IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.85 OF 2009

Hindustan Unilever Limited,
a company incorporated under
the Indian Comapnies Act, 1913
and having its registered office
at Hindustan Lever House,
164/166, Backbay Reclamation,
Mumbai – 400 020 ..Petitioner.

Versus

1. Deputy Commissioner of
Income-tax 1(1),
533, 5th Floor, Aayakar Bhavan,
M.K. Road, Mumbai 400 020

2. Union of India,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020 ..Respondents.

Mr.Percy J. Pardiwala, senior Advocate with mr.Nishant Thakkar and Mr.Rajesh Poojari i/by M/s.Mulla & Mulla & C.B.C. for the petitioner.

Ms.Suchitra Kamble i/by Mr.Suresh Kumar for the respondents.

CORAM : Dr.D.Y. Chandrachud &
J.P. Devadhar, JJ.

DATE : 1st April 2010.

ORAL JUDGMENT (Per : Dr.D.Y. Chandrachud, J.)

1. Rule, with the consent of Counsel returnable forthwith. By consent of both the parties, the petition is taken up for final hearing at the stage of admission.

2. The petitioner filed its return of income on 29th October 2004 for assessment year 2004-2005. Under the head of business income, an amount of Rs.1815.59 crores was reflected as the net profit before tax. This was arrived at after taking into consideration losses of Rs.10.84 crores suffered by the Plantation division and of Rs.98.28 lakhs suffered by the Crab Stick Unit at Chorwad. The case of the petitioner for assessment year 2004-2005 was selected for a scrutiny assessment. The assessment was concluded upon the passing of an order on 27th December 2006. By a notice dated 7th April 2008, the assessment was sought to be re-opened, in exercise of the powers conferred by Sections 147 and 148 of the Income Tax Act, 1961.

3. Four reasons have been furnished for re-opening the assessment in the disclosure made by the Assistant Commissioner of Income Tax on 17th September 2008. For convenience of reference, it would be appropriate to

extract from the reasons which have been furnished to the assessee, which are as follows :

> *"On perusal of the records, it is noticed that in the computation of income enclosed with the return of income filed by the assessee along with the return of income, the assessee has claimed deduction of Rs.10,84,07,449/- as loss of Plantation division deductible under Rule 8 and the same was allowed in the assessment order passed u/s.143(3) of the Act. As per Rule 8 of Income Tax Rules, 1962, income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business and forty per cent of such income shall be deemed to be income liable to tax. The provision under Rule 8 for taxing of 40 per cent of income from sale of tea grown and manufactured in India is deeming provision and it is applicable only in the case of income. Therefore, the assessee's claim of set off of 40 per cent of such losses against the normal business profits is not allowable. Thus, the assessee's income to the extent of Rs.10,84,07,449/- has escaped the assessment.*
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> *On perusal of the records, it is also noticed that in the computation of income enclosed with the return of income filed by the assessee, the business income included in the total income determined by the assessee is at Rs.18,15,59,78,868/-. In the same computation of income, while determining the business income, the assessee has deducted an amount of Rs. 10,84,07,449/- as loss of Plantation division. However, in the computation of business income in the assessment order passed u/s. 143(3) of the Act, the assessee was again allowed a deduction of Rs.10,84,07,449/- as loss of Plantation division. Therefore, the assessee was wrongly allowed the deduction of Rs.10,84,07,449/- as loss of Plantation division in the assessment order passed u/s. 143(3) of the Act. Thus, the assessee's income to the extent of Rs. 10,84,07,449/- has escaped the assessment.*
>
> *On perusal of the records, it is also noticed that in the computation of long term capital gain on sale of Bhandup land enclosed with the return of income filed by the assessee, the assessee has claimed exemption u/s.54EC of the Act of Rs. 3,07,50,000/- being invested in 5.10% National Housing Bank Capital Gains Bonds and the same claim of exemption was allowed*

