M/S.Cairn Energy India Pty.Limited vs Deputy Director Of Income Tax on 29 October, 2011

Author: Chitra Venkataraman

Bench: Chitra Venkataraman

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 29.10.2011

CORAM

THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

W.P.No.10910 of 2011
and M.P.No.1 of 2011

M/s.Cairn Energy India Pty.Limited
Rep. by its Authorised Signatory
Mr.Navin Jain, Authorised Signatory
WEllington Plaza,2nd Floor
NO.90, Anna Salai
Chennai-600 002 ..Petitioner

Vs

1.Deputy Director of Income Tax
(International Taxation)
7th Floor, Room NO.703,
Annexe Building, Aaykar Bhawan
121, Mahatma Gandhi Road
Chennai-600 034

2. Assistant Director of Income Tax
(International Taxation-I)
121, Mahatma Gandhi Road
Chennai-600 034 ..Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a wr

For Petitioner : Mr.C.S.Aggarwal
Senior Counsel for
Mr.M.V.Swaroop

For respondents: Mr.T.R.SenthilKumar
Junior Standing Counsel for Income Tax.

O R D E R

This writ petition is filed by the assessee seeking writ of certiorari to quash the impugned notice under Section 148 of the Income Tax Act, 1961 dated 30.03.2010 and the consequential order passed on 29.03.2011 based on the objections filed by the assessee to the initiation of the proceedings under Section 147 of the Income Tax Act, 1961.

2. On notice, the respondents have filed the counter affidavit. Apart from supporting the notice issued to reopen the assessment, the counter supported that the Officer had valid reason to believe that the income had escaped assessment. The Counter supported the proceedings as well within the limitation provided for under Section 147 and 148 of the Income Tax Act, 1961 (hereinafter called as "the Act"). Hence, the respondents sought for dismissal of the main writ petition.

3. The petitioner herein is a Company incorporated in New South Wales, Australia and is a subsidiary of Cairn Energy PLC based in Edinburgh. The Company is stated to be engaged in the business of exploration and production of oil and gas in India since 1996. In the return filed for the assessment year 2003-04 on 24.11.2003, the assessee declared Nil total income under the normal provisions of the Act and book profit of Rs.195,14,29,385/- under Section 115JB of the Act. The assessee states that it filed the tax audit report under Section 44 AB of the Act. The assessee's case was selected for scrutiny by issuance of notice under Section 143(2) of the Act. In the enquiry conducted, the assessee is stated to have filed replies and materials in support of its various claims starting from its letter dated 19.09.2005 to end on 16.02.2006.

4. Thus, a perusal of the records produced before this Court show that for nearly 8 months or so, the assessment proceedings were going on seeking various information and materials and clarification from the assessee. Ultimately, on 20.02.2006, the respondent-Income Tax Department completed the assessment under Section 143(3) of the Act. As regards the disallowance made against certain claims of the assessee in the assessment, the assessee had filed appeal before the Commissioner of Income Tax (Appeals), which is now pending disposal therein.

5. While the matters stood thus, the second respondent herein sent a notice under Section 148 of the Act on 30.03.2010 on the ground that the claim of the assessee as regards the payment made towards geological studies, seismic data acquiring and processing and chartered hire charges (drilling preparation, rig mobilisation and demobilisation) amounting to Rs.29,73,41,247/- would not fall for consideration under Section 44BB of the Act to go for TDS at the rate of 4%. The Officer viewed that the services rendered by the assessee would attract Section 44D of the Act or Section 115A of the Act or fall within the definition of "Fee for technical services" under Section 9(1)(vii) of the Act and hence, not eligible for consideration under Section 44BB of the Act. Referring to the CBDT Instruction No.1862 and to the decision of the Advance Ruling Authority in file No.P/6 of 1995 (234 ITR 371), the respondent viewed that the assessee was not entitled to deduct lower rate ; since the expenses claimed had been fully allowed in the assessment, the same called for

proportionate disallowance under Section 40(a)(i) of the Act. The second respondent viewed that the excess deduction had resulted in escapement of income chargeable to tax. The assessee also made payment towards reimbursement of actual expenses and time cost charges to its associated enterprises abroad. Although, these expenses had been allowed in the assessment, no TDS was made on these payments. In the light of the same, the respondent herein held that there was reason to believe that the income chargeable to tax had escaped assessment and hence liable to be dealt with under Section 147 of the Act read with Explanation thereto.

