REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) NO. 9036 OF 2007**

Reserved on : 4th January, 2011.
% **Date of Decision** : 14th February, 2011.

HONDA SIEL POWER PRODUCTS LIMITED .... Petitioner
Through Mr. Ajay Vohra & Ms. Kavita Jha, Advocates.

VERSUS

THE DEPUTY COMMISSIONER OF INCOME-TAX AND ANOTHER
…..Respondents
Through Ms. Prem Lata Bansal, Advocate.

CORAM:
HON'BLE MR. JUSTICE DIPAK MISRA, THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? YES
3. Whether the judgment should be reported in the Digest ? YES

SANJIV KHANNA, J.:

The petitioner-Honda Siel Power Products Limited formerly known as Shriram Honda Power Equipment Limited has challenged reassessment notice under Section 147/148 of the Income-Tax Act, 1961 (Act, for short) for the assessment year 2000-01 on the ground of "lack of jurisdiction" as conditions pre-requisite for reopening assessment are not satisfied. Consequential reliefs have also been prayed.

2. The reasons recorded by the Assessing Officer for reopening of assessment for the assessment year 2000-01 are as under:-

" The assessee company filed return of income on 30-11-2000 declaring income of Rs.14,35,73,320/-. Assessment in this case was completed u/s 143(3) at an income of Rs.15,73,66,280/-.

It has come to the notice that as per clause 20 of the form 3CD, the profit amounting to Rs.107.70 lakhs has been shown in annexure VIII under section 41 of the Income Tax Act, 1961. Out of this, the assessee has credited a sum of Rs.9.23 lakhs on account of provision for warranties no longer required written back under the head 'Other Income' in the P&L a/c leaving a balance of Rs.98.46 lakhs which has not been shown under the head 'Other Income'. Therefore, this amount of Rs.98.46 lakhs has not been offered for taxation by the assessee and the income of the assessee has been under-assessed by Rs.98.46 lakhs. Further, it is seen that the assessee has earned dividend income of Rs.188.73 lakhs on long term non trade investments which is claimed as exempt under Section 10(33) of the Income Tax Act, 1961. However, there are various administrative expenses for earning the dividend income like the expenses on the personnel involved in taking the decision of investment, expenses related to purchase/sale of the investment like the DMAT fee, collection expenses, telephone expenses, etc. and other administrative expenses and only the net dividend income is exempt from taxation, therefore, these expenses relating to earning of dividend income all not allowable and income of the assessee has been under-assessed as these expenses have wrongly been allowed.

I, therefore, have reasons to believe that income chargeable to tax has escaped assessment amounting to Rs.98.46 lakhs on account of amount not offered for tax under Section 41 of the Income Tax Act, 1961. Further, the assessee has reduced gross dividend income from its income for computing the taxable income instead of reducing the net dividend income after accounting for the expenses related to earning the dividend income and therefore, the income of the assessee is also under-assessed on this account. The above income has escaped taxation by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for A.Y. 2000-01. It is therefore, proposed to re-open the assessment by issue of notice u/s, 148 after seeking necessary sanction."

3. It is clear from the aforesaid reasons that there were two grounds on the basis of which reassessment notice has been issued, viz., (1) a sum of Rs.107.70 lacs was shown as taxable income under Section 41 of the Act but only Rs.9.23 lacs has been shown under the head "Other Income" in the profit and loss account, resulting in Rs.98.46 lacs escaping assessment; (2) The petitioner had earned tax free dividend income of Rs.188.73 lacs on long term non-trade investment exempt under Section 10(33) of the Act but various administrative expenses for earning dividend income were claimed and allowed as an expenditure. Expenses relating to earning of tax free dividend income were not allowable as expenditure and accordingly income has escaped assessment or was under-assessed.

4. As far as first reason/ground is concerned, in the tax audit report, Rs.1,07,69,936/- has been mentioned as the amount written back and chargeable to tax under Section 41 of the Act. A note to the tax audit report further states that the above amounts have been credited to the profit and loss account. The contention of the petitioner is that Rs.9,23,471/- was specifically added back in the profit and loss account under the heading "Other Income" and the balance amount of Rs.98.46 lacs was added back under different heads but was not separately indicated. It is not necessary for an assessee to add back the amounts mentioned in Section 41 of the Act under a separate heading. In other words, the contention of the petitioner is that ground 1 is factually incorrect.

