The Lakshmi Vilas Bank Ltd. vs The Dy. Commissioner/Joint ... on 10 March, 2006

Equivalent citations: [2007]105ITD502(CHENNAI)

ORDER

N.R.S. Ganesan, Judicial Member

1. Let us first take I.T.A. Nos. 844 & 845(Mds)/2003 for the Assessment Years 1989-90 and 1990-91. The only issue arises for consideration in both the years is regarding the validity of reopening of the assessment under Section 147 of the Income Tax Act. The CIT(A) held that reopening of the assessment for both the Assessment Years are bad in law. The Revenue filed the present appeal against the order of the CIT(A).

2. The learned Departmental Representative (D.R.) submitted that the Assessing Officer reopened the assessment for the Assessment Years 1989-90 and 1990-91 on the basis of the judgement of the Apex Court in the case of Vijaya Bank Ltd. v. CIT . According to the learned D.R., the assessee has claimed interest on purchase of securities as revenue expenditure for both the Assessment Years. The Assessing Officer found that in view of the judgement of the Supreme Court in the case of Vijaya Bank Ltd. (supra), the interest paid by the assessee on purchasing securities would form part of capital expenditure, therefore, the assessee is not entitled to any allowance. According to the learned D.R., the interest component on purchasing securities which is otherwise known as broken period interest is not an allowable expenditure or deduction in view of the judgement of the Apex Court in the case of Vijaya Bank Ltd. (supra). The learned D.R. further submitted that in view of Explanations (1) and (2) to Section 147 of the Income Tax Act, the Assessing Officer has validly reopened the assessment for the purpose of assessing the interest component which was otherwise escaped from assessment. The learned D.R. placed his reliance on the judgement of the Delhi High Court in the case of Rakesh Aggarwal v. ACIT and submitted that after amendment of Section 147 of the Income Tax Act with effect from 1.4.89, the power of the Assessing Officer to reopen the assessment in respect of income which has escaped assessment is much wider, therefore, the amended provisions of Section 147 will not curtail the power of the Assessing Officer to reopen the assessment under Section 147.

3. The learned D.R. again submitted that the judgement of High Court or Supreme Court constitutes an information in view of the judgement of the Supreme Court in the case of Income Tax Officer v. Saradbhai Lakhani and Anr. . The learned D.R. again placed his reliance on the judgement of the Madras High Court in the case of Revathy CP Equipment Ltd. v. DCIT and submitted that Sections 147 and 149 are to be complied with simultaneously. Therefore, whenever the escapement of income from assessment was more than Rs. 50,000/-, extended period provided under Section 149(b) of the Income Tax Act would be applicable and the Assessing Officer can issue notice under Section 148 upto seven years from the date of assessment under Section 143(3). The learned D.R. again placed his reliance on the judgement of the Madras High Court in the case of Precot Mills Ltd. v. CIT and

submitted that four years period prescribed under proviso to Section 147 have to be read along with Section 149. Therefore, if the income chargeable to tax which escaped the assessment is more than Rs. 50,000/-, then the Assessing Officer would have the extended period of seven years as provided under Section 149(b). According to the learned D.R., even after amendment of Section 147 with effect from 1.4.89, the judgement of the Supreme Court in the case of Saradbhai Lakhani And Another (supra) would be applicable. Therefore, according to the learned D.R., the Assessing Officer reopened the assessment for the Assessment Years 1989-90 and 1990-91 validly on the basis of the judgement of the Supreme Court in the case of Vijaya Bank Ltd. (supra).

4. On the contrary, Mr. G. Narayanasamy, the learned representative for the assessee submitted that admittedly, the Assessing Officer reopened the assessment for the-Assessment Years 1989-90 and 1990-91 on the basis of the judgement of the Apex Court in the case of Vijaya Bank Ltd. (supra). According to the learned representative, the Supreme Court pronounced the judgement in the case of Vijaya Bank Ltd. (supra) on 19.9.90. In this case, the assessee filed the return of income for the Assessment Year 1989-90 on 27.12.89 disclosing all material facts. Likewise, for the Assessment Year 1990-91, the return of income was filed disclosing all the material facts which were necessary for completing the assessment. According to the learned representative, it is not the case of the Assessing Officer that the assessee has not furnished the material and primary facts fully. The learned representative invited our attention to para 5.5 of the CIT(A) order for the Assessment Year 1990-91 and submitted that in fact, the Assessing Officer conceded that the assessee-bank have disclosed fully and truly all the material facts necessary for the assessment. The only objection of the Assessing Officer is that the subsequent judgement of the Supreme Court constitutes an information. Therefore, according to the learned representative, the assessee has furnished all the primary and material facts which are essential for completing the assessment.

5. The learned representative for the assessee further submitted that before amendment of Section 147 with effect from 1.4.89, the Assessing Officer had power to reopen the assessment provided the Assessing Officer has reason to believe that by reason of omission or failure on the part of the assessee to file a return under Section 139 or to disclose fully and truly all material facts which are necessary for the assessment, the income chargeable to tax escaped assessment. Sub-section (b) of 147 empowers the Assessing Officer to reopen the assessment notwithstanding that there was an omission or failure on the part of the assessee, provided the Assessing Officer has information in his possession and reason to believe that income chargeable to tax has escaped assessment. After amendment with effect from 1.4.89, the legislature restructured the Sub-clauses (a) and (b) which empowered the Assessing Officer to reopen the assessment within four years provided the income escaped assessment. After completion of four years, the Assessing Officer can reopen the assessment provided there was a failure on the part of the assessee to file a return under Section 139 or to disclose fully and truly all material facts necessary for the assessment. Therefore, according to the learned representative for the assessee, the legislature restructured the provisions of Section 147 and in effect there was no amendment at all.