6. Immediately, by letter dated 18.10.2010, the assessee objected to the proceedings that it was in total disregard of the proviso to Section 147 of the Act ; further, there were no reasons sent along with notice under Section 148 of the Act, supporting the reopening of the assessment. However, in support of its contention that the claim fell for consideration under Section 44AB, the assessee made its objections that when (1) there was no suppression of facts on the side of the assessee, (2) there being no materials to warrant the reopen of the assessment and (3) there was no jurisdiction to reopen assessment. The petitioner stated that there was no allegation that there had been any failure on the part of the assessee to disclose fully or truly all material facts necessary for the assessment. Hence, in the absence of valid materials, proceedings under Section 148 of the Act are totally without jurisdiction. In view of the proviso to Section 147 of the Act, the proceedings are barred by limitation.

7. In support of its contention on the aspect of jurisdiction, the assessee relied on the following decisions of this Court, Delhi High Court as well as the Supreme Court :-

> (1) Haryana Acylic Manufacturing Co. Vs. CIT (308 ITR 38 (Del) (2) CIT Vs Tarachand Khusiram 303 ITR 298 (MP) (3) Thiagarajar Mills (P) Ltd Vs. Deputy Commissioner of Income Tax (2009) 26 DTR 50 (Mad) (4) Fenner India Ltd., Vs. DCIT (241 ITR 672 (Mad) (5) Well Intertrade Pvt Ltd Vs. ITO (308 ITR 22 (Del.) (6) Duli Chand Singhania Vs. Assistant Commissioner of Income Tax (269 ITR 192 (P&H) (7) CIT Vs. Elgi Finance Ltd (155 Taxman 124) (8) CIT Vs. Former France (264 ITR 566 (SC)) (9) Former France Vs. CIT (247 ITR 436 (All) (10) Bapalal and Company Vs. JCIT (289 ITR 37 (Mad)) (11) Jindal Photo Films Vs. CIT (234 ITR 170 (Del)) (12) CIT Vs. Kelvinator of India Ltd (256 ITR 1 (Del) (FB)) (13) KLM Royal Dutch Airlines Vs. Assistant Director of Income Tax (292 ITR 49 (Del)) (14) Andhra Bank Ltd., Vs. CIT (225 ITR 447(SC)) (15) Calcutta Discount Co Ltd Vs. ITO (41 ITR 191 (SC)) (16) Fenner India Ltd Vs. DCIT (241 ITR 672(Mad)) (17) Parashuram Pottery Works Co., Limited Vs. Income Tax Officer (106 ITR 1 (SC)) (18) Cartini India Ltd., Vs. Addl CIT (179 Taxman 157) (19) Jindal Photo Films Ltd Vs. CIT & Another (234 ITR 170) (20) CIT Vs. Baer Shoes India (P) Ltd T.C.(Appeal) No.706 of 2010 Lex Doc Id:393691 (21) ITO Vs. Lakhmani Mewal Das (103 ITR 437,448(SC)) (22) CIT Vs. Daulat Ram Rawatmull (87 ITR 349 (SC)) (23) Raunaq & Co. Pvt Ltd., Vs. ITO (158 ITR 30(Del)) (24) Ritu Investments Private Limited Vs. DCIT in W.P.(C).7515/2010 (25) First Income Tax Officer, Davanagere Circle Vs. A.Y.Panduranga Rao and others (128 ITR 250 (Kar.)) (26) Gemini Leather Stores Vs. ITO (1975) (100 ITR 1 (SC)) (27) CIT Vs. Kelvinator of India Limited (256 ITR 1 (FB))