5. Unfortunately, the petitioner in its objections dated 14th November, 2007 filed before the Assessing Officer did not take this as a specific plea. The petitioner did not in the objections state under which headings this amount of Rs.98.46 lacs has been added back or included to enhance the taxable income by the said amount. The only statement made in the objection was that Rs.1,07,69,936/- was added back/credited to the profit and loss account and one item of Rs.9,23,471/- was reflected on the credit side of the profit and loss account. Even in the writ petition, the petitioner has not given complete break-up how and in what manner Rs.98.46 lacs was reflected in the different accounts. The break-up is given in the rejoinder affidavit filed in response to the counter affidavit filed by the Revenue. Learned counsel for the petitioner, however, drew our attention to the reply given by the petitioner to the notice under Section 154 of the Act. Copy of the said reply is on record. It is pointed out that the petitioner had given the full break-up and specific details with regard to credit/adjustment of Rs.98.46 lacs in the profit and loss account as the said income was taxable under Section 41 of the Act. It is, thus, submitted that the Assessing Officer was aware and had knowledge of the correct position and contention of the assessee. It is accordingly submitted that the reason/ground No. 1 given by the Assessing Officer, therefore, is nothing but a mere suspicion or assumption and not a requisite tentative opinion necessary for reopening. Prima facie, there appears to be some merit in the contention of the petitioner in this regard, though there has been a serious lapse and failure on the part of the petitioner to raise a

specific and clear cut objection with details before the Assessing Officer and even in the writ petition. However, we are not dwelling further into this aspect as we feel that the notice of reassessment can be sustained on ground No. 2.

6. The contention of the petitioner is that the Assessing Officer seeks to invoke Section 14A of the Act to disallow deduction of such expenses which were incurred for earning tax free income which is exempt. It is submitted that Section 14A was introduced in the statute by the Finance Act, 2001 with retrospective effect from 1st April, 1962. It is stated that the petitioner had filed their return of income for assessment year 2000-01 on 30th November, 2000 and, therefore, it was not obligatory on the part of the petitioner to disclose any fact in respect of the expenditure incurred to earn exempt/tax free income. It is accordingly submitted that there was no failure on the part of the assessee-petitioner to disclose fully and truly all material facts in respect of the expenditure incurred for earning tax free income. It is pointed out that in the present case the reassessment notice has been issued beyond four years from the end of relevant assessment year and, therefore, Assessing Officer was required to record and form a prima facie opinion that there was failure or omission on the part of the assessee to disclose fully and truly all material facts.

7. Section 14A of the Act was introduced by the Finance Act, 2001, which was tabled in the Parliament on 28th February, 2001. The said provision was introduced with retrospective effect from 1st April, 1962 and reads as under:-

> "**14-A. Expenditure incurred in relation to income not includible in total income**.—For the purposes of computing the total income under this Chapter, no deduction shall be allowed in respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under this Act:
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> **Provided** that nothing contained in this section shall empower the Assessing Officer either to reassess under Section 147 or pass an order enhancing the assessment or reducing a refund already made or otherwise increasing the liability of the assessee under Section 154, for any assessment year beginning on or before the 1st day of April, 2001."

8. The petitioner has relied upon the proviso to Section 14A of the Act. The proviso according to us is not applicable in view of the factual matrix of the present case and does not protect or come to the aid of the petitioner. In the present case, after return of income for the assessment year 2000-01 was filed on 30th November, 2000, the case was taken up in scrutiny. Assessment order under Section 143(3) of the Act was passed on 7th March, 2003. The proviso only bars reassessment/rectification and not original assessment on the basis of the retrospective amendment. The proviso does not stipulate and state that Section 14A of the Act cannot be relied upon during the course of the original assessment proceedings. The Assessing Officer was, therefore, required to disallow expenses incurred for earning exempt or tax free income. Failure on the part of the Assessing Officer to apply Section 14A when he passed the assessment order under Section 143(3) of the Act dated 7th March, 2003 has prima facie resulted in escapement of income. The proviso is not intended to apply to the cases of the present nature. The object and purpose of the proviso is to ensure

that the retrospective amendment is not made as a tool to reopen past cases, which have attained finality.

9. Whether or not there was omission or failure on the part of the assessee to make full and true disclosure of material facts, the stand of the assessee-petitioner is illusionary and ambiguous. In the written submissions it is stated as under:-

> "It is pertinent to point out that Section 14A was introduced in the Statute by the Finance Act, 2001 w.r.e.f. 1.4.1962. When the return of income was filed for the relevant assessment year, the provisions of section 14A were not on the Statute. There was accordingly no obligation on the assessee to disclose any facts in respect of the said issue.
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> The Courts have in the following cases held that where a claim is rendered inadmissible on account of amendment of law introduced subsequently though with retrospective effect (covering the relevant year), it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts in respect thereof, to warrant exercise of jurisdiction under section 148 of the Act, beyond four years from the end of the relevant assessment year.
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> - CIT vs. SIL Investments Ltd.: ITA 700/2010 and 701/2010 (Del HC)
> - Rallis India Limited vs. ACIT: 323 ITR 54 (Bom HC)
> - Sadbhav Engineering Ltd. V DCIT: SCA No. 5847/2010 (Gujarat) HC (Copy enclosed and marked as annexure A)"