6. Mr. G. Narayanasamy, the learned representative for the assessee submitted that the power of the Assessing Officer for reopening the assessment before 1.4.89 could be resorted if there was negligence on the part of the assessee for furnishing the material facts. The Assessing Officer could

also reopen provided there was an information to show that the income chargeable to tax has escaped assessment. The learned representative for the assessee invited our attention to the judgement of the Supreme Court in the case of ALA Firm v. CIT and submitted that the Apex Court considered the scope of provisions of Section 147(b) and held that the judgment of the jurisdictional High Court which was not within the knowledge of the Assessing Officer at the time of the completion of the assessment and was not considered at the time of original assessment, constitutes an information under Section 147(b) of the I.T. Act. This judgement was followed by the Apex Court in the case of Saradbhai Lakhani And Another (supra). According to the learned representative for the assessee, after 1.4.89, the power of the Assessing Officer to reopen the assessment after expiry of four years is curtailed by proviso to Section 147. According to the learned representative, proviso is an exception to the main provision. Therefore, the provision which provides that no action shall be taken after expiry of four years from the end of the relevant Assessment Year unless the income chargeable to tax has escaped assessment by reason of failure on the part of the assessee either to file a return under Section 139(1) or 148 or to disclose fully and truly all material facts necessary for assessment would come into operation immediately after expiry of four years from the end of the relevant Assessment Year. The learned representative placed his reliance on the judgement of the Apex Court in the case of CIT v. Indo-Mercantile Bank Ltd. . According to the learned representative, proviso to Section 147 provides for exceptional circumstances after expiry of four years from the end of the Assessment Year. Therefore, unless and until it was shown that there was a negligence on the part of the assessee to disclose fully and truly all material facts, according to the learned representative, the assessment cannot be reopened after expiry of four years. According to the learned representative, for all earlier Assessment Years, the assessee claimed the interest component in purchasing securities as revenue expenditure and the same was allowed. Likewise, for the Assessment Year under consideration also, the assessee furnished all material facts relating to interest component in purchasing the securities. Therefore, according to the learned representative for the assessee, there was no omission or negligence on the part of the assessee.

7. Mr. G. Narayanasamy, the learned representative for the assessee again invited our attention to the circular issued by CBDT in circular No. 489 dated 31.10.89 reported in (1990) 182 ITR 1 (Statutes) and submitted that the CBDT clarified the position after 1.4.89 by this circular. Therefore, according to the learned representative, after expiry of four years, the assessment cannot be reopened unless there was negligence on the part of the assessee for furnishing the material facts which are necessary for completing the assessment. The learned representative for the assessee further submitted that the assessee had all along claiming the interest relatable to purchase of stocks as revenue expenditure and which was also accepted by the Revenue for all earlier Assessment Years. In those circumstances, according to the learned representative, it cannot be construed as if the assessee has not furnished the necessary details which are essential for completing the assessment. Therefore, the learned representative submitted that reopening of the assessment has been rightly held by the CIT(A) as invalid.

8. We have considered the rival submissions on either side, and also perused the material available on record. The question arises for consideration is whether the Assessing Officer has reopened the case validly after expiry of four years. It is not in dispute that four years period has expired after completion of assessment under Section 143(3), when the notice was issued under Section 148 of the

Income Tax Act for reopening the assessment. The main contention of the learned D.R. is that the judgement of the Apex Court in the case of Vijaya Bank Ltd. (supra) would constitute an information for the purpose of reopening the case. For the purpose of considering the issue of reopening, we Rave to examine the provisions of Section 147. Before going to the provisions of Section 147, we have to examine the legislative history of the Income Tax Act which provides for reopening of the completed assessment. Section 34 of the Income Tax Act 1922 provides for reopening of the assessment for the purpose of assessing the income which escaped assessment. For the purpose of convenience, the provisions of Section 34 of the Income Tax Act 1922 is reproduced hereunder:

> 34. (1) If in consequence of definite information which has come into his possession the Income-tax Officer discovers that income, profits or gains chargeable to income-tax have escaped assessment in any year, or have been under-assessed, or have been assessed at too low a rate, or have been the subject of excessive relief under this Act the Income-tax Officer may, in any case in which he has reason to believe that the assessee has concealed the particulars of his income or deliberately furnished inaccurate particulars thereof, at any time within eight years, and in any other case at any time within four years of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection:
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> Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be:
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> Provided further that when the - income, profits or gains concerned are income, profits or gains liable to assessment for a year ending prior to the commencement of the Indian Income-tax (Amendment) Act, 1939, or where the assessment made or to be made is an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year were substituted.
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> (2) No order of assessment under Section 23 of assessment or re-assessment under Sub-section (1) of this section shall be made after the expiry, in any case to which Clause (c) of Sub-section (1) of Section 28 applies, of eight years, and in any other case, of four years from the end of the year in which the income, profits or gains were first assessable:
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> Provided that nothing contained in this sub-section shall apply to a re-assessment made in pursuance of an order under Section 31, Section 33, Section 66, or Section 66A.

Under Section 34 of the Income Tax Act 1922, on the basis of the information which was in possession of the Income Tax Officer, the completed assessment can be reopened within a period of eight years provided Income Tax Officer has reason to believe that the assessee has concealed the particulars of income or deliberately furnished inaccurate - particulars thereof. In any other case, the Assessing Officer can reopen the assessment within four years of the end of the assessment year. This was the original provision contained in Income Tax Act 1922. In the year 1961, the Parliament enacted Income Tax Act 1961. The provision for reopening the assessment was provided in Section 147. A separate section was provided in Section 149 for limitation. In the original Section 34 of the Income Tax Act 1922, the limitation was provided in the main Section 34 itself. However, in the 1961 Act, the limitation was provided by a separate section in 149.

The provisions of Section 147 as it stood upto 31.3.1989 reads as follows:

Section 147. Income escaping assessment. - If-

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

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

he may, subject to the provisions of Sections 148 to 453, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment, year).

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

(a) where income chargeable to tax has been underassessed; or

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

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

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

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

9. The first part of Section 147 empowers the Assessing Officer to reopen the assessment if he has reason to believe that there was a failure on the part of the assessee to furnish full and true particulars and material necessary for assessment and as a result of that income chargeable to tax has escaped assessment. The second part of Section 147 is that irrespective of the fact of disclosure made by the assessee, if the Assessing Officer has any information in his possession that the income chargeable to tax has escaped assessment, then the Assessing Officer subject to provisions of Sections 148 to 153 assess or reassess such income. Explanation (1) to Section 147 clarifies the cases in which the income chargeable to tax deemed to be escaped from assessment. Likewise, Explanation (2) to Section 147 shows that production of books of accounts or other material evidence from which the material evidences could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of Section 147.

