IN THE INCOME TAX APPELLATE TRIBUNAL
DIVISION BENCH 'A', CHANDIGARH

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND MS.ANNAPURNA GUPTA, ACCOUNTANT MEMBER

ITA No.1466/Chd/2017
(Assessment Year: 2008-09)

The DCIT India C-1(1), Chandigarh Infectives	Vs.	M/s DSM Sinochem Pharmaceuticals Pvt. Ltd. (Formerly known as DSM Anti India Ltd.), Toansa PAN: AABCM4314K

Cross Objection No. 03/Chd/2018
(In ITA No. 1466/Chd/2017)

M/s DSM Sinochem Pharmaceuticals India Pvt. Ltd. (Formerly known as DSM Anti Infectives India Ltd.), Toansa	Vs.	The DCIT C-1(1), Chandigarh
(Appellant)		(Respondent)

Assessee by : Shri. K.M. Gupta & Shri. Harish Bisht

Department by : Dr. Gulshan Raj, DR

Date of hearing : 15/05/2018
Date of Pronouncement : 28 /05/2018

ORDER

PER ANNAPURNA GUPTA, A.M.:

The present appeal filed by the Revenue and the Cross Objection of the assessee are directed against the order of CIT(A)-1 Chandigarh 31/07/2017.

2. Briefly stated the assessee had for the impugned year filed return declaring Nil income, which was assessed under section 143(3) of the Act making various additions therein. Thereafter the AO reopened the assessment under section 147 and made addition of Rs. 3,11,32,500/- to the income of the assessee by treating the royalty paid by the assessee

amounting to Rs. 4.67 crores as capital expenses, as against revenue claimed by the assessee. The said order was challenged before the Ld. CIT(A) both on the legal ground of the validity of the assessment framed under section 147 of the Act as well as on the merits of the case. The Ld. CIT(A) upheld the validity of the order passed but at the same time decided the issue in favour of the assessee on merits following the decision of the ITAT Chandigarh in the case of the assessee for AY 2009-10 and 2010-11.

3. Aggrieved by the same the Revenue has come in appeal before us challenging the deletion of the addition made on merits while the assessee has filed a Cross Objection challenging the action of the CIT(A) in upholding the validity of the order passed under section 147 of the Act. The grounds raised by the Revenue are as under:

> *1. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in allowing the appeal of the assessee without appreciating the facts of the case.*
>
> *2. Whether the Ld. CIT(A) is right in deleting the addition on account of royalty expenses by relying of the decision of Hon'ble ITAT in the case of the assessee for A.Y. 2009-10 & A.Y. 2010-11 in which it was held that expenditure made on account of royalty is a license fee, when the agreement clearly stipulates that it is a royalty payment for an intangible asset.*
>
> *3. Whether the Ld. CIT(A) is right in law in holding that expenditure made on account of royalty is a Revenue expenditure by relying on the decision of Hon'ble ITAT in the case of the assessee for A.Y. 2009-10 & A.Y. 2010-11 which further relied on the decision of the Hon'ble Supreme Court in the case of CIT vs. I.A.E.C (Pumps) Ltd., when the facts of the present case are distinguishable.*
>
> *4. It is prayed that the order of the Ld. CIT(A) be cancelled and that of the assessing officer may be restored.*
>
> *5. The appellant craves leave to add or amend any grounds of appeal before the appeal is heard or is disposed off.*

4. The ground raised by the assessee in its CO are as under:

> *1. That on the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income-tax (Appeals) ['Ld. CIT(A)'] has erred in upholding the erroneous action of the Ld. Assessing Officer ('Ld. AO') in*

*initiating and completing the reassessment proceedings under section **147/148** of the Act.*

***1.1** That the Ld. CIT(A) failed to appreciate that the said reassessment proceedings were barred by limitation in view of the proviso to section **147** of the Act on account of the reason that there was no failure on the respondent's part to disclose fully and truly all material facts necessaiy for assessment.*

***1.2** That the Ld. CIT(A) failed to appreciate that there is no escapement of income for the year under consideration as no tangible material has come into existence after completion of original assessment and there was mere change of opinion on the part of Ld. AO.*

5. Since the assessee has raised a legal ground before us challenging the validity of the order passed under section 147, we shall first be dealing with the Cross Objection filed by the assessee.

