Delhi High Court Jindal Photo Films Ltd. vs The Deputy Commissioner Of ... on 28 May, 1998 Equivalent citations: 1998 IIIAD Delhi 888, 73 (1998) DLT 823, 1998 (46) DRJ 201, 1998 234 ITR 170 Delhi Author: R Lahoti Bench: R Lahoti, M Mudgal JUDGMENT R.C. Lahoti, J. 1. This common order shall govern the disposal of three writ petitions between the same parties and arising out of a common set of facts and events. 2. The petitioner is a public limited company engaged in the business of manufacturing of photo sensitive film and is a regular income tax Assesses since long. It commenced several industrial units, one of which is located at an industrially backward area of Bhimtal in Nainital District of the State of U.P. The unit was engaged in manufacturing of colour roll films. 2.1 Prior to the assessment year 1991-92 the asessee had claimed invest-ment allowance under Section 32A of the Income-tax Act, 1961 on the machines installed for production of colour film rolls for the period relevant to the assessment year 1990-91. This claim of the petitioner was disallowed by the assessing officer on the ground that manufacture of colour film rolls was not entitled to investment allowance because such an article was included in the prohibited list mentioned in the leventh Schedule of the Income-tax Act, 1961. In the said list, at Sl No. 10 the articles mentioned are : "photographic apparatus and goods". The cinematographic films were also included in this list at Sl No.9. Vide Finance Act, 1988, the Government decided to withdraw cinematographic films from this Schedule because these films were used for manufacturing educational and tourism documentaries. However, photographic apparatus and goods which included photographic films were not excluded and remained in this list. Hence the assessing officer disallowed the claim of the petitioner on investment allowance under Section 32A of the Act for the assessment year 1991-92. The return of income-tax for 1991-92 was filed on 31.12.1991. In this return the petitioner did not claim any deduction under Section 80I of the Act. 2.2 Similarly for the assessment years 1992-93 and 1993-94 in the original return the petitioner had not claimed any deduction under Section 80I of the Act. 3. CIT (Appeals) while dealing with the appeal relevant to the assessment year 1991-92 in his order dated 28.2.1994 made an observation that after exclusion of the term cinematographic films from entry No.9, there was no justification for holding that the colour film rolls were included in the Eleventh Schedule. CIT (Appeals) held :- "After the exclusion of the term Cinematographic film from entry No. 9 colour film which is normally used in an important sector of tourism there does not appear to be any justification in holding that view that colour roll film is included in 11th Schedule. All film whether cinematographic and colour roll film must be taken in one category and since the legislature has excluded the term cinematographic film from entry No.9 of Eleventh Schedule, the assessing officer was not justified in holding the view that the machineries purchased by the appellant relating to manufacturing of colour roll films where machineries covered by the provision of Eleventh Schedule of the I.T.Act. However, are detailed discussion I have held that the appellant is not entitled to investment allowance during the current year and appellant shall be free to claim investment allowance in the next assessment year because whether the appellant is allowed invest ment allowance in this year or next assessment year

does not make any difference to the revenue as the appellant has got a gross total income of Rs. 47727307/- even in assessment year 1991-92 after deduction of depreciation claimed as per calculation given by the appellant." 4. After passing of the above said order by CIT (Appeals) the petitioner stacked this claim for deduction under Section 80-I vide letter dated 15.3.94. No revised return was filed. 5. Vide order dated 16.3.1994 for the assessment year 1991-92, vide order dated 31.3.1994 for the assessment year 1992-93, and vide order of assessment dated 21.10.1994 for the assessment year 1993-94 the petitioner's claim for deduction under Section 80-I was allowed. 6. For the assessment year 1991-92 the assessing officer has in his order dated 16.3.1994, Annexure P1, in CWP 3528/97 dealt with the petitioner's claim as under :- "3. Claim raised in respect of deduction u/s 80I. The Assesses has elaborately contended its claim u/s 80 I in respect of its colour roll film unit and other photosensitized goods, such as Medical x-ray, graphic art film, cine positive film and photo graphic colour paper. The contention of the Assesses company is that it fulfills the conditions laid down in sub-section (2) of Section 80-I and is entitled for the deduction @ 25% of the gross total income of that unit. The Assesses further contends that this roll film unit was set up in the assessment year 1989-90 as a new industrial undertaking and it is not engaged in poduction of any article specified in the Eleventh Schedule. On my