10. Thus, the petitioner has accepted and admitted that he had not given details with regard to proportionate expenses relatable to tax free or exempt income, which were claimed as a deduction under the cumulative head "expenditure". It is pleaded and stated that the petitioner was not required to disclose the said fact as when they had filed the return, Section

14A was not in the statute book. Sequitor, there was no omission and failure on the part of the assessee-petitioner to make full and true disclosure. The term "failure" on the part of the assessee is not restricted only to the income-tax return and the columns of the income-tax return or the tax audit report. This is the first stage. The said expression "failure to fully and truly disclose material facts" also relate to the stage of the assessment proceedings, the second stage. There can be omission and failure on the part of the assessee to disclose fully and truly material facts during the course of the assessment proceedings. This can happen when the assessee does not disclose or furnish to the Assessing Officer complete and correct information and details it is required and under an obligation to disclose. Burden is on the assessee to make full and true disclosure.

11. In the case of ***Consolidated Photo and Finvest Ltd. v. Asst. CIT,*** *(2006) 281 ITR 394*, the Delhi High Court has referred to several decisions of the Supreme Court and observed :-

> "In Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638, the apex court held that in proceedings under article 226 of the Constitution of India challenging the jurisdiction of the Income-tax Officer to issue a notice for reopening the assessment, the High Court was only concerned with examining whether the conditions which invested the Income-tax Officer with the powers to reopen the assessment existed. It is not, observed the court, within the province of the High Court to record a final decision about the failure to disclose fully and truly all material facts bearing on the assessment and consequent escapement of income from assessment and tax. The court also held that from a mere production of the books of account, it could not be inferred that there had been full disclosure of the material

> facts necessary for the purposes of assessment. The terms of the Explanation, declared the court, were too plain to permit an argument that the duty of the assessee to disclose fully and truly all material facts would stand discharged when he produces the books of account or evidence which has a material bearing on the assessment. The court observed :
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> "It is the duty of the assessee to bring to the notice of the Incometax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the Income-tax Officer, if he had been circumspect, could have found out the truth, the Income-tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment."
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> To the same effect is the decision of the Supreme Court in Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466 where the court observed :
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> "It is true that if the Income-tax Officer had made some investigation, particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realised by the assessee. It can be said that the Income-tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment for that year'."
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> (emphasis supplied)

12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse affect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate

or inadvertent. This is not relevant, provided there is omission or failure on the part of assessee. The latter confers jurisdiction to reopen assessment.

13. Whether or not there was a failure or omission to disclose fully and truly material facts, is essentially a question of fact. Section 14A was introduced with retrospective effect by Finance Act, 2001, which was tabled in the Parliament on 28th February, 2001 and was passed by the Parliament on 1st April, 2001. The petitioner is a multinational company and it is difficult to perceive and accept that their tax or the legal department was not aware and did not have knowledge about Section 14A of the Act.

14. In the objection dated 14th November, 2007 filed by the petitioner before the Assessing Officer on facts the petitioner had pleaded as under :

> "In the case of the assessee the assessment was, completed under section 143(3) of the Act. Further, it would be evident from the reasons provided for reopening the assessment that the reassessment has been initiated on appreciation of the papers/documents furnished alongwith the return of income. The notice under the section 148 of the Act initiating the reassessment proceedings, therefore, could validly be issued till 31-03-2005 in terms of the proviso to section 147 of the Act. In the case of the assessee, none of the requirement of the proviso to section 147 of the Act apply in as much as there was no failure to file return of income nor is there any allegation as to failure to disclose fully and truly all material facts necessary for the assessment."

15. It is clear from the aforesaid paragraph the petitioner has accepted that "material particular" referred to in the first proviso not only refers to details in the Return but also explanations and details furnished during the

course of assessment. The petitioner had not stated anything or given factual matrix to justify and state that the material facts had been fully and truly disclosed in the assessment proceedings and there was no omission or failure on the part of the petitioner. Explanation to section 147 stipulates that mere production of books of accounts or other evidence is not sufficient. (Refer paragraph 11 above wherein judgment in the ***Consolidated Photo and Finvest Ltd.*** (supra) has been quoted). Therefore merely because material lies imbedded in material or evidence, which the Assessing Officer could have uncovered but did not uncover is not a good ground to deny or strike down a notice for reassessment. Whether the Assessing Officer could have found the truth but he did not, does not preclude the Assessing Officer from exercising the power of re-assessment to bring to tax the escaped income.

16. There was an omission and failure on the part of the petitioner to point out the expenses incurred relatable to tax free/exempt income which prima facie have been claimed as a deduction in the income and expenditure account. There was, therefore, omission and failure on the part of the petitioner to disclose fully and truly material facts.