in the assessment order passed u/s.143(3) of the Act. The date of sale i.e. transfer of asset is 29.09.2003. As per Sec 54 EC (1) of the Act, where the capital gain arises from the transfer of a long-term capital asset and the assessee has, at any time within a period of six months after the date of such transfer, invested the whole or any part of capital gains in the long-term specified asset, the capital gain shall be dealt with in accordance with the following provisions of this section, that is to say – (a) if the cost of the long-term specified asset is not less than the capital gain arising from the transfer of the original asset, the whole of such capital gain shall not be charged under section 45 of the Act, (b) if the cost of the long-term specified asset is less than the capital gain arising from the transfer of the original asset, so much of the capital gain as bears to the whole of the capital gain the same proportion as the cost of acquisition of the long-term specified asset bears to the whole of the capital gain, shall not be charged under section 45 of the Act. On perusal of the NHB Capital Bonds Certificates dated 9th June 2004, it is seen that the date of allotment of the said bond is 31.3.2004. The date of allotment of the bond is the record date for all other purposes (date of redemption is 31.3.2009). Thus, the assessee has not invested the gain in specified asset within a period of six months after the date of transfer of the capital asset (date of sale 29.9.2003). Hence, the assessee is not eligible for the exemption u/s.54EC of the Act of Rs.3,07,50,000/- on sale of Bhandup land. Thus, the assessee's income from long term capital gain to the extent of Rs. 3,07,50,000/- has escaped the assessment.

On perusal of the records, it is also noticed that in the computation of income enclosed with the return of income filed by the assessee, the assessee has claimed deduction of Rs. 14,53,98,193/- u/s.10B in respect of four 100 per cent export oriented undertakings. The deduction u/s.10B was restricted to Rs.11,11,76,919/- in the assessment order passed u/s.143(3) of the Act. On perusal of the records, it is noticed that in the assessment order the exemption u/s.10B in respect of Crab Stick, Chorwad Unit was taken as NIL in view of loss from that unit of Rs.1,33,49,654/-. As the income of the said unit is exempt from taxation, the loss of the said unit, which is already set off against normal business income in the accounts, is not allowable. However, the same was allowed in the assessment order. Thus, the assessee's income to the extent of Rs.1,33,49,654/- has escaped the assessment."

4. The petitioner communicated its objections to the re-opening of the assessment on 6th October 2008. An order was passed thereon by the Assessing Officer on 14th November 2008, over-ruling the objections. The challenge in these proceedings is to the notice re-opening the assessment for assessment year 2004-2005. The re-opening of the assessment, it may be noted has taken place within a period of four years of the end of the relevant assessment year.

5. The reasons on the basis of which the assessment is sought to be re-opened have been extracted earlier. Before dealing with the challenge in these proceedings, it would be appropriate to summarize the basis for re-opening the assessment. The *first* reason, according to the Revenue, is that the loss of Rs.10.84 crores in respect of which the assessee had claimed a deduction, as emanating from the Plantation division, is wrongly set off and income to the extent of Rs.10.84 crores has escaped assessment. *Secondly*, according to the Revenue, there is a computational error in the assessment order. *Thirdly,* the investment which has been made under Section 54EC was beyond a period of six months of the date of the transfer of the asset by the assessee and the exemption is alleged to have been wrongly allowed. *Fourthly,* in respect of a loss which was incurred on an eligible unit under Section 10B, the case of the Revenue is that the set off was wrongly granted in the order of assessment.

6. Each of the reasons set out in the notice for re-opening the assessment would have to be taken separately in order to consider the challenges addressed before the Court.

(i) The loss sustained by the Plantation division

7. In the return of income that was filed by the assessee and as a part of the statement, showing computation of the total income, the total business income was reflected as Rs.1826.43 crores. The assessee reported a loss on the Plantation division, described as the Doom Dooma division and the Tea estates, in the amount of Rs.10.84 crores. After deducting the loss of Rs.10.84 crores from the business income, the profits attributable to the business carried on by the assessee were computed at Rs.1815.59 crores.

8. The assessee, as a part of its plantation business carries on a composite activity of growing tea leaves which are then utilized for the manufacture and sale of tea. Rule 8 of the Income Tax Rules, 1962 provides that income derived from the sale of tea grown and manufactured by the seller in India shall be computed as if it were income derived from business and 40 per cent. of such income is deemed to be the income liable to tax. Rule 8, in other words, enacts a legal fiction for segregation of agricultural income from business income, where an assessee grows tea, which constitutes an agricultural activity and also manufactures and sells tea, which is a non-agricultural and business activity.