specific query why entry No.9 and 10 should not be construed as bringing the activity of the Assesses within the ambit of schedule eleven, the Assesses has referred to and relied upon a clear finding given by the learned CIT (A)-XVI New Delhi in its own appeal No. 63/93-94 relating to assessment year 1990-91 in which my prede cessor had turned down the claim of the Assesses for investment allowance on the ground that the industrial unit of the Assesses engaged in the manufacturing of colour roll film and other photo sensitised items was an Eleventh Schedule industry. Notice that the learned CIT(A)-XVI in his order dated 28.2.1994 has held that the items namely colour roll film is not an item specified in schedule eleven, which debars the Assesses from getting neceessary relief of investment allowance u/s 80 I. 3.1 In accordance with the direction and finding of the CIT(A) the Assesses is allowed deduction u/s 80I of the Act in respect of profits of its colour roll films unit." 7. Now for all the three years of assessment i.e. 1991-92, 1992-93, 1993-94, the assessing officer has issued notice under Section 147/148 proposing to reopen the assessments on the ground of the income having escaped assessment within the meaning of Section 147 of the Act. The reasons recorded for issuance of the said notice are identical for all the three years. The reasons read as under : "Assesses company manufactures photo films which is an article placed under Schedule Eleven 11 of the Income-tax Act. By virtue of its placement in 11th Schedule manufacturers of photo films are not entitled to claim deduction u/s 80I. In the case of Assesses company deduction u/s 80 I amounting to Rs.1,59,91,442/- has been allowed wrongly. Therefore, I have reason to believe that income to the tune of Rs. 1,59,442/- has escaped assessment." 8. In all the cases approval for issuance of notices under S.148 has been accorded by the CIT. 9. These three writ petitions have been filed laying challenge to the notices issued in respect of the said three assessment years. 10. According to the petitioner all the relevant

facts were disclosed to the assessing officer and the assessing officer having deliberated upon the entitlement of the petitioner had allowed the deduction, the assessment was sought to be reopened merely on account of 'change of opinion' by the assessing officer on the same facts. The assessing officer cannot simply review his own assessment orders, a power which is not conferred on him by the Act. The assessment officer had 'no reason to believe' that any income had escaped assessment within the meaning of Section 147 of the Income-tax Act and the show cause notice u/s 148 is therefore without jurisdiction submitted the learned senior counsel Mr G.C. Sharma for the Assesses. 11. According to the respondents the assessing officer while examining the record for the Assesses for alls the three years found that deduction under Section 80I of the Act had been wrongly allowed at the assessment. The assessments were completed by merely following the order of CIT(A) passed on 28.2.1994 relevant to the assessment year 1990-91 which were not binding on the assessing officer for the subsequent years. The observations of CIT(A) were totally against the provisions of the Act. The photographic apparatus includes camera etc and photographic goods including colour film rolls etc and the intention of the legislature is clear that the manufacture of these articles is not entitled to the deductions. Removal of cinematographic films is to confer eligibility for deduction on educational and tourism documentary films. Looking to this fact and taking the view that income had escaped assessment notices under Section 148 were issued. It was submitted that it was not a case of mere change of opinion particularly in view of the amendment made in Section 147 of the Act w.e.f. 1.4.1989. 12. Section 147 of the Act reads as under : S.147. Income escaping assessment _ 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 eassess such income and also any other income chargeable to tax which has escaped assess-ment 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 (hereinafter in this Section and in Sections 148 to 153 referred to as the relevant assessment year." xxx xxx xxx 13. It is pertinent to note that the provision in its present form has been substituted for its predecessor provision by the Direct Tax Laws Amendment Act, 1984 (Act 4 of 1988) w.e.f. 1.4.1989. Even in the original text of Section 147 so substituted, there were the words "for reasons to be recorded by him in writing, is of the opinion" which have been substituted by "has reason to believe" by the Direct Tax Law Amendment Act, 1989 (Act 3 of 1989) w.e.f. 1.4.1989. This phrase-" has reason to believe", is an all important expression. On it depends the fate of the present petition. This expression, 'reason to believe' was to be found contained in the predecessor provision also and has been the subject matter of judicial scrutiny on numberless occasions. 14. Calcutta Discount Company Ltd Vs. ITO is the leading authority which still holds the field. It is well settled that while submitting to the jurisdiction of an assessing officer, it is the duty of the Assesses to disclose all the primary facts (in contra-distinction with inferential facts) which have a bearing on the liability of the income earned by the Assesses