17. Decisions in the case of CIT vs. SIL Investments Ltd. decided on 7th May, 2010 ITA No. 700-701/2010, Rallis India Limited vs. ACIT: (2010) 323 ITR 54 (Bom) and Sadbhav Engineering Ltd. V DCIT Special Civil Application Nos. 5846 and 5847/2010 decided by High Court of Gujarat are distinguishable. In these cases the legislative amendments with retrospective effect were made after the original assessment

proceedings were completed and finalised. Thus it was held the re-opening was contrary to law. In the present case, Section 14A of the Act was enacted and was in the statute book when the assessment proceedings were undertaken. Thus there is no question of an impossible act or foreseeing a future amendment. The factum that the Section 14A was in the statute book was known to the Assessing Officer and the petitioner when the original assessment order was passed.

18. Learned counsel for the petitioner had submitted that reopening proceedings cannot be sustained as after the original assessment proceedings were concluded, notice for rectification of mistake was issued under Section 154 and a reply dated 20th November, 2004 was filed by the petitioner-assessee. Thereafter, nothing was heard from the Assessing Officer and presumably no order under Section 154 of the Act was passed. It was submitted that as a legal proposition; that once a notice under Section 154 of the Act is issued, proceedings under Section 147 of the Act on the same ground or reasons cannot be taken. It is not possible to accept the said proposition in broad terms as propounded or as one having universal application. Scope and ambit of Sections 154 and 147/148 of the Act are different. Under Section 154 of the Act, the Assessing Officer can only rectify mistakes and errors. Section 154 is not a substitute for Section 147/148. In a given case, resort to provisions of Section 154 of the Act may be an appropriate remedy but in other cases resort to Section 147/148 may be required. The question; whether reopening is justified when both provisions 154 and 147/148 of the Act are attracted, is not urged and

argued by the petitioner. It is not the case of the petitioner that section 154 of the Act is applicable and can be invoked to make addition on ground no.2.

19. Decision of the Bombay High Court in ***Hindustan Unilever Ltd. Vs. Deputy Commissioner of Income Tax***, (2010) 325 ITR 102, which opines that when section 154 applies, reopening under section 147 of the Act should not be resorted to, is not applicable to the facts of the present case. Reliance placed by the learned counsel for the petitioner on the decision of Gujarat High Court in ***Damodar H. Shah versus ACIT***, (2000) 245 ITR 774 and Calcutta High Court in ***Berger Paints India Limited versus ACIT,*** (2010) 232 CTR 338 for the same reason is misconceived.

20. The aforesaid judgments do not state that once notice under Section 154 of the Act is issued, resort to Section 147 is barred or prohibited under the Act. What is highlighted by the Gujarat High Court is the distinction between Sections 154 and 147 of the Act. It is further pointed out that if Section 154 of the Act is applicable then the Assessing Officer should not arbitrarily and in a wanton manner resort to process of reopening the assessment under Section 147 of the Act. This reasoning is contrary and goes against the plea and argument of the petitioner as it accepts the difference in scope and ambit of the said provisions. It has been held that when mistakes are apparent, the Assessing Officer should invoke Section 154 of the Act but in cases where mistakes are not

apparent from the record, the Assessing Officer can reopen assessments under Section 147 of the Act when the pre-conditions are satisfied.

21. Rectification of a mistake apparent from the record cannot be equated with the power of reopening under Sections 147 and 148 of the Act, which is conferred on the Assessing officer to reopen cases under assessment when conditions mentioned in the said Section are satisfied. The object and purpose of the two provisions is separate and the preconditions and requirements are different. The words 'reasons to believe' when income chargeable to tax as escaped assessment has a different connotation and requirements and cannot be equated with the power under Section 154 to rectify mistakes apparent from the record. In some cases albeit not in all cases, Sections 154 and 147 both may be applicable and, therefore, the aforesaid decisions suggest that recourse to Section 154 may be justified rather than recourse to the provisions of Section 147/148 of the Act for reopening of assessments. But this is different from stating that if notice under Section 154 is issued, then notice under Section 147/148 is barred or prohibited. Per se and ex facie the language of Section 147 shows that the pre-requisites of the said provision are not controlled, curbed and regulated with the requirement of mistake which is apparent from the record.

22. In the present case, the assessee in response to the notice under Section 154 of the Act had objected to the rectification proceedings. It was submitted that rectification proceedings under Section 154 of the Act were not justified and without jurisdiction as there was no mistake or error

apparent from the record. We have examined the second ground. The Assessing Officer could not have resorted to Section 154 proceedings to disallow expenditure under Section 14A of the Act. This was not possible in 154 proceedings as it was not an error or mistake apparent from the record.

The writ petition stands accordingly dismissed, with no order as to costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

FEBRUARY 14, 2011
VKR