6. The sole argument of the Ld.Counsel for the assessee before us was that the reassessment proceedings were initiated in violation of the conditions prescribed in the proviso to section 147 of the Act ,which was attracted in the present case. Drawing our attention to the proviso which states as under:

"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 failure80 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:"

Ld. Counsel for the assessee stated that where assessment had been earlier framed u/s 143(3) of the Act, reopening beyond four years from the end of the assessment year could be resorted to only in the situations prescribed therein which included the failure to file the return of income or the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment.

7. Ld. Counsel for the assessee thereafter drew our attention to the facts of the present case stating that the notice for initiation of reassessment proceeding for the impugned AY i.e. AY 2008-09 was issued on 30/03/2015 i.e. after a lapse of four years from the end of the relevant assessment year. Ld. Counsel for the assessee further pointed out that assessment had originally been made under section 143(3) of the Act. Ld. Counsel for the assessee thus stated that the reopening could be resorted to only in the situations prescribed in the proviso to section 147. Ld.Counsel for the assessee stated that the since the failure to file return could not be ascribed to the assessee, since it had filed its return of income which had been duly scrutinized u/s 143(3) of the Act, the reopening could have been validly initiated only if the assessee had failed to disclose fully and truly all material facts necessary for assessment. Ld. Counsel for the assessee thereafter drew our attention to the reasons recorded by the AO placed at PB page no. 272 which is reproduced hereunder:

> *The reason for re-assessment u/s **148** of the Act are as under:*
>
> *"During the course of assessment proceedings for A.Y. 2009-10, it was noticed that the M/s DSM Sinochem Pharmaceuticals India Pvt. Ltd. claimed expenditure of 46.73 million as Revenue Expenditure on account of payment of Royalty under the head operating and other expenses. As per Agreement/license furnished by the assessee, the royalty is to be paid in installments. During the F.Y. 2007-08 relevant to A.Y. 2008-09, the assessee company has paid Royalty of Rs. 41.51 million and claimed it as a Revenue Expenditure. Since, such expenditure made under the head*

> *'"royalty' shall give enduring benefits to the assessee company in the ensuing years, therefore, the claim of the assessee of expenditure with reference to Royalty amounting to Rs. 41.51 Million appear to be unjustified. The stance of the derailment on this issue in A.Y. 2009-10 & A Y . 2010-11 has also been confirmed by the DRP.*
>
> *Therefore, I have reasons to believe that the income to the tune of Rs. 4,15,10,000/- for the A. Y. 2008-09 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961. Therefore, the proceedings in the case of the assessee for A. Y. 2008-09 are being initiated u/s 147 of the Income Tax Act."*

8. Ld. Counsel for the assessee pointed out therefrom that the reopening had been resorted to on account of the claim of the assessee of royalty expenses as revenue in nature, which the AO noted in the reasons, as having been held to be capital in nature in the assessment framed for the subsequent years. It was on account of this fact that the AO allegedly formed the belief that income to the tune of royalty expenses claimed amounting to Rs. 4.15 crores had escaped assessment within the meaning of section 147 of the Act. Ld. Counsel for the assessee thereafter pointed out that the issue of royalty had been discussed during assessment proceedings wherein all primary and material facts relating to royalty had been submitted. In this regard, Ld. Counsel for the assessee pointed out that the transfer pricing officer had discussed the issue of royalty in his order dt. 28/10/2011 placed in the PB at page 113-141. It was contended that through various submissions made during assessment proceeding all information relevant to the payment of royalty had been furnished (P.B 1-112) and also the copy of the Royalty License Agreement(P.B-303-319) .Therefore Ld. Counsel for the assessee contended that all material facts with respect to the purported issue of royalty had been filed and had been truly and fully disclosed during assessment proceedings and therefore by virtue of the first proviso to section 147 the AO could not have reopened the assessment. Ld.

Counsel for the assessee further pointed out from the reasons that there is not a whisper in the said reason of any failure on the part of the assessee to disclose fully and truly any material fact vis a vis the issue of royalty expenses. It was therefore contended that the present proceedings were invalid and liable to be quashed for this reason. Reliance was placed on the decision of the Hon'ble jurisdictional High Court in the case of State Bank Of Patiala Vs. Commissioner of Income Tax (2015) 375 ITR 109(P&H).