being subjected to tax. It is for the assessing officer to draw inferences from the facts and apply the law determining the liability of the Assesses. The law does not require the Assesses to state the conclusions that can reasonably be drawn from the primary facts. Once that is done and assessment order framed, the assessing officer cannot at a later point of time merely on forming an opinion, by giving a second thought to the primary facts disclosed by the Assesses, arrive at a finding that he had committed an error in computing the taxable income of the Assesses and reopen the assessment by resort to Section 147 of the Act. Discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment would constitute a 'reason to believe the income having escaped assessment' within the meaning of Section 147. Here also such facts which could have been discovered by the assessing authority but were not so discovered at the time of original assessment may not constitute a new information. (See. Phool Chand Bajrang Lal Vs. ITO [1993] 203 ITR 456,477, A.L.A. Firm Vs. CIT [1991] 189 ITR 285, 298 Indian & Eastern Newspaper Society Vs. CIT [1979] 119 ITR 996,1004, ITO Vs. Lakshmani Mewal Das [1976] 103 ITR 437, 445 CIT Vs. Bhanji Lavji [1971] 79 ITR 582, 588). 15. In Kalyanji Mavji & Co Vs. CIT West Bengal II one of the points decided was that where in the original assessment, the income liable to tax had escaped assessment due to oversight, inadvertence or a mistake committed by the ITO, the assessment can be reopened. It was a decision by a bench of two Honourable Judges At least on two occasions, benches of three Honourable Judges have clarified that alyanji Mavji & Co.'s case (supra) cannot be taken to have overridden the consistently laid down law. Where the ITO (very often successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or more often, by a predecessor ITO), was in his opinion incorrect, judicial decisions have consistently held that this could not be done. (See- Indian Eastern Newspaper Society Vs. CIT New Delhi, [1979] 119 ITR 996 and ALA Firm Vs. CIT [1991] 189 ITR 285. 16. The power to re-open an assessment was conferred by the legislature but not with the intention to enable the ITO to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods. (See CIT Vs. Rao Thakur Narayan Singh [1965] 56 ITR 234,239). 17. In Phool Chand Bajrang Lal, their Lord-ships have held while interpreting Section 147 as it stood in the assess-ment year 1963-64 :- "An Income-tax Officer acquires jurisdiction to reopen an assess-ment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and rele-vant 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 Assesses 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,profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had 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 asses- see 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." 18. Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction; (See- Siesta Steel Construction Pvt Ltd Vs. K.K.Shikare & Ors Satpal Automobile Co. ITR , Gopal Films Vs. ITO Vs. [1983] 139 ITR 566 (Kant) CWT Vs. Manilal C. Desai ,[1973] 91 ITR 135 (M.P) 19. Reverting back to the case at hand, it is clear from reasons placed by the assessing officer on record as also from the statement made in the counter affidavit that all what the ITO has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase 'reason to believe' in his order, admittedly, between the date of orders of assessment sought to be reopened and the date of forming of opinion by the ITO nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same assessing officer to the same set of facts. While passing the original orders of assessment the order dated 28.2.94 passed by CIT(A) was before the assessing officer. That order stands till today. What the assessing officer has said about the order of CIT(A) while recording reasons u/s 147 he could have said even in the original orders of ssessment.Thus, it is a case of mere change of opinion which does not provide jurisdiction to the assessing officer to initiate proceedings under Section 147 of the Act. 20. It is also equally well settled that if a notice under S. 148 has been issued without the jurisdictional foundation under Section 147 being available to the assessing officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this Court. If 'reason to believe' be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the assessing officer to initiate the

proceedings under Section 147/148 of the Act. 21. For the foregoing reasons all the three petitions are allowed. The impugned notices under Section 148 of the Incometax Act issued by the assessing officer and relevant to the assessment years 1991-92, 1992-93, 1993-94 are all directed to be quashed. No order as to costs.