(28) K.L.M.Royal Dutch Airlines Vs. ITO (292 ITR 49 (Del)) (29) Calcutta Discount Co. Ltd Vs. ITO (41 ITR 191) (30) CIT Vs. Former France (264 ITR 566(SC)) Relying on the above decisions, learned Senior Counsel submits that in the face of complete disclosure of all the materials in the course of enquiry on various dates at the time of original assessment, the question of reopening as though the assessee had not disclosed the facts fully or truly would not arise. Thus, in the absence of any material disclosed by the Revenue to go for a prima facie view that there is escapement of tax, the proceedings are to be dropped.

8. On consideration of the detailed reply, the respondent passed the order dated 29.03.2011, rejecting the objection under eleven heads and ultimately called upon the assessee to co-operate in the proceedings. Aggrieved by the same, the present writ petition is filed by the assessee.

9. Learned Senior Counsel appearing for the petitioner took me through Section 147 of the Act to point out that unless and until the Revenue had necessary materials to treat the income as escaping assessment, the question of reopening of the assessment under Section 147 of the Act would not arise. Placing reliance on the decision of the Apex Court reported in 320 ITR 561 in the case of Commissioner of Income Tax Vs. (1)Kelvinator Of India LTd (2)Eicher Ltd, learned Senior Counsel pointed out that even after the amendment to Section 147 in 1989, the Officer concerned has to record his reason that the income had escaped assessment. To arrive at such a view, the Officer concerned must have valid and necessary materials providing live link for the formation of the belief. In the absence of any materials disclosed in the notice or even subsequently thereto, the question of assuming jurisdiction under Section 147 does not arise. Placing reliance on the proviso to Section 147 of the Act, he submitted that on the facts thus disclosed in the notice, no action could be taken after the expiry of four years from the end of the relevant assessment year. Even to fall under any of the clauses in Explanation (2) from (a) to (c), the respondent is duty bound to show that his reasons rested on materials in his possession. In the absence of any such materials disclosed, the reassessment proceedings has to fail.

10. Referring to the reply filed at the time of the original assessment proceedings, in respect of TDS made both under Section 44AB of the Act as well as as regards the payment towards reimbursement of actual expenses, he pointed out that in the letter dated 16.02.1996 in respect of the claim under Section 44BB of the Act at 4%, the assessee had offered the explanation and produced the details thereon on the details of TDS made. Thus, along with the tax Audit Report before the Officer, all materials relating to the claim was placed and the same were considered. Therefore, the question of making allegation that the assessment had resulted in under-assessment resulting in granting of excess relief does not arise.

11. In so contending, learned Senior counsel for the assessee placed reliance on the following decisions:-

(1) Haryana Acrylic Manufacturing Co. Vs. CIT reported in 308 ITR 38 (Del) (2) Well Intertrade Pvt Ltd Vs. Income Tax Officer reported in 308 ITR 22 (Del) (3) Duli Chand Singhania Vs. Assistant Commissioner of Income Tax reported in 269 ITR 192

(P&H) (4) Fenner India Ltd Vs. DCIT reported in 241 ITR 672 (Mad) and (5) the unreported decision of the Delhi High Court dated 31.05.2011 in W.P.No.7789 of 2010 and submitted that on the face of the records thus available and on a reading of the notice issued under Section 147 of the Act, it is clear that the Revenue had no material to substantiate that there was reason to believe that income had escaped assessment, warranting proceedings under Section 147 of the Act.