By virtue of Section 10, agricultural income is not included in the computation of the total income of the assessee. Consequent upon Rule 8, a formula has been provided for the segregation of income, which is attributable to agricultural activity from income which is attributable to the business activity of the assessee. Income derived from the sale of tea grown and manufactured by the assessee has to be computed as if it were income derived from the business; 40 per cent. of such income is deemed to be income liable to tax. Rule 8, therefore, which is subordinate legislation, stipulates a method of segregating the agricultural income from the business income, by applying the proportion of 60 : 40.

9. The genesis of Rule 8 has been explained in the judgment of the Supreme Court in ***Commissioner of Income Tax V/s. Williamson Financial Services and Others***[1]. In the case before the Supreme Court, the assessee grew and manufactured tea, which was then exported. The assessee claimed that the deduction under Section 80HHC was liable to be granted against the entire tea income before applying Rule 8(1). The Assessing Officer rejected the claim and held that the deduction would be allowed only after apportionment between agricultural income and non-agricultural income. The Tribunal restored the order of the Assessing Officer, which had been interfered with by the Commissioner (Appeals), while the High Court in turn

1 [2008] 297 ITR 17 (S.C.)

reversed the decision of the Tribunal. The Supreme Court observed that Rule 8 refers to cases of integrated income. Where the income of the assessee arises partly from agriculture and partly from manufacture, the profits which arise from the sale of tea have to be apportioned since that part of the income which constitutes income from agricultural activity, has to be exempted, being agricultural income. The Supreme Court held that Rules 7 and 8 simplify the procedure for apportionment. Where the income comprises both of agricultural and non-agricultural elements, the Supreme Court held that the income has to be 'disintegrated' and that portion which represents agricultural income should be exempted from tax. At the same time, computation of income from tea had to be in accordance with the relevant provisions of the Income Tax Act, 1961 and deductions towards expenses incurred for earning the income shall be liable to be made in accordance with the law. The Supreme Court held that since agricultural income is neither chargeable nor includible in the total income, Rule 8(1) segregates the agricultural income from business income in the ratio of 60 : 40. Consequently, chargeability and computability under the Act would be confined to the extent of 40 per cent. of the income. If this distinction is kept in mind, the assessee would not be entitled to claim a deduction under Section 80HHC against the entire or composite tea income but only against a proportionate part thereof, which is attributable to business income in the ratio which is set out in Rule 8.

10. In the present case, the ground on which the assessment is sought to be re-opened is that the assessee had claimed a deduction of Rs. 10.84 crores as the loss sustained by the Plantation division under Rule 8, which came to be allowed. According to the notice issued to the assessee, the deeming provisions of Rule 8 are applicable only in the case of agricultural income and the claim of the assessee to set off 40 per cent. of the losses against normal business profits was not allowable.

11. The submission which has been urged on behalf of the assessee is that the ground on which the assessment is sought to be re-opened could not possibly have led any reasonable person, instructed in law, to form a reason to believe that income had escaped assessment within the meaning of Section 147. Learned Counsel submitted that under Rule 8 a segregation is required to be made of income derived from the sale of tea grown and manufactured by the seller, such that 40 per cent. of the income is deemed to be income liable to tax. Counsel submitted that income for the purposes of the Act and, for the purposes of Rule 8 must of necessity take into account the expenditure incurred by the assessee for the purposes of business and Rule 8 requires the computation of such income as if it were income derived from the business. Ex-facie, the legal fiction which is created by Rule 8(1) requires the computation of the income derived from the sale of tea "as if it were income derived from business" and that can only be after taking into account the expenditure which is incurred by the assessee for the purposes of

