bogus transaction, mere disclosure of that transaction at the time of original proceedings could not be said to be a disclosure of true and full facts and officer would have jurisdiction to reopen the concluded assessment in such a case."

37. In the present case, as already noted, the only disclosure was that the assessee had earned interest income of Rs.3,03,48,973/-. There was no further information available on record that such interest included overdue payment charges at the rate of 24% received from the sister concern, viz. Aditya Medisales. Even without the aid of explanation (1) to proviso to section 147, therefore, it was perhaps open for the Assessing Officer to contend that there was no true and full disclosure on the part of the

assessee in this respect. At any rate, by applying such explanation, it can be easily gathered that the assessee failed to disclose fully and truly all material facts. Counsel for the petitioner, however, vehemently contended that these were not primary facts. Only primary fact was that the assessee had earned interest income. We are, however, of the opinion that in the context of the close connection between the petitioner and Aditya Medisales, the fact that the assessee was eligible for deduction under section 80IA of the Act and the interest income received from the sister concern had relevance to the provisions of section 80IA(10) of the Act, primary facts were not on record.

38. Under the circumstances, in so far as ground No.3 is concerned, we find that the same cannot be stated to be invalid.

39. In the result, the petition is dismissed. Rule is discharged with no order as to costs. Interim relief is vacated.

(Akil Kureshi, J.)

(Harsha Devani,J.)

(vjn)