12. Per contra, while supporting the notice, learned Standing Counsel for Income Tax Department reiterated his contention taken in the counter affidavit. He submitted that even assuming for a moment that the assessee had given the details in the claim under Section 44AB of the Act, the reading of the order shows that there was no proper consideration made on the said claim in accordance with law. In the circumstances, as there income had escaped tax, reopening of the assessment was rightly done. The allegation of the assessee that the respondent had not stated any reasons in the notice under Section 147 of the Act is not a good ground for quashing the proceedings. He further argued that the proceedings being at the notice stage, the petitioner be directed to cooperate in the reassessment proceedings and work out the remedy in accordance with law. It is further stated that the mere submission of the records in the course of assessment proceedings, per se, would not oust the jurisdiction of the officer resorting to Section 147 of the Act. Learned Standing Counsel pointed out that the mere fact that the assessee had given certain details would not automatically fall under the phrase that there was 'true and full disclosure of all material facts'. The Assessing Officer has recorded his reasons to believe that the income of the assessee company had escaped assessment. Rightly, the proceedings were initiated to reopen the assessment to bring to tax the income that had escaped assessment.

13. In support of his contention, learned Standing Counsel for the Income Tax Department placed reliance on the decision of this Court in the case of Tamil Nadu Petroproducts Ltd Vs. Commissioner of Income Tax reported in (2011) 11 Taxmann 311 (Mad), in the case of Ankita Deposits and Advances (P) Ltd Vs. Commissioner of Income Tax reported in (2010) 235 CTR(HP) 273, in the case of Honda Siel Power Products Limited Vs. The Deputy Commissioner of Income Tax And Another reported in (2011) 197 Taxman 415 (Del) in W.P.No.9036 of 2007 dated 14.02.2011. Relying on the decision of the Delhi High Court, learned Standing Counsel for the Revenue contended that the proceedings initiated for reassessment could not be quashed at the threshold. Hence, it is open to the assessee to produce records and there is no necessity to quash the notice on reassessment notice. Learned Standing Counsel further pointed out that when the assessee had not stated anything or given particulars to justify the claim ; thus going by Explanation to Section 147 of the Act, the notice has to be upheld.

14. Heard learned Senior Counsel appearing for the petitioner and learned Standing Counsel for the Income Tax Department and perused the materials available on record.

15. I am constrained to accept the plea to quash the notice issued under Section 147 of the Act. Even though the assessee has further remedy in the event of the order passed under the reassessment proceedings, I hold that the notice issued is totally without jurisdiction, there being no materials to base the belief that income had escaped assessment and it is hit by limitation of four years. I have no

hesitation in accepting the plea of the writ petitioner and thereby, quash the proceedings.

16. As far as the jurisdiction of the Officer to reopen the assessment under Section 147 is concerned, the consistent view taken by this Court as well as by the other Courts and particularly by the Apex Court is that while the power to reopen the assessment under Section 147 is a very wide power, yet, reopening of assessment must be based on tangible materials to show that income had escaped assessment. In considering the amended provision under Section 147 of the Act with effect from 01.04.1989 as well as the provision prior to the amendment, in the decision in the case of Commissioner of Income Tax Vs. (1) Kelvinator of India Ltd (2) Eicher Ltd reported in (2010 320 ITR 561 (SC), the Apex Court observed that in assuming jurisdiction under Section 147 of the Act, under the guise of reopening the assessment, the Officer does not review his own order. The Apex Court pointed out that after the amendment post 1st April 1989, the power to reopen under Section 147 of the Act is much wider than what it was under the old law. Cautioning the exercise of arbitrary power in the guise of "reason to believe" as available under Section 147 of the Act, the Apex Court pointed out that "mere change of opinion" would not empower the authority to reopen an assessment. The Apex Court pointed out as under:-

> " We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there in "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated October 31, 1989 ((1990) 182 ITR (St.)1, 29), which reads as follows:-
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> "7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression "reason to believe" in Section 147 - A number of representations were received against the omission of the words "reason to believe" from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended

> section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

17. In the background of such enunciation of law, we need to look at the amended Section 147 of the Act relevant to the case on hand. For convenience of reference, Section 147 is extracted hereunder:-

> "147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year.
>
> Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this Section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment 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.
>
> Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