earning the income. Consequently, the loss, if any, that is sustained by the assessee on account of its business operations involving the manufacture and sale of tea would be allowable and all that the assessee has done was to segregate the overall loss that was sustained by attributing only 40 per cent. of the loss to the business activity of the manufacture and sale of tea. Counsel submitted that the notice for re-opening the assessment proceeds on the basis that the loss of Rs.10.84 crores is entirely to be disallowed. This, it was urged is an inference which has been drawn by the Assessing Officer without even a plausible basis in law. The claim of the assessee was that 60 per cent. of the loss which was sustained as a result of its composite operations should be attributable to the agricultural activity and it was only in respect of the balance representing 40 per cent. that the assessee sought to set off the loss which has arisen as a result of its business activities. Hence, it was submitted that the basis on which the Revenue has sought to re-open the assessment could not possibly be sustained as giving rise to an inference that income chargeable to tax had escaped assessment.

12. In evaluating the submissions which have been urged on behalf of the assessee, this Court, has been mindful of the circumstance that the jurisdiction of the Court has been invoked against a notice issued under Section 148 seeking to re-open an assessment on the ground that income chargeable to tax has escaped assessment. The condition precedent for a valid exercise of power under Section 147 is the formation of a reason to

believe on the part of the Assessing officer that income chargeable to tax had escaped assessment. Now, it cannot be disputed, as it has not been during the course of the submissions, that the assessee had sought to adjust 40 per cent. of the overall loss which was sustained as the loss that was attributable to the business activity of the manufacture and sale of tea at its two plantation units. This is evident from the computation of the profits and gains of business made by the assessee in respect of its Tea estates and Doom Dooma unit. In other words, the material on record clearly demonstrates that the adjustment that was sought was not in respect of the entire loss that was sustained by the assessee in the composite activity of the growing of tea leaves and the manufacture and sale of tea but only to the extent of 40 per cent. which represented the segregation of the income attributable to the sale of tea under Rule 8.

13. Now, what Rule 8 postulates is the process of segregating the income derived from the sale of tea upon its computation as if it were income derived from business. Rule 8 creates a legal fiction, as a result of which the income which is derived from the sale of tea which is grown and manufactured by the assessee is to be computed as if it were income derived from business. It needs no line of elaborate reasoning to state the well settled position in law that once a legal fiction is created by the legislature or, as in this case, in subordinate legislation, the legal fiction has to be given force and effect so as to operate within the area in which it was intended to

operate. In applying a legal fiction, it is trite law that one cannot allow the imagination to boggle. A legal fiction has to be carried to its logical conclusion. In computing the income from the sale of tea as if it was income derived from business, for the purposes of Rule 8, it is impossible to comprehend as to how the expenditure incurred by an assessee, wholly and exclusively, for the purposes of business should be disregarded. Obviously, the expenditure cannot be disregarded. The principle which must govern is well settled and only a brief reference to authority on the subject would be necessary.

14. In ***Commissioner of Income Tax (Central), Delhi Vs. Harprasad & Co. P. Limited,***[2] the question which came up before the Supreme Court was whether a capital loss could be determined and carried forward, in accordance with the provisions of Section 24 of the Act of 1922, when the provisions of Section 12B were not applicable during the course of assessment year 1955-56. The Supreme Court held that from the charging provisions of the Act "it is discernible that the words 'income' or 'profits and gains' should be understood as including losses also, so that, in one sense 'profits and gains' represent 'plus income' whereas losses represent 'minus income'. The Supreme Court observed as follows :

> *"From the charging provisions of the Act, it is discernible that the words "income" or "profits and gains" should be understood as including losses also, so that, in one sense "profits*

2 (1975) 99 ITR 118 (S.C.)

> *and gains" represent "plus income" whereas losses represent "minus income". In other words, loss is negative profit. Both positive and negative profits are of a revenue character. Both must enter into computation, wherever it becomes material, in the same mode of the taxable income of the assessee. Although section 6 classifies income under six heads, the main charging provision is section 3 which levies income-tax, on the "total income" of the assessee as defined in section 2(15). An income in order to come within the purview of that definition must satisfy two conditions. Firstly, it must comprise the "total amount of income, profits and gains referred to in section 4(1)". Secondly, it must be "computed in the manner laid down in the Act". If either of these conditions fails, the income will not be a part of the total income that can be brought to charge."*