10. The legislature amended the provisions of Section 147 of the Income Tax Act with effect from 1.4.89. The amended provisions of Section 147 reads as follows:

> Section 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 reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings, under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant Assessment Year):
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> Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.
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> Explanation 1. - Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.
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> Explanation 2. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

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

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

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

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

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

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

11. After amendment, the Assessing Officer has to record his reasoning and his opinion that income chargeable to tax has escaped from the assessment. The legislature dispensed with the earlier requirement of reason to believe or information in the possession of the Assessing Officer for the purpose of reopening the assessment. The legislature by Direct Tax Laws (Amendment) 1989 again amended Section 147 by deleting the word "for reasons to be recorded by him in writing, is of the opinion" and substituted the word "has reason to believe". By this amendment, the legislature restored the earlier position as provided in Section 147(a) before amendment. However, there was no indication regarding the power of the Assessing Officer to reopen the assessment on the basis of the information which was in his possession. Therefore, after 1.4.1989, the Assessing Officer can reopen the assessment provided he has reason to believe that the income chargeable to tax escaped assessment. The proviso to Section 147 prohibits the Assessing Officer, when an assessment was made under Section 143(3), from reopening the assessment after the expiry of four years from the end of the relevant Assessment Year unless any income chargeable to tax escaped assessment by reason of the failure on the part of the assessee either to file a return or to disclose fully and truly all material facts necessary for assessment. The earlier Explanation (2) was reintroduced as Explanation (1) after amendment. Therefore, mere production of books of accounts or other evidence from which the Assessing Officer could have discovered with due diligence, will not necessarily amount to disclosure. In Explanation (2), the legislature has added two more instances of deeming cases in which the income chargeable to tax escaped assessment. Therefore, as rightly pointed out by the learned representative for the assessee, the provisions of Section 147 before amendment and after amendment substantially remains the same, except to the extent of prohibiting the Assessing Officer from reopening of assessment after expiry of four years by way of a provision and the power of the Assessing Officer to reopen the case on the basis of the information

in his possession was also taken away.

12. The amended provisions of Section 147 specifically provides for reopening of assessment subject to provisions of Sections 148 to 153 of the Income Tax Act. Therefore, the Assessing Officer necessarily has to comply with the provisions of Sections 148 to 153 of the Income Tax Act while reopening the assessment under Section 147. Section 149 of the Income Tax Act provides for limitation for issuing notice under Section 148. Section 149(1)(a) says that no notice shall be issued under Section 148 after expiry of four years from the end of the relevant Assessment Year unless the case falls under Sub-clause (b). Sub-clause (b) says that if four years period was lapsed, but not more than six years from the end. of the relevant Assessment Year unless income chargeable to tax escaped assessment is more than Rs. 1 lakh. Proviso to Section 147 prohibits the Assessing Officer from reopening the assessment after expiry of four years provided there is a failure on the part of the assessee from furnishing the full and true particulars required for assessment. Section 149(1)(b) says that if the income escaped assessment is more than Rs. 1 lakh, the assessment can be reopened upto six years. Therefore, the real controversy arises for consideration is whether the assessment can be reopened after expiry of four years when the income chargeable to tax escaped assessment is Rs. 1 lakh or more than Rs. 1 lakh?

13. We find that the Apex Court in the case of Parashuram Pottery Works Co. Ltd. v. ITO had an occasion to consider an identical issue under the provisions of pre-amended Sections 147 and 149. In the pre-amended Section 147, there was no proviso prescribing four years period for reopening the assessment. However, Section 149 as it stood upto 31.3.1989 prescribed limitation for reopening. The Supreme Court after considering the provisions of Sections 10 and 34 of the Income Tax Act 1922, and Sections 147 and 149 of Income Tax Act 1961 observed that two conditions have to be satisfied before the Assessing Officer acquires jurisdiction to issue notice under Section 148 in respect of assessment beyond the period of four years but within a period of eight years from the end of the relevant Assessment Year, viz. (1) The Income Tax Officer must have reason to believe that the income chargeable to tax has escaped assessment; (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee either to file or return of income or to disclose fully and truly the material facts necessary for the assessment. The Supreme Court observed that both these conditions must coexist to confer jurisdiction on the Income Tax Officer. The Supreme Court further observed that the duty of the assessee does not extend beyond making true and full primary facts. The Supreme Court further observed that before issuing notice after expiry of four years from the end of the relevant Assessment Year, the Commissioner must be satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for issue of notice. In view of this judgement of the Apex Court, the assessment, cannot be reopened unless there is a failure on the part of the assessee for disclosing fully and truly the material facts which are necessary for assessment.

14. The Madras High Court in the case of Revathy CP Equipment Ltd. (supra) considered the provisions of Sections 147, 148 and 149 and held that the provisions of Section 147 and 149 are to be simultaneously complied with and the requirement of both the provisions of Sections are to be fulfilled before a valid notice can be issued under Section 148 of the Income Tax Act. The Madras High Court specifically observed that the notice can be sustained only if it can be held that there had

been failure on the part of the assessee to disclose fully and truly all material facts "that were necessary for the -assessment. The Madras High Court at page 859 of the ITR has observed as follows.

Section 147 of the Act deals with the income escaping assessment. Before a notice under Section 148 of the Act can be issued, all further requirements of Section 147 of the Act must be fully met. The time limit specified in Section 149 of the Act is not a substitute for what has been stated in Section 147 of the Act. Section 149 of the Act merely stipulates the time limits within which action can be taken under Section 147 of the Act and a notice issued under Section 148 of the Act. In other words, where a notice issued under Section 148 of the Act is after the expiry of a period of four years from the end of the relevant assessment year, the conditions set out in the proviso to Section 147 of the Act must be satisfied. Such a notice also should conform to the time limits and the monetary limits set out in Section 149 of Act. There is no option given to the Assessing Officer to comply with either Section 149 of the Act or the proviso to Section -147 of the Act. Both of them are to be simultaneously complied with and the requirements therein are to be fulfilled before a valid notice can be issued under Section 148 of the Act.

In all these cases the notices have been issued after the expiry of period of four years. The notices can be sustained only if it can be held that there had been failure on the part of the assessee to disclose fully and truly all material facts that were necessary for the assessment for three assessment years.

15. We have also carefully gone through the judgement of the Madras High Court in the case of Fenner (India) Ltd. v. DCIT . The Madras High Court after considering the provisions of Section 147 held that whenever a notice was issued by the Assessing Officer beyond the period of four years from the end of the Assessment Year, such a notice shall be issued after recording the reasons for the belief of the Assessing Officer that the income escaped from assessment due to failure of the assessee either to file return or to disclose fully and truly the material facts. The Madras High Court observed that it cannot be presumed in law that there is also a failure on the part of the assessee. Unless the pre-condition for the exercise of the power under Section 147 of the Income Tax Act is satisfied, there cannot be any valid reopening of assessment. The Madras High Court has also observed that a notice issued without recording the Assessing Officer's reasonable belief that there was such a failure on the part of the assessee would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts and on that ground also the notice issued could be vitiated.