A reading of the said provisions thus show that when an assessment is made under Section 143(3), a proceeding taken to reopen the assessment under Section 147 must first satisfy that the income chargeable to tax has escaped assessment by reason of (1) failure to make a return under Section 139 or in response to Section 141(1) or Section 148 or (2) to disclose fully and truly all material facts necessary for the assessment. Thus, the fundamental aspect of reopening is that the order of assessment suffers under-assessment on account of want of material facts and such a situation has arisen on account of the assessee not placing fully and truly all material facts necessary for assessment and but for which, the occasion to reopen would not have arisen at all. Thus the reason to believe that income has escaped assessment must necessarily rest on facts indicating the failure on the part of the assessee not placing full and true facts or material relating to the assessment. There is no dispute that the assessee had filed its return under Section 139 of the Act and assessments were also completed under Section 143(3) of the Act.

18. A perusal of the records filed before this Court show that in response to the notice issued under Section 143(2) of the Act, the assessee filed its reply immediately starting from 19.09.2005,

26.09.2005, 16.12.2005, again 16.12.2005, 23.12.2005, 30.12.2005 and 16.02.2006. A reading of all these replies show that particularly on 16.12.2005, the assessee had given the particulars of TDS made. Along with the return filed, the assessee had also enclosed the statutory Auditor's report and the Schedule to the Financial statements on the expenses made on geological studies, seismic data, acquiring and processing and chartered hire charges (drilling preparation, rig mobilisation and demobilisation). In respect of the above said claim, particularly with reference to Section 40(a)(i) of the Act, in the letter dated 16.02.2006, the assessee had also clarified that it had not withheld any tax at source to attract Section 40(a)(i) of the Act. In the letter written on 16.02.2006, in response to the enquiry made, the assessee had also given details regarding the TDS deducted from time to time. Thus, a reading of the various correspondence show that the assessee had participated fully in the enquiry under Section 143(2) of the Act and had in fact, disclosed fully and truly all material facts and materials for the purpose of making the assessment.

19. Learned Standing counsel appearing for the Revenue pointed out that even though the assessee might have disclosed these materials, in the absence of any consideration on these details, rightly, the proceedings has to be initiated.

20. I do not think such line of reasoning could be sustained in the context of the decisions referred to above viz.,in the case of Messe Dusseldorf India P.Ltd Vs. Deputy Commissioner of Income Tax, Transfer pricing officer and another reported in (2010) 320 ITR 565 (Delhi) (1) Haryana Acrylic Manufacturing Co. Vs. CIT reported in 308 ITR 38 (Del), (2) Well Intertrade Pvt Ltd Vs. Income Tax Officer reported in 308 ITR 22 (Del), (3) Duli Chand Singhania Vs. Assistant Commissioner of Income Tax reported in 269 ITR 192 (P&H), (4) Fenner India Ltd Vs. DCIT reported in 241 ITR 672 (Mad) and (5) the unreported decision of the Delhi High Court dated 31.05.2011 in W.P.No.7789 of 2010 etc. It is no doubt true that under Explanation 2, Sub clause (c) narrates the instances which enables the Officer to assume jurisdiction under Section 147 of the Act viz.,

(i) where the income chargeable to tax has been underassessed ;

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

(iii) 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.

Even to come under any of the clauses referred to above, unless and until the department is in a position to show "tangible material' leading to an inference that there is income escaping assessment, as the Apex Court pointed out unless the reasons have a live link to the formation of belief, the mere belief that the income chargeable to tax is the subject of excessive relief or under assessment, per se, would not empower the Officer to assume jurisdiction to reopen the assessment under Section 147. Following the decisions in the cases of Haryana Acrylic Mfg.Co. Vs CIT reported in (2009) 308 ITR 38, in the case of Duli Chand Signhania Vs. Assistant Commissioner of Income Tax reported in 269 ITR 192 (P&H), in an unreported decision in W.P.No.7789 of 2010 dated 31

May 2011 relied upon by the assessee, the Delhi High Court held that when the assessee had disclosed fully and truly all material facts for its assessment, no action could be taken under Section 147 of the Act after the expiry of four years indicated therein. I agree that the submission of the learned Senior counsel appearing for the petitioner that in the absence of any reasons disclosed to link the materials to the formation of belief that there is an escapement of income, the proceedings taken, necessarily, has to be quashed by this Court.