9. Ld.Counsel for the assessee further contended that when the reopening was initiated vide issue of notice dt.30-03-15, on account of the treatment of Royalty expenses as revenue in nature, on the basis and for the reason that the same had been held to be capital in nature in the succeeding year i.e. A.Y 2009-10 & 2010-11 by the DRP, the ITAT had already decided the issue in favour of the assessee in one of the years ,i.e. A.Y 2009-10, vide its order in ITA. No. 155/Chd/2014,dt.16-03-15.Ld.Counsel contended that the AO therefore could not have any reason to believe that income had escaped assessment on account of allowing the claim of royalty expenses as revenue . Ld.Counsel for the assessee further pointed out that the said fact stood admitted by the AO also in his assessment order, and despite the same the AO proceeded with the assessment proceedings. Ld.Counsel for the assessee drew our attention to para 2 of the assessment order in this regard which read as under:

> *"2. Later, while framing the assessment u/s 143(3) for the subsequent year A.Y. 2009-10, the then Assessing Officer noticed that the assessee company claimed expenditure of 46.73 million as Revenue Expenditure on account of payment of Royalty under the head operating and other expenses. As per Agreement/license furnished by the assessee, the Royalty is to be paid in instalments. The 1st*

installment of Rs.41.51 million was paid by the assessee during the F.Y. 2007-08 relevant to A.Y. 2008-09. The Assessing Officer made an addition on this ground in A.Y. 20091-0. The assessee's claim of Revenue expenditure on this account was rejected by the DRP during these years. However, the assessee succeeded on this ground in ITAT, Chandigarh, for A.Y. 2009-10 in ITA NO. !55/Chd/2014 dated 16.3.2015. The department is in process of filing appeal on this issue in the Hon'ble High Court of Punjab & Haryana. Since, the expenditure made under the head Royalty' shall give enduring benefits to the assessee company in the ensuing years, therefore, the claim of the assessee of expenditure with reference to Royalty amounting to Rs.41.51 Million has to be re examined in the A.Y. 2008-09 as well. Therefore, proceedings were initiated u/s 147 of the Act and notice was issue to the assessee u/s 148 of the Act on 30.3.2015 after obtaining due approval from the competent authority."

10. Ld. DR, on the other hand ,supported the order of the CIT(A) and stated that merely because the assessee had disclosed the transaction at the time of original assessment proceedings it does not protect the assessee from reassessment under section 147 and further that the department was in the process of contesting the order of the ITAT and therefore the said agreeable order of the ITAT did not make the present proceedings invalid. Our attention was drawn to the findings of the AO while dealing with the objections raised by the assessee to the reopening of assessment which the Ld.CIT (A) had reiterated to dismiss the legal ground raised by the assessee before him as under:

"5.2 Objection No. 2 & 3: While the reason to believe by the Assessing Officer primarily focus on the issue at hand whereby certain expenditure made on account of payment of Royalty to M/s DSM BV which was treated as revenue expenditure in your books of account, non disclosure by the assessee has not been explicitly brought out in the reasons recorded. Nevertheless, perusal of the record shows that the assessee failed to disclose the nature of expense so claimed and it was only during assessment proceedings for A.Y. 2009-10 that the issue came to light. Mere submission of final accounts wherein several heads of expenses have been shown does not amount to full disclosure within the meaning of section

147. The assessee should have ideally declared before the AO that the expenditure claimed as Royalty which by its nature gives enduring benefit to the assessee has been differently treated.

5.3 Objection No. 5: The assessee's contention that relook at the existing material is impermissible has no basis in law and therefore, requires no comments. Further, the argument that the assessee had submitted the ITAT order for A.Y. 2009-10 wherein Royalty payment has been allowed as revenue expenditure also does not has any weight because as a matter of procedure, orders of the Hon'ble ITAT are given effect to only once they are formally received in the office of Commissioner of Income Tax. Moreover, the department is in process of contesting the order of the ITAT before the High Court."