The Supreme Court held that if the capital was not chargeable to tax during the period between 1 April 1948 to 1 April 1957, the assessee did not possess an independent right to carry forward his capital loss even if it could not be set off, owing to the non-taxability of the capital gains, against profits in subsequent years. The decision of the Supreme Court emphasizes that under the charging provisions of the Act, income must be comprehensively understood as including a loss. The principle that income would include a loss has also been re-affirmed in a subsequent judgment of the Supreme Court in ***Commissioner of Income Tax, Bangalore V/s. J.H. Gotla***[3]**.**

15. In the present case, the Assessing Officer, while issuing a notice for re-opening the assessment observed that the provisions of Rule 8 are applicable "only in the case of income" and the claim of the assessee to set off

3 (1985) 156 ITR 323 (at page 338)

40per cent. of losses against normal business profits could not be allowed. On this basis, the Assessing Officer has formed the opinion that the loss of Rs. 10.84 crores attributable to the business activity of the assessee involving the manufacture and sale of tea was liable to be disallowed. It must be noted here that it is not the contention of the Assessing Officer that the loss which has been computed by the assessee by applying the proportion of 40 per cent. is not a fair estimate of the actual loss sustained by the assessee in its business operations. On the contrary, it is on the basis of Rule 8 that the Assessing Officer seeks to postulate that the loss attributable to the business activity of the assessee would have to be disregarded on the ground that it is not allowable expenditure. This inference which is sought to be drawn by the Assessing Officer is contrary to the plain meaning of the charging provisions of the Act; and to Rule 8, besides being contrary to the position in law laid down by the Supreme Court. The assessee was lawfully entitled to adjust the loss which arose as a result of the business activity under Rule 8.

(ii) Computational Error in the Assessment Order :

16. The second ground on which the assessment is sought to be re-opened is a computational error in the assessment order. In order to appreciate the ground for re-opening, it would be appropriate to refer to the statement showing the computation of total income, as appended to the return for assessment year 2004-2005.

The assessee returned a business income of Rs.1,826.43 crores. The loss of Rs.10.84 crores arising out of the Plantation division and attributable to the business activity was deducted from the business income so as to result in a profit of Rs.1815.59 crores from business operations. Consequently, in its computation of income, the assessee disclosed the adjustment of the loss arising from the Plantation division as being made in order to determine the business profit.

The Assessing Officer while passing his order of assessment dated 27th December 2006 adopted the business income of Rs.1815.59 crores which was in terms of the computation made by the assessee. While making deductions from the business income, the Assessing officer deducted an amount of Rs.10.84 crores as a loss arising from the Plantation division. This was a plain computational error on the part of the Assessing Officer because the figure of Rs.1815.59 crores disclosed as business income by the assessee in the computation of income was after the adjustment of the loss from the Plantation division of Rs.10.84 crores. The Assessing Officer, therefore, plainly made a computational error in once again deducting an amount of Rs. 10.84 which had already been accounted for in the computation of business income at Rs.1815.59 crores.

17. Counsel appearing on behalf of the assessee submitted that the error which took place in the computation of income by the Assessing Officer

can and ought to be rectified under Section 154. The submission which was urged before the Court is that if the Assessing Officer would proceed to rectify the error, which is obvious, the assessee would have no objection. Further it was urged that upon a mistake in the order of the Assessing Officer, three remedies may possibly be available under the Act, namely (i) A rectification under Section 154; (ii) A revision under Section 263; and (iii) A re-assessment under Section 147. Each of these remedies is exercisable by different authorities within different periods of limitation. The submission which has been urged before the Court is that the Revenue must choose the most appropriate remedy, that leaves the assessee with the least detriment. In the event that the Assessing Officer was to exercise the power of rectification under Section 154, the order would have to be corrected to the extent of the computational error. Exercising the power of re-opening the assessment on that ground of a simple computational error is a matter of serious prejudice to the assessee since, in such an event, the entire assessment would be liable to be re-opened including all other issues which come to the notice of the Assessing officer in the course of proceedings under Section 147.