16. The Madras High Court in the case of Precot Mills Ltd. v. CIT (supra) examined the provisions of Sections 147 and 149 and found that income escaped assessment as a result of failure to examine the books of accounts produced by the assessee would be sufficient justification in making re-assessment. The High Court further observed that Section 147 is subject to Sections 148 to 153, therefore, if four years have elapsed from the relevant Assessment Year, but not seven years, the assessment can be reopened if the income escaped assessment amounts to Rs. 50,000/- or more. The High Court observed that four years prescribed under provisions of Section 147 have to be read with Section 149 where the four years have been extended to seven years if the income chargeable to

tax that escaped assessment is more than Rs. 50,000/-. The Madras High Court distinguished its earlier judgement in the case of Fenner (India) Ltd. (supra) on the ground that -Explanations (1) and (2) to Section 147 were not considered in the case of Fenner (India) Ltd. (supra). Ultimately, the High Court in the case of Precot Mills Ltd. (supra) observed that on merits whether the income escaped assessment was not decided since the petitioner will have ample opportunity to question the reassessment on merit. Therefore, while observing that the four years period will extend to six years when the income chargeable to tax escaped assessment amounting to Rs. 50,000/- or more, the question of actual escapement and validity of reassessment was left open to the concerned authorities. The Madras High Court has not considered their earlier judgement in the case of Revathy CP Equipment Ltd. (supra) while deciding the case of Precot Mills Ltd. (supra). In the case of Revathy CP Equipment Ltd. (supra), the High Court analysed the provisions of Sections 147 and 149 and held that both the Sections are to be simultaneously complied with and the requirements contained in both Section are to be fulfilled before a valid notice can be issued under Section 148 of the I.T. Act. Therefore, there is an apparent conflict between the two judgements of the jurisdictional High Court. The jurisdictional High Court in the case of Revathy CP Equipment Ltd. (supra) held that the notice can be issued under Section 148 after expiry of four years only if there was a failure on the part of the assessee to disclose fully and truly all the material facts that are necessary for the assessment. In the case of Precot Mills Ltd. (supra), the jurisdictional High Court held that when the income chargeable to tax which escaped assessment amounting- to Rs. 50,000/- or more, proviso to Section 147 have to be read with Section 149 where the four years period have been extended to seven years. Both the judgements were rendered by the Hon'ble single judge of the jurisdictional High Court. Normally, whenever there is a conflict between two judgements, the judicial authorities have to follow the later judgement or the judgement which gives more reason for arriving to a particular conclusion. After considering both the judgements of the jurisdictional High Court, in our opinion, the judgement in the case of Revathy CP Equipment Ltd. (supra) gives more reasoning. The reasoning of the judgement in the case of Revathy CP Equipment Ltd. (supra), gives effect to both Sections 147 and 149 and whenever there was a failure on the part of the assessee to disclose fully and truly and by reason of such failure, the income escaped assessment is more than Rs. 1 lakh or more, the notice under Section 148 can be issued upto seven years. This extended period of time upto seven years would be available to Assessing Officer provided there was a negligence on the part of the assessee in furnishing full and true material facts which are required for assessment". Therefore, the reasoning given by the jurisdictional High Court in the case of Revathy CP Equipment Ltd. (supra) would give effect to all the provisions of Section 147 and 149, therefore, the judicial propriety requires to follow the judgement of the jurisdictional High Court in the case of Revathy CP Equipment Ltd. (supra). In view of the above, in our opinion, the judgement of the Madras High Court in the case of Precot Mills Ltd. (supra) may not be applicable to the facts of this case in view of the judgement in the case of Revathy CP Equipment Ltd. (supra). In our opinion, the reasoning and observation of the Madras High Court in the case of Revathy CP Equipment Ltd. (supra) would be squarely applicable to the facts of this case. Therefore, by following the judgement of the Madras High Court in the case of Revathy CP Equipment Ltd. (supra), we hold that unless there was a failure on the part of the assessee for furnishing fully and truly all material facts relevant for assessment, the completed assessment cannot be reopened after expiry of four years.

17. Section 149 as it stood upto 31.3.1989 reads as follows:

> (1) No notice under Section 148 shall be issued.
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> (a) in cases falling under clause-(a) of Section 147.-
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> (i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls -under Sub-clause (ii):
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> (ii) for the relevant assessment year,- where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;
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> (b) in cases falling under Clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year.

18. With effect from 1.4.1989, the legislature amended Section 149 by Direct Tax Laws (Amendment) Act 1987. The amended provisions of Section 149 which is applicable with effect from 1.4.89 reads as follows:

> Section 149. Time limit for notice.- (1) No notice under Section 148 shall be issued for the relevant assessment year,-
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> (a) in a case where an assessment under Sub-section (3) of Section 143 or Section 147 has been made for such assessment year, -
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> (i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Sub-clause (ii) or Sub-clause (iii);
>
> (ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has elapsed assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;
>
> (iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees one lakh or more for that year;
>
> (b) in any other case,-
>
> (i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Sub-clause (ii)or Sub-clause (iii);

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees twenty-five thousand or more for that year;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year.

Explanation.- In determining income chargeable to tax - which has escaped assessment for the purposes of this subsection, the provisions of Explanation 2 of Section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of Sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.

(3) If the person on whom a notice under Section 148 is to be served is a person treated as the agent of a non-resident under Section 163 and the assessment, reassessment or recomputation. to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.

19. Therefore, upto 31.3.1989, the legislature provided in Section 149 itself the prohibition to reopen the assessment after expiry of four years from the end of the relevant Assessment Year notwithstanding that there was no failure or omission on the part of the assessee to furnish full and true particulars which are required for assessment provided the case falls under Section 147(b) as it stood upto 31.3.1989. By way of an amendment by Direct Tax Laws (Amendment) Act 1987, the legislature bodily lifted Sub-clause (1)(b) of Section 149 and incorporated as proviso by restructuring Section 147. -Therefore, as rightly pointed out by the learned representative for the assessee, the legislature restructured the provisions of Sections 147 and 149 by way of amendment by Direct Tax Laws (Amendment) Act 1987. Therefore, in our opinion, even after amendment with effect from 1.4.89 in Sections 147 and 149, the substantial provisions of Sections 147 and 149 continue to remain the same except some minor changes. We find that Section 149 was again amended by Direct Tax Laws (Second Amendment) Act 1989 with effect from 1.4.89. After this Direct Tax Laws (Second Amendment) Act, Section 149 reads as follows:

149. (1) No notice under Section 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped

assessment amounts to or is likely to amount to one lakh rupees or more for that year. -

Explanation,- In determining income chargeable to tax which - has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of Section 147 shall-apply as they apply for the purposes of that section.

(2) The provisions of Sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.

(3) If the person on whom a notice under Section 148 is to be served is a person treated as the agent of a non-resident under Section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of the -period of two years from the end of the relevant assessment year.