11. Ld. DR further relied upon the following case laws in support of its contention:

1) Honda Siel Power Products Ltd. Vs. Dy.CIT [2012] 20 Taxmann.com 5 (SC) [2012] 206 Taxman 33 (SC) (MAG.) [2012] 340 ITR 64 (SC) [2012] 247 CTR 316 (SC)
2) Honda Siel Power Products Ltd. Vs. Dy.CIT [2012] 10 Taxmann.com 2 (Delhi)[(2011] 1907 Taxman 415 (Delhi) [2012] 340 ITR 53 (Delhi) [2012] 247 CTR 322 (Delhi)

3) New Delhi Television Ltd.. Vs. [2017] 84 Taxmann.com 136 (Delhi)

4) CIT Vs. P.V.S. Beedies (P) Ltd. [1999] 103 Taxman 294 (SC) [1999] 237 ITR 13 (SC) [1999] 155 CTR 538 (SC)

5) CIT Vs. Kiranbhai Jamnadas Sheth (HUF). [2013] 39 Taxmann.com 116 (Gujarat) [2014] 221 Taxman 19 (Gujarat) (MAG.

6) Dishman Pharmaceuticals & Chemicals Ltd. Vs. CIT [2012] 346 ITR 228 (Guj)

12. We have heard the contentions of the both the parties,gone through the orders of the authorities below and also the documents referred to before us. We find merit in the contentions of Ld. Counsel for the assessee. Undisputedly notice u/s 148 of the Act was issued after the expiry of 4 years from the end of the assessment year and, we agree with the Ld.Counsel for the assessee, that the same did not satisfy the

requirement provided u/s 147 regarding the failure of the assessee to disclose fully and truly all material facts.

13. Admittedly, it was the assessees claim of royalty expenses as revenue, as against capital held by the AO in subsequent year i.e A.Y 2009-10 & 2010-11, which lead the AO in the impugned year to form belief of escapement of income. We find that the said issue of royalty expenses had been examined in detail during assessment proceedings by the TPO, before whom all copies of agreement and other information relating to the said expenses had been filed by way of submissions made to the ACIT(TP) through the following letters:

Date on which Letter filed to ACIT	**Detail/ Information submitted**
18-03 -11	That the transaction on account of Royalty payment was an international transaction duly reported alongwith other such transactions
26-07-11	The benefits derived from the royalty agreement were explained alongwith the method for quantifying the same
12-09-11	The reason for entering into the said agreement was submitted and also that the license was granted to the assessee for use of patents and advanced technology for production of a product "Purimox". The terms of payment of the royalty was also detailed.

14. Further copy of the said agreement was also filed. We also find that the TP order passed under section 92CA(3) of the Act reveals that the Royalty issue had been examined since it finds mention of the nature and purpose of the agreement entered into for the payment of Royalty. These facts have not been considered by the Revenue. Therefore clearly the

assessee had explained the nature, purpose and even method of quantification of royalty expenses and substantiated it with the copy of Agreement also.

15. Therefore in such circumstances we fail to understand how the assessee can be charged with not disclosing material facts relating to the issue of royalty expenses. Clearly all primary facts pertaining to the said expenses were filed by the assessee. The revenue has not pointed out any suppression/ misrepresentation or falsification of any fact. Even the reasons recorded do not reveal what material fact was not disclosed nor do they charge the assessee with non disclosure of the same. There is no whisper of any such allegation in the reasons recorded. This being a sine qua non for initiating proceeding under section 147, in the absence of the same we hold the present proceedings to be bad in law. The reliance placed by Ld. Counsel for the assessee in this regard on the judgment of the jurisdictional High Court in the case of SBOP(supra) is apt, wherein on identical facts, wherein reopening was resorted to on the basis of disallowance of claim of depreciation made in succeeding year, the Hon'ble High Court has categorically held that where the reasons do not show any failure on the part of the assessee to disclose fully and truly all material facts, the reopening was not valid. The relevant findings of the Hon'ble High Court at para 10-15 is as under:

> *"10. Without going into the merits of the issue as to whether the ATM is a computer or ought to be treated as normal plant and machinery, attracting different rates of depreciation, we are of the opinion that the present writ petitions are liable to be allowed on the ground that admittedly, the notice issued on 27.03.2012 did not fulfil the mandatory requirement of recording that the assessee did not disclose fully and truly all the material facts which was the necessary requirement in CWP Nos.6765 and 17892 of 2013. The reasons which have prevailed with the AO to issue notice reads as under:*

"Reasons u/s 147 r.w.s. 148 of the Income Tax Act, 1961 reopening the assessment.