18. We find that there is merit in the submission which has been urged on behalf of the assessee. Section 154 empowers the Income-tax Authorities, including an Assessing Officer, to amend any order passed by them with a view to rectify any mistake apparent from the record. The

limitation for the exercise of the power is under sub-section (7) of Section 154, four years from the end of the financial year in which the order sought to be amended was passed. There can be no dispute about the position that the computational error that has been made by the Assessing Officer in the present case is capable of being rectified under Section 154(1). The Assessing Officer is within the period of limitation prescribed by sub-section (7) of Section 154. Moreover, the computational error cannot be attributed to any act or omission on the part of the assessee, as the assessee in the course of its statement of computation of total income had clearly disclosed that the business profits were arrived at after adjusting the losses sustained by the Plantation division (attributable to the business activity) from the business income.

19. Explanation (2) to Section 147 provides a deeming fiction, for the purposes of the Section, of cases where income chargeable to tax would be regarded as having escaped assessment. Clause (c) of Explanation (2) incorporates a situation where an assessment has been made, but income chargeable to tax has been under assessed; or assessed at too low a rate; or where such income has been made the subject of excessive relief under the Act. Where the power to rectify an order of assessment under Section 154(1) is adequate to meet a mistake or error in the order of assessment, the Assessing Officer must take recourse to that power as opposed to the wider power to re-open the assessment. The assessee cannot be penalized for a

fault of the Assessing officer. We must emphasize that we are not dealing with a case where the error in the order of assessment is attributable to a lapse or omission on the part of the assessee. The provisions of the statute lay down over-lapping remedies which are available to the Revenue but the exercise of these remedies must be commensurate with the purpose that is sought to be achieved by the legislature. The re-opening of an assessment under Section 147 has serious ramifications. Explanation (3) to Section 147 provides that for the purposes of assessment or re-assessment, the Assessing Officer may assess or re-assess the income in respect of any issue which has escaped assessment and where such issue comes to his notice subsequently in the course of the proceedings under the Section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148. In other words, once an assessment is validly re-opened in exercise of powers conferred by Section 147, the Assessing Officer is empowered to re-assess the income in respect of any other issue which comes to his notice in the course of the proceedings, though such reasons have not been set out in the notice under Section 148. There is, therefore, merit in the submission that is urged on behalf of the assessee that before recourse can be taken to the wider power to re-open the assessment on the ground that there is a computation error, as in the present case, the Assessing Officer ought to have rectified the mistake by adopting the remedy available under Section 154 of the Act. All statutory powers have to be exercised reasonably. Where a statute confers an area of discretion, the

exercise of that discretion is structured by the requirement that discretionary powers must be exercised reasonably. Indian Law is governed by the prescriptions of a written constitution. Fairness and fair treatment are norms which emanate from the guarantee of equality and non discrimination under Article 14. Constitutional norms, including non discriminatory application of law, must guide the interpretation of statutes. Statutory enactments must be read to be in conformity with constitutional norms. The exercise of powers vested by a statute must equally be consistent with constitutional norms. The remedies which the law provides are tailored to be proportional to the situation which the remedy resolves. Where the statute provides for several remedies, the choice of the remedy must be appropriate to the underlying basis and object of the conferment of the remedy. A simple computational error can be resolved by rectifying an order of assessment under Section 154(1). It would be entirely arbitrary for the Assessing Officer to re-open the entire assessment under Section 147 to rectify an error or mistake which can be rectified under Section 154. An arbitrary exercise of power is certainly not a consequence which Parliament contemplates.

20. The view which we are inclined to take would find support from a judgment of Chief Justice M.C. Chagla, speaking for a Division Bench of the Court in ***J.C. Thakkar V/s. Commissioner of Income-tax, Central, Bombay***[4]. The principle which was laid down by the Division Bench is that when one or

4 (1955) XXVII ITR 658 (Bom)

more modes of assessment or remedies are available to the taxing Authority, the Authority must adopt that remedy which is a matter of the least prejudice to the assessee. The principle has been put in the felicitous words of the learned Chief Justice, which are as follows :