20. The legislature intended to continue the prohibition contained in Section 149(1)(b) as it stood upto 31.3.1989 by way of proviso to Section 147. The Supreme Court, in the case of Parashuram Pottery Works Co. Ltd. (supra), examined the provisions of Section 149(1)(b) as it stood upto 31.3.89 and held that the assessee's omission or failure to disclose fully and truly all material facts because it was realised that after expiry of four years from the end of the Assessment Year no action for reopening of assessment could be taken on the basis of the detection of mistake alone unless there was also an allegation that the income has escaped assessment because of failure or omission on the part of the assessee to disclose fully and truly material facts. Therefore, it is very clear that before 31.3.89, whenever there was a failure or omission on the part of the assessee to disclose fully and truly all material facts, the assessment could be reopened upto eight years, in case income chargeable to tax escaped assessment amounts to or is likely to amount to Rs. 50,000/- or more, the assessment can be reopened upto sixteen years from the end of the relevant Assessment Year. In case there was no omission or failure on the part of the assessee to disclose fully and truly all material facts, then the case may fall under Sub-section (b) of Section 147. In that case, the assessment cannot be reopened after expiry of four years from the end of the relevant Assessment Year. On and from 1.4.89, the legislature restructured the provisions of Sections 147 and 149. Due to restructuring of Sections 147 and 149, the assessment can be reopened upto four years from the end of the relevant Assessment Year when the income escaped assessment irrespective of the fact whether the assessee disclosed the material facts or not. After the expiry of four years, the Assessing Officer cannot reopen the assessment in a case where an assessment under Section 143(3) was made, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, when the assessee disclosed all material facts relevant for the assessment and the assessment was also completed under Section 143(3), the assessment cannot be reopened for assessing the income escaped assessment beyond four years unless the Assessing Officer is able to establish that there was a negligence on the part of the assessee to disclose fully and truly all material facts. In view of the law laid down by the Apex Court in the case of Parashuram Pottery Works Co. Ltd. (supra), in our opinion, the judgement of the Madras High Court in the case of Precot Mills Ltd. (supra) may not

applicable to the facts of this case. Therefore, the Assessing Officer cannot reopen the assessment beyond four years unless there was omission or failure on the part of the assessee to disclose fully and truly all material facts relevant for the assessment.

21. Let us now consider the judgement of the Apex Court in the case of Saradbhai Lakhani And Another (supra). In this case, the Assessing Officer reopened the assessment on the basis of the judgement of the jurisdictional High Court. The Apex Court by following its earlier judgement in the case of ALA Firm (supra), held that the judgement of the jurisdictional High Court constitutes an information under Section 147(b) as it stood upto 31.3.89. Therefore, the Apex Court upheld the reopening.

22. We have also carefully gone through the judgement of the Supreme Court in the case of ALA Firm (supra). In the case of ALA Firm (supra), the assessee has shown a sum of $ 1,01,248 as difference on revaluation of estates, garden and house property on the dissolution of the firm on March 13, 1961. In the memo of adjustment for income tax purposes, the assessee deducted the differences on revaluation on the ground that it was not assessable either as revenue or capital. The Assessing Officer accepted the claim of the assessee. However, subsequently, the Assessing Officer came to know the judgement of the Madras High Court in the case of G.R. Ramachari and Co. v. CIT (1961) (41 ITR 142). On the basis of the above judgement of the Madras High Court, the Assessing Officer reopened the case under Section 147(b) of the Income Tax Act as it stood upto 31.3.1989. The Supreme Court after analysing the entire case laws on the subject and the provisions of Section 34 of the Income Tax Act 1922 and Section 147 of the Income Tax Act 1961 held that the judgement of the jurisdictional High Court would constitute an information within the meaning of Section 147(b), therefore, the reopening of assessment was upheld by the Apex Court. In the case of ALA Firm (supra) as well as in the case of Saradbhai Lakhani And Another (supra), the cases were reopened within four years on the basis of the judgement of the Supreme Court, therefore, the Supreme Court held that the judgement of the jurisdictional High Court would constitute an information. Since the assessments were reopened within four years from the end of the relevant Assessment Year, the provisions of Section 149(1)(b) of the Income Tax Act as it stood upto 31.3.89 was not considered by the Supreme Court in both the cases. Since the assessments were reopened within four years in the cases before the Supreme Court, in our opinion, both the judgements of the Apex Court may not applicable to the facts of this case.

23. We have also carefully gone through the circular issued by the CBDT dated 31.10.1989 which is reported in 1990 182 ITR 1 (Statutes). At para 7.1 of the circular which is reported at page 28 (Statutes) of the ITR, the CBDT clarified the position as follows:

> 7.1 Simplification of the provisions relating to assessment or reassessment of income escaping assessment (section 147).- Under the old provisions of Section 147 of the Income-tax Act, separate Clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed, as follows:

(i) Clause (a) empowered the Income-tax Officer to assess or reassess the income escaping assessment, if he had reason to believe that the income had escaped-assessment on account of omission or failure on the part of the assessee to file a return of income for an assessment year or to disclose fully and truly all material facts necessary for assessment for that year.

(ii) Clause (b) empowered the Income-tax Officer to reopen an assessment, notwithstanding the fact that there had been no omission or failure, as mentioned in Clause (a), on the part of the assessee if the Income-tax Officer, on the basis of the information in his possession, had reason to believe that income had escaped assessment for the relevant assessment year.

Since under the new scheme of assessment (refer to para 5.1 of these Explanatory Notes), introduced by the Amending Act, 1987, returns filed will now be accepted as such and passing of assessment orders will not be necessary, it follows that in the majority of cases there would not be any application of mind by the Assessing Officer after the returns are filed, unless the case is picked up for scrutiny and regular assessment order is passed under Section 143(3). The Amending Act, 1987, has, therefore, rationalised the provisions of Section 147 and other connected sections to simplify the procedure for bringing to tax the income which escapes assessment, especially in non-scrutiny cases. Thus, the Amending Act, 1987, has substituted a new Section 147 which contains simplified provisions as follows:

(i) Separate provisions contained in Clauses (a) and (b) of the old section have been merged into a single new section, which provides that if the Assessing Officer is of the opinion that income chargeable to tax for any assessment year has escaped assessment, he can assess or reassess the same after recording in writing the reasons for doing so.

(ii) The requirements in the old provisions that the Income-tax Officer should have "reason to believe" or "information in possession" before taking action to assess or reassess the income escaping assessment, have been dispensed with.

(iii) The existing legal interpretation that once an assessment has been reopened, any other income that has escaped assessment and comes to the notice of the Assessing Officer subsequently during the course of proceedings under this section can also be included in the assessment, has been incorporated in the new section itself.

(iv) A proviso to the new section provides that an assessment, which has been completed under Section 143(3) or 147, i.e., a scrutiny assessment, can be reopened after the expiry of four years from the end of the relevant assessment year only if income has escaped assessment due to the failure on the part of the assessee to file a return of income or to disclose fully and truly all material facts necessary for his assessment.