21. It may be of relevance to point out that in the decision reported in the case of Fenner India Ltd Vs.DCIT reported in 241 ITR 672 (Mad), which has been consistently followed by this Court as well as by the other High Courts, it was pointed out that after an assessment had been made under normal circumstances, there is no reason for anyone to doubt the assessment made on the basis of all relevant facts. This Court pointed out:-

> " If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice. AS to whether the material facts disclosed by the assessee are full and true is always a question of fact and unless the facts disclosed had been examined in relation to the extent of failure if any on the part of the assessee, it is not possible to form the opinion that there had been a failure on the assessee's part to truly and fully disclose the material facts. A notice issued without a record of the Assessing Officer's reasonable belief that there was such failure on the part of the assessee would be indicative of a failure on the part of the Assessing Officer to apply his mind to material facts, and on that ground also, the notice issued would be vitiated."

22. In the light of the above said enunciation of law, there being no allegation that the assessee had not disclosed truly and fully the material facts, on the mere allegation that the claim would not fall under Section 44BB of the Act, the Officer could not review his order in the guise of exercise of power under Section 147 to reopen the assessment and there cannot be any assumption of jurisdiction under Section 147 of the Act.

23. As to the decisions relied on by the petitioner already referred to above, I do not think that it is necessary to deal with each of the decisions referred to by the learned counsel independently since all of them are as regards the same enunciation of law.

24. As regards the decision in the case of Tamil Nadu Petroproducts Ltd Vs. Commissioner of Income Tax reported in (2011) 11 Taxmann 311 (Mad) rendered in W.P.Nos.28457 of 2008 and 19260 of 2009 dated September 17, 2010 relied on by learned Standing Counsel for the Revenue is concerned, the same has to be seen in the light of the facts therein. This Court pointed out that the reassessment proceedings were initiated based on the information available on record relating to the assessment of M/s.CIBA India Pvt Ltd as regards the compensation paid to the assessee for the termination of supply agreement. The Revenue pointed out that there was total non-disclosure of

full and true facts before the Income Tax Officer and hence the reassessment proceedings were justified in law. On considering the materials, this Court came to the conclusion that the proceedings taken for reassessment could not be quashed at the threshold and that it is open to the assessee to produce all the records and accordingly held that there is no necessity for quashing the reassessment proceedings.

25. As far as the decision of the Himachal Pradesh High Court in the case of Ankita Deposits and Advances (P) Ltd Vs. Commissioner of Income Tax reported in (2010) 235 CTR (HP) 273 is concerned, even the said decision is not of any assistance to the Revenue. The facts show that the assessee therein filed its return declaring income on the sale of shares as attracting capital gains. Even though originally, the returns were accepted under Section 143(1) of the Act, later on, the Assessing Officer found on a perusal of computation of the income that the assessee was engaged in the business of the trading in shares and the income shown as a long-term capital gain should in fact be computed under the head of 'business income'. The assessee contended that in respect of the previous years, they had reflected the shares in question as investment and therefore, the Revenue could not change the nature and character of this investment. In considering such a question, the Himachal Pradesh High Court pointed out that in the proceedings under Section 143(1), the returns filed by the assessee was accepted as a matter of course. The returns filed by the assessee normally would be taken up for scrutiny only in few cases. As regards the notice issued for the reopening of the assessment, the facts revealed that the assessee had been showing investment as trading investment and the income on sale, a long-term capital income. However, when losses were incurred on the sale of shares, the assessee claimed the losses under the head of business income and for the previous years, the assessee was showing the investment in the very same shares as trading investment. The Himachal Pradesh High Court pointed out that the assessee had been showing the holding as stock in trade. Thus on going through the records, the authorities came to the conclusion that the holding of shares was by way of stock in trade. In the light of the factual finding, the Himachal Pradesh High Court upheld the notice issued by the Assessing Officer and held that the Assessing Officer was justified in reopening the assessment.