> *"……. It would still be open to the assessee to contend that by adopting one mode of assessment rather than another a prejudice has been caused to him or that he has been deprived of some right to which he would have been entitled if the unregistered firm had been assessed first or that the burden of taxation has been increased because he has been assessed without the unregistered firm being assessed. It is needless to say that if one or more modes of assessment are open to the taxing authorities, the taxing authorities must adopt that mode which is more beneficial to the assessee. The Indian Income-tax Act is a taxing statute and therefore the Courts must be zealous to see that no right which an assessee has under the Act has been taken away by any action on the part of the department. Even though it may not be obligatory upon the department to follow a particular procedure the Court will insist upon the department following the procedure if that procedure leads to a beneficial result as far as the assessee is concerned and the procedure followed by the department is prejudicial to the assessee. ……."*

We are in respectful agreement with the principle laid down by the Division Bench, in the facts of the present case. We, therefore, hold that in this case the Revenue has an efficacious remedy open to it in the form of a rectification under Section 154 for correcting the computational error and that consequently recourse to the provisions of Section 147 was not warranted.

(iii) The investment under Section 54EC

21. The third ground for re-opening the assessment relates to the exemption claimed by the assessee under Section 54EC in respect of an amount of Rs.3.07 crores invested in the National Housing Bank Capital Gains Account. The assessee transferred an immovable asset namely certain land at Bhandup on 29th September 2003. Section 54EC(1) provides that where capital gains arise from a transfer of a long term capital asset and the assessee has at any time within a period of six months after the date of such transfer, invested the whole or any part of the capital gains in a long term specified asset, the capital gains shall be dealt with in accordance with the provisions made in the Section. In order to avail of the benefit of Section 54EC, the capital gains have to be invested in a long term specified asset within a period of six months of the date of the transfer.

22. In the present case, the period of six months was due to expire on 28th March 2004. The assessee invested an amount of Rs.3.07 crores on 19th March 2004. A receipt was issued on that date by the National Housing Bank. A debit was reflected in the bank account of the assessee to the extent of the sum invested on 19th March 2004. The certificate of Bond was issued by the National Housing Bank on 9th June 2004, which refers to the date of allotment as 31st March 2004. For the purposes of the provisions of Section 54EC, the date of the investment by the assessee must be regarded as the date on which payment was made and received by the National Housing Bank. This was within a period of six months from the date of the transfer of

the asset. Consequently, the provisions of Section 54EC were complied with by the assessee. There is absolutely no basis in the ground for re-opening the assessment.

(iv) The loss incurred by the eligible unit under Section 10B :

23. The fourth and final ground which has weighed with the Assessing Officer in re-opening the assessment is that the assessee claimed a deduction of Rs.14.53 crores under Section 10B. The deduction was restricted to Rs.11.11 crores in the order. While re-opening the assessment, the Assessing Officer has proceeded on the basis that Section 10B provides an exemption and that in respect of the Crab Stick Unit the assessee had suffered a loss of Rs.1.33 crores. The Assessing Officer has observed that since the income of the unit was exempt from taxation, the loss of the unit could not have been set off against the normal business income. However, this was allowed by the assessment order and it is opined that the assessee's income to the extent of Rs.1.33 crores has escaped assessment.

24. There is merit in the submission which has been urged on behalf of the assessee that the Assessing Officer has while re-opening the assessment ex-facie proceeded on the erroneous premise that Section 10B is a provision in the nature of an exemption. Plainly, Section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10B was substituted by the Finance Act of 2000 with effect from 1

April 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent Export Oriented Undertaking, to which the section applies "*shall not be included in the total income of the assessee*". The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of Section 10B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent Export Oriented Undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be re-opened is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four units of the assessee were eligible under Section 10B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be re-opened is contrary to the plain language of Section 10B.

25. For all the aforesaid reasons, we are of the view that the

Assessing Officer could not possibly have formed a belief that income chargeable to tax had escaped assessment within the meaning of Section 147. The petition would have to be allowed and is accordingly allowed by setting aside the impugned notice dated 31st March 2008 issued under Section 148 of the Income Tax Act, 1961.

26. Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

(J.P. Devadhar, J.) (Dr.D.Y. Chandrachud, J.)