24. At para 7.6 of the circular, the CBDT has also clarified the provisions of Section 149. Therefore, a reading of Sections 147 and 149 and the clarification issued by the CBDT in its circular dated 31.10.1989 it is very clear that whenever the assessment was completed under Section 143(3), the assessment can be reopened after expiry of four years from the end of the relevant Assessment Year-only if the income escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. If the income which escaped assessment amounts to or is likely to amount to Rs. 1 lakh or more and such escapement of income was due to failure on the part of the assessee to disclose fully and truly all material facts, then the assessment can be reopened upto eight years. Therefore, the failure on the part of the assessee to disclose fully and truly all the material facts is the essential factor for reopening the assessment beyond four years. If the Assessing Officer found that the assessee had disclosed the entire material facts necessary for completing the assessment, then the assessment cannot be reopened after expiry of four years in view of proviso to Section 147. Furthermore, the judgement of the Apex Court in the case of Parashuram Pottery Works Co. Ltd. (supra) clearly says that the assessment cannot be reopened after expiry of four years provided there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for completing the assessment. In view of the above, in our opinion, the judgement of the Madras High Court in the case of Precot Mills Ltd. (supra) may not be applicable to the facts of this case.

25. We have also carefully gone through the judgement of the Delhi High Court in the case of Rakesh Aggarwal (supra). In the case before Delhi High Court, the assessee filed return of income which was accepted and an intimation was issued under Section 143(1)(a) of the Income Tax Act. Subsequently, the Assessing Officer issued notice under Section 148 requiring the assessee to file return of income as he has reason to believe that-certain income chargeable to tax had escaped assessment within the meaning of Section 147. While examining the provisions of Section 147 for reopening the assessment, the Delhi High Court observed that the amended provisions of Section 147 not only merges Clauses (a) and (b) of the pre-amended Section 147 but also brings about a significant change in the preliminary requirement of certain mandatory conditions before reassessment proceedings could be initiated under the old section. Under the old Section 147(a), the Assessing Officer could initiate reassessment proceedings if he had reason to believe that income chargeable to tax had escaped assessment by reason of failure or omission on the part of the assessee to disclose fully and truly all material facts. In the original unamended section twin conditions are spelt out in Clauses (a) and (b) of Section 147 as conditions precedent for reopening. It is not so in the amended section. The only condition for action now is that the Assessing Officer should have reason to believe that the income has escaped assessment which belief can be reached in any manner, and is not qualified by the precondition of failure by the assessee to make full and true disclosure of material facts. Ultimately, the Delhi High Court observed that the power to reopen the assessment in the amended provisions of Section 147 is much wider and can be exercised even if an assessee had fully and truly disclosed all material facts. In this case, the assessee filed the return of income on 30.10.89 after issuing intimation under Section 143(1)(a). Notice under Section 148 was issued on 2.8.1991, therefore, the assessment was reopened within four years and the time limit prescribed under proviso to Section 147 may not be applicable. When the case was reopened within four years what is required is reason to believe that the income assessable to tax was escaped assessment irrespective of the fact whether there was a failure on the part of the assessee or not to disclose the material facts

relevant for assessment. In the case before the Delhi High Court, the assessment was reopened within four years period, in our opinion, the judgement of the Delhi High Court in the case of Rakesh Aggarwal (supra) may not applicable to the facts of this case.

26. In view of the above discussion, by following the judgement of the Supreme Court in the case of Parashuram Pottery Works Co. Ltd. (supra) and the judgement of the Madras High Court in the case of Revathy CP Equipment Ltd. (supra), we hold that in view of proviso to Section 147 read with Section 149 of the Income Tax Act, the assessment completed under Section 143(3) cannot be reopened after expiry of four years from the end of the relevant Assessment Year unless there was failure or omission on the part of the assessee to disclose filly and truty all material facts necessary for completing the assessment.

27. Now, let us examine whether the assessee has disclosed fully and truly all material facts relevant for assessment. For the Assessment Year 1989-90, the Assessing Officer reopened the assessment on the ground that the interest on purchase of securities has to be disallowed in view of the judgement of the Apex Court in the case of Vijaya Bank Ltd. (supra). Therefore, we have to see whether the assessee has furnished the details of interest of payment on purchase of securities to the Assessing Officer before the completion of the assessment under Section 143(3). It is not in dispute that in the return of income the assessee-bank furnished complete particulars pertaining to broken period interest. It is also not in dispute that the statement which accompanied the return of income discloses the interest on purchase of securities. Admittedly, the assessee all along claiming the interest payment as revenue expenditure. The Assessing Officer was continuously allowing the claim of the assessee as revenue expenditure, therefore, for these years also the assessee claimed the interest payment as revenue expenditure. In those factual circumstances, it is an admitted case of both parities that the assessee has furnished the entire particulars with regard to payment of interest on purchase of securities. Once the assessee furnished the entire particulars and the Assessing Officer has also for earlier Assessment Years accepted the claim of the assessee continuously, in our opinion, it cannot be said that there was a negligence on the part of the assessee in disclosing fully and truly the material facts required for completing the assessment. It is for the Assessing Officer to apply the law laid down by the Apex Court while completing the assessment. If there was a negligence or omission on the part of the Assessing Officer to apply the law laid down by Apex Court, it is open to the Assessing Officer to apply the law laid down by the Apex Court or to reopen the assessment within four years from the end of the Assessment Year. The failure of the Assessing Officer to reopen the assessment within four years cannot be shifted to the shoulders of the assessee. Therefore, in our opinion, the Assessing Officer cannot reopen the case after expiry of four years on the basis of the judgement of the Apex Court in view of the proviso to Section 147 as interpreted by the judgement of the Apex Court in the case of Parashuram Pottery Works Co. Ltd. (supra) and by the judgement of the Madras High Court in the case of Revathy CP Equipment Ltd. (supra). In view of the above, we uphold the order of the CIT(A) for the Assessment Years 1989-90 and 1990-91.

28. In the result, I.T.A. Nos. 844 & 845(Mds)/2003 stand dismissed.

29. Now let us take Department's appeal in I.T.A. No. 1068(Mds)/98 for the Assessment Year 1994-95. The first issue arises for consideration is regarding depreciation on investment. We heard

the learned D.R. and the learned representative for the assessee. It is brought to our notice that in the assessee's own case for the Assessment Year 1990-91 in I.T.A. No. 1342(Mds)/95, this Tribunal had decided the issue in favour of the assessee. Likewise, for the Assessment Years 1988-89 and 1992-03 in I.T.A. Nos. 552(Mds)/92 and 379(Mds)/96, this Tribunal held that on the basis of the value of the investment at the close of the accounting period, depreciation is allowable in the hands of the assessee. It is also brought to our notice that the Apex Court in the case of United Commercial Bank v. CIT (1999) (240 ITR 355) considered similar issue and it was held that the assessee can value the investment either at cost or market value whichever is lower for valuing its stock-in-trade (investment) for income tax purposes. In view of the above factual aspect, in our opinion, the CIT(A) has rightly allowed the claim of the assessee. We do hot find any infirmity in the order of the lower authority. Accordingly, we confirm the same.