26. As far as the decision of the Delhi High Court in the case of Honda Siel Power Products Limited Vs The Deputy Commissioner of Income Tax and another reported in (2011) 197 Taxman 415 (Delhi) relied by the Revenue is concerned, the said decision rests on the facts of the case. The issue therein related to the claim of the Revenue that the income chargeable to tax amounting to Rs.98.46 lakhs was found to have escaped assessment by reason of the assessee not disclosing the details fully and truly. The Revenue pointed out that the Tax Audit Report mentioned a sum of Rs.1,07,69,936/- as the amount written back under Section 41 of the Act. A sum of Rs.9,23,471/- was specifically added in the profit and loss account under the head 'other income' leaving Rs.98.46 lakhs and was added back under different heads, but was not separately indicated. The High Court pointed out that the assessee did not give complete break up of Rs.98.46 lakhs reflected in the different accounts. In the background of facts thus available, the Delhi High Court ultimately upheld the reopening of the assessment. In so holding, the Delhi High Court referred to the Explanation to Section 147 of the Act and pointed out that there was omission or failure on the part of the assessee to make full and true disclosure of material facts to point out that the expenses incurred were relatable to tax free / exempt income, which prima facie had been claimed as deduction in the income and expenditure

account. The Delhi High Court pointed out that the failure on the part of the Assessing Officer to apply Section 14 A of the Income Tax Act, 1961 had resulted in the escapement of income. In the background of the fact that the assessee had not disclosed the material facts fully or truly, the notice on reopening was upheld.

27. A reading of the above decisions relied on by the learned Standing Counsel for the Revenue shows that while there is no dispute on the point of law laid down therein that the reason must have a live link to the formation of the belief that the income has escaped assessment and that there must be tangible material to come to conclusion that there is escapement of income from assessment, the decision in the above cases rested on the facts in each case. Thus, as rightly pointed out by the learned Senior Counsel appearing for the petitioner the facts before us are different and therefore, the decisions are distinguisable. When the assessee had placed all the materials before the Officer during enquiry under Section 143(2) of the Act fully and truly and the notice does not, in any manner, speak on the failure of the assessee to disclose truly and fully the materials with the very basis on initiation of reassessment proceedings thus absent, I do not find any justification in the contention of the Revenue that the reassessment proceedings is sustainable on the face of the provisions of Section 147 of the Act. Hence, holding that the decisions referred to by the learned Standing Counsel appearing for the Revenue are distinguishable on facts, I accept the plea of the assessee that the reassessment proceedings lack the very basis for assumption of jurisdiction.

28. The second ground taken in the notice was that the assessment called for proportionate disallowance under Section 40(a)(i) of the Act. In the light of the fact that the assessee had specifically dealt with the same in its reply given and the accounts produced, there being no other materials disclosed on a view held by the Assessing Officer the proceedings deserved to be quashed by this Court. As regards the second view taken by the Officer in the notice that there was no TDS found to have been made on the payment of reimbursement of actual expenses and time cost charges to its associated enterprises abroad, the notice does not disclose any materials on the formation of belief, consequently, I have no hesitation in rejecting the plea of the Revenue.

29. As already pointed out even though the assessee has an alternative remedy to canvass the merits of reassessment under the various provisions of Statute, a reading of the notice leaves no manner of doubt that it is more in the nature of review of the assessment made than in the nature of reopening.

30. In the light of the above, on the ground of relevant materials not being there to justify the formation of belief as to the escapement of income, there being, no allegation that there was no full and true disclosure of the material facts by the assessee at the time of original assessment, I hold that the reassessment proceedings lack jurisdiction as required under Section 147 of the Act, consequently, is also hit by limitation.

31. In the circumstances, quashing the impugned notice, I allow the writ petition. No costs. Consequently, connected miscellaneous petition is closed.

29.10.2011 Index:Yes/No Internet:Yes/No nvsri To

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