30. The next ground of appeal arises for consideration is regarding the claim of the assessee towards disallowance towards proportionate expenses. This issue arises for consideration for the Assessment Years 1994-95, 1995-96 and 1996-97 in I.T.A. Nos. 1068(Mds)/98, 1542(Mds)/99 and 767(Mds)/2000. We heard the learned D.R. and the learned representative for the assessee. The Assessing Officer disallowed proportionate expenses relating to income on tax free investment. However, the CIT(A) allowed the claim of the assessee on the ground that the assessee without incurring any further expenditure towards salary, establishment, etc. could have earned income from tax free investments. During the course of haring, it was pointed out that the provisions of Section 14A was not examined by the lower authorities while deciding this issue. Therefore, it was prayed that the matter may be remitted back to the Assessing Officer for reconsideration of the issue in the light of the provisions of Section 14A. We find some justification on the prayer made by both the parties. Admittedly, both the authorities below have not examined the provisions of Section 14A. Therefore, in our opinion, the matter has to be reexamined in the light of the provisions of Section 14A of the Income Tax Act. Accordingly, we set aside the orders of the lower authorities and remand back the issue to the file of the Assessing Officer. The Assessing Officer shall reexamine the issue in the light of the provisions of Section 14A and thereafter decide the issue afresh in accordance with law after giving reasonable-opportunity to the assessee.

31. The next issue arises for consideration is regarding deduction under Section 80M. This issue arises for consideration for the Assessment Year 1994-95 in I.T.A. No. 1068(Mds)/98. The CIT(A) deleted the deduction on the ground that no expenses could be disallowed while computing deduction under Section 80M. Both the parties brought to our notice that this Tribunal, after considering the various case laws on the subject, consistently taking view that 2% of the total dividend received by the assessee may be relatable to the expenditure for the purpose of earning the dividend income since the Apex Court in the case of Distributors (Baroda) Pvt. Ltd. v. Union of India and Ors. held that deduction under Section 80M is available only on net income. Therefore, by following the consistent view taken by this Tribunal, in our opinion, 2% of the total dividend income may be relatable to expenditure for earning such dividend income. Accordingly, we set aside the orders of the lower authorities and direct the Assessing Officer to take 2% of the dividend income as expenditure and thereafter deduct under Section 80M.

32. The next ground of appeal is regarding deposit mobilisation expenses. This issue arises for consideration for the Assessment Year 1995-96 in I.T.A. No. 1542(Mds)/99. We heard the learned D.R. and the learned representative for the assessee. The Assessing Officer disallowed the claim of the assessee at Rs. 58,095/-. However, on appeal by the assessee, the CIT(A) found that a sum of Rs. 14,182/- could be disallowed under Section 37(2A). It appears from the order of the Assessing Officer that the auditors-in-Form-----No. CD have stated that these expenditures are in the nature of entertainment expenditure and the same Was included in the miscellaneous expenses. The CIT(A) has observed that a sum of Rs. 38,363/- should be treated as entertainment expenditure attracting the provisions of Section 37(2A). At the very same time, the CIT(A) has found that disallowance under Section 37(2A) works out to 14,182/- only. When the auditors have pointed out that the expenditure was relatable to entertainment expenditure and the CIT(A) has also found that provisions of Section 37(2A) was attracted in respect of Rs. 38,363/-, it is not known under what basis the CIT(A) found that disallowance under Section 37(2A) works out to Rs. 14,182/- only. Therefore, we set aside the orders of the lower authorities and remand back the issue to the file of the Assessing Officer to reexamine the issue afresh after considering the nature of the expenditure. In our opinion, the actual nature of the expenditure has to be considered before deciding the issue one way or other. Accordingly, the Assessing Officer shall reexamine the issue in the light of the actual nature of expenditure and thereafter decide the issue afresh in accordance with law after giving reasonable opportunity to the assessee.

33. The next issue arises for consideration for the Assessment Year 1995-96 and 1996-97 in I.T.A. Nos. 1542(Mds)/99 and 767(Mds)/2000 is regarding lease charge. We heard the learned D.R. and the learned representative for the assessee. The assessee owned the safety lockers. Subsequently, the safety lockers were sold to ITC Classic Finance Ltd. for consideration of Rs. 67,50,000/- on 20.3.1995. The Assessing Officer disallowed the claim of lease charges on the ground that sale and lease back transaction was arranged for tax avoidance. The CIT(A) after examining the factual situation found that if the lease and sale transaction arrangement was not made, the assessee would have been entitled to depreciation at the rate of 25% on Rs. 67,50,000/- which works out to Rs. 16,87,500/-. Because of lease back transaction, the assessee has claimed only Rs. 7,51,950/-. Therefore, the CIT(A) found that the assessee has not gained or saved anything because of lease and sale back transaction If the assessee, in our opinion, wanted to avoid payment of tax, it would have continued to own the safety lockers and claimed depreciation to the extent of Rs. 16,87,500/-. The very fact that the assessee is claiming an expenditure of Rs. 7,51,950/- towards quarterly rent and lease management fee, in our opinion, it cannot be said that the arrangement was to avoid tax. The lease transaction, in our opinion, is a genuine, therefore, no motive could be attributed in the sale and lease back transaction. During the course of hearing, the learned representative for the assessee submitted that in case the lease charges could not be allowed for this Assessment Year, it has to be allowed in the subsequent Assessment Years. If the assessee used the safety locker for part of the Assessment Year and the other part falls in the next Assessment Year, the lease charges paid by the assessee has to be necessarily allowed in the next Assessment Year since we uphold the genuineness of the sale and lease back transaction. Accordingly, we direct the Assessing Officer to verify the details of leasing transaction and thereafter allow the lease charges in the respective Assessment Years.

34. The next ground of appeal is regarding surplus amount realised on sale of jewellery. This issue arises for consideration in I.T.A. No. 846(Mds)/2003 for the Assessment Year 1995-96. We heard the learned D.R. and the learned representative for the assessee. The assessee received a sum of Rs. 1,37,000/- in excess on jewel auction. According to the learned D.R., after adjustment of loan amount, the assessee bank realised the excess amount on sale of jewellery which was not returned to the concerned parties but used by the bank for their circulation. Therefore, according to the learned D.R., it was a trading receipt. The learned representative for the assessee brought to our notice the decision of this Tribunal in the assessee's own case in I.T.A. No. 2842(Mds)/88 and submitted that under similar circumstances this Tribunal held that the surplus amount was not includible in the total income of the assessee since the surplus amount after adjusting the amount due was payable to the borrower. It is not in dispute that the assessee sold the pledged jewellery in realisation of the borrowed amount. Therefore, the excess amount realised in the auction proceedings would be the amount belongs to the borrower, therefore, there was an ascertainable liability to refund the amount to the respective borrowers. When the assessee received in excess in auction sale proceed coupled with ascertainable liability to refund the excess amount to the respective borrower, in our opinion, it cannot be treated as trading receipt. A similar view was taken by this Tribunal in the assessee's own case in I.T.A. No. 2842(Mds)/88 which became final. Therefore, we do not find any infirmity in the order of the lower authority on this issue.

35. The next issue arises for consideration is regarding subscription made by the assessee to SEBI. This issue arises for consideration for the Assessment Year 1996-97 in the Department's appeal in I.T.A. No. 767(Mds)/2000 and also in the assessee's appeal in I.T.A. No. 1406(Mds)/99 for the Assessment Year 1995-96. We heard the learned D.R. and the learned representative for the assessee. The case of the assessee is that for the purpose of registering the assessee as merchant banker the assessee had to pay fee to the SEBI. According to the learned representative for the assessee, the assessee being a banking company has to transact business in stocks and securities, therefore, registration with SEBI is for the purpose of doing the business, hence, it has to be treated as revenue expenditure. We find that the Assessing Officer disallowed the claim of the assessee for the Assessment Year 1995-96 on the ground that the payment to SEBI is in the nature of capital expenditure. It is not in dispute that the payments were made for registering the assessee with SEBI. SEBI is a regulatory authority. Therefore, registration with SEBI is mandatory for the purpose of dealing in securities and stocks. The payment made to SEBI is in the nature of fee for the purpose of enabling the assessee to carry out its business. The payment of renewal fee is only for the purpose of continuing the business as a merchant banker. Registering with SEBI is only to identify the person who is dealing in securities. Therefore, in our opinion, the subscription to SEBI will not give any enduring benefit to the assessee. In our opinion, the fee paid by the assessee is only a fee paid to a regulatory authority, therefore, it is a revenue expenditure. By the payment of fee to SEBI, the assessee is not getting any capital asset. Therefore, in our opinion, the subscription made to SEBI has to be allowed as revenue expenditure. Accordingly, we confirm the order of the CIT(A) for the Assessment Year 1996-97 in I.T.A. No. 767(Mds)/2000 and set aside the order of lower authorities for the Assessment Year 1995-96 in I.T.A. No. 1406(Mds)/99 and delete the addition made by the Assessing Officer.

36. The next issue arises for consideration is deduction under Section 36(1)(viia). This issue arises for consideration in the assessee's appeals for the Assessment Years 1994-95, 1995-96 and 1996-97 in I.T.A. Nos. 806(Mds)/98, 681(Mds)/2003 and 682(Mds)/2003. We heard the learned D.R. and the learned representative for The assessee. During the course of hearing, it was brought to our notice that this Tribunal considered a similar issue for the Assessment Year 1990-91 in I.T.A. No. 1161(Mds)/95 in the assessee's own case. We have carefully gone through the order of this Tribunal in I.T.A. No. 1161(Mds)/95. This Tribunal found that the difference between the provision made and the bad debt actually written off has to be allowed while computing the income of the assessee. At para 4 of the order dated 22.5.2003, this Tribunal observed as follows:

> Coming to the issue of deduction claimed under Section 36(1)(viia), the arguments by both the parties have been considered. The assessee had filed various decisions of the Tribunal like Syndicate Bank v. DCIT (2001) 78 ITD 103; State Bank of Bikanr & Jaipur v. DCIT (1999) 65 TTJ 480; State Bank of Bikaner & Jaipur v. DCIT (2000) 74 ITD 203 and extracts from lading authors. These decisions have been filed by the assessee to impress upon the fact that the provisions of Section 36(1)(vii) of the Act and Section 36(1)(viia) of the Act read with Board's Circular dated 14.6.1979 indicate that both the sections run in a sequence". This is to suggest that in the event of deduction is allowed to the Bank on the basis of provision made, and in the year in which the actual write off is made and the amount so written off in the books exceeds the amount provided for in the earlier years, the difference between the actual write off and the amount provided for is to be allowed as a deduction in the year in which the write off is mad by the assessee. The reading of the provisions apparently seem to indicate the various decisions relied upon by the assessee and in our opinion this is in recognition of the fact which is exclusive to the Bank which have to make provision for bad and doubtful debts. The Bank apparently provided for bad and doubtful debts on adhoc basis which may or may not cover debts recoverable in full. For example, debts recoverable may be Rs. 5,47,000 and the provision may be made excluding the interest element say to the extent of Rs. 4 lakhs. The amount that is actually written off which may include interest element also, which if in the earlier years was not treated as income, to that extent and the Bank may set off against debts recoverable. The net amount recoverable if it exceeds the provision made of Rs. 4 lakhs, such excess amount would have to be allowed as bad debts in the year in which the write off takes place. The reading of Section 36(1)(vii) and 36(1)(viia) in the sequence goes to suggest this procedure of evaluating the provision and the actual amount written off. Conversely if the provision made exceeded the amount actually written off, the difference is adjusted to the provision account in the year in which the write off takes place and on that basis in books of account the provision for bad debt is reduced. For the above mentioned reasons we allow the claim of the assessee in regard to the write off of bad debts.

37. In view of the above order of this Tribunal in the assessee's own case, we set aside the orders of the lower authorities on this issue and remand back the issue to the file of the Assessing Officer. The Assessing Officer shall reexamine the issue in the light of the order of this Tribunal in the assessee's

own case for the Assessment Year 1990-91 and thereafter decide the issue afresh in accordance with law after giving reasonable opportunity to the assessee.

38. The next ground of appeal is regarding expenditure incurred by the assessee for right issues. This issue arises for consideration in the assessee's appeal in I.T.A. Nos. 1406(Mds)/99 for the Assessment Year 1995-96. We heard the learned D.R. and the learned representative for the assessee. We find that this issue is covered by the judgement of the Supreme Court in the case of Brooke Bond India Ltd. v. CIT . In view of the above judgement of the Apex Court, we do not find any infirmity in the order of the lower authority. Accordingly, we confirm the same.

39. In the result, I.T.A. Nos. 1068(Mds)/98, 1542(Mds)/99, 766, 767(Mds)/2000, 1052(Mds)/20007l406(Mds)/99, 681(Mds)/2003 and 631 (Mds)/2000 are partly allowed. I.T.A. Nos. 844, 845 and 846(Mds)/2003 are dismissed. I.T.A. No. 806(Mds)/98 and 682(Mds)/2003 are allowed. However, there will be no order as to costs.