During the course of assessment proceedings for the assessment year 2008-09, it has been noticed that the assessee bank has claimed depreciation on ATM @ 60% by treating the ATM as Computer. At the time of finalizing the assessment, the assessee was allowed depreciation on ATM @ 15% as allowed under I.T Laws on Plant & Machinery by treating the ATM as Plant & Machinery. Accordingly, an addition of Rs. 3,71,00,000/- was made by disallowing the excess depreciation claimed by the assessee. Similar is the position for the assessment year under consideration i.e. A.Y 2005-06. Assessee had operationalised 251 ATMs by March, 2005. Therefore, I have reason to believe that income of the assessee chargeable to tax has escaped assessment for the financial year 2004-05 relevant to A.Y 2005-06 within meaning of section 147.

Issue notice u/s 148 r.w.s. 151 of the Income Tax Act, 1961.

Date: 27.03.2012
Sd/-
(Dr.Raman Garg)
Asstt. Commissioner of Income-tax,
Circle, Patiala"

11. A perusal of the above would go on to show that when the returns for the subsequent years were processed, the AO had disallowed the claim made @ 60% and added a sum of '3,71,00,000/- to the income of the assessee-Bank, by allowing depreciation @ 15% only, by treating the ATMs as plant and machinery. Keeping in view the fact that the ATMs had been operationalised by March, 2005, reasons were recorded to believe that the income of the assessee, chargeable to tax, had escaped assessment. There is no disputing the fact that the assessment for the said years, i.e., 2005-06 and 2006-07, under Section 143(3) had concluded on 28.11.2007 and 30.11.2007 and determination of tax upon the assessee was made on the basis of the assessment. The proviso to Section 147 provides that no action shall be taken under the said section, after the expiry of 4 years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment, by reason of failure on the part of the assessee to make the return or respond to the notice issued under Section 142(1) or Section 148. The other condition is that there should be disclosure of fully and truly all material facts necessary for the said assessment year.

12. The issue of initiating proceedings under Section 147 was considered by this Court in Duli Chand Singhania Vs. Assistant Commissioner of Income Tax (2004) 269ITR 192. wherein, it was held that in the absence of valid assumption of jurisdiction under Section 147, the notice after 4 years from the end of the assessment year in question, could not be initiated in the absence of any allegation that there was failure on the part of the assessee to disclose fully and truly all material facts. In the absence of any such reasons, the assumption of jurisdiction under Section 147 was not justified. Relevant portion of the reasoning given reads as under:

"13. The entire thrust of the findings recorded by the Assessing Officer in his order dated 13-3-2003 is to justify his satisfaction about escapement of income. According to him, it was a clear case of escapement of income as defined in Explanation-2 to Section 147 as the assessee had been allowed excessive relief under Section 80-O of the Act. However, it is not necessary for us to go into the merits of this finding as the second requirement of the proviso has not been satisfied obviously. The reasons recorded by the Assessing Officer for initiation of proceedings under Section 147 of the Act have already been reproduced

above. A bare perusal of the same shows that the satisfaction recorded therein is merely about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Absence of this finding, which is a "sine quo non" for assuming jurisdiction under Section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. As already observed, the learned counsel for the Revenue has conceded that neither in the reasons recorded nor in the order dated 13-3-2003, has the assessee been charged with failure to disclose, fully and truly all material facts necessary for his assessment."

13. The said view was followed in Mahavir Spinning Mills Ltd. Vs.Commissioner of Income Tax & another [2004] 270 ITR 290, and the objections raised by the Revenue that the writ was not maintainable against the notice, was rejected. Relevant portion of the judgment reads as under:

"11. A bare perusal of the above shows that the entire thrust of the observations recorded by the Assessing Officer is to justify his satisfaction about escapement of income. There is not even a whisper of an allegation that such escapement had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. As held in Duli Chand Singhania's case, absence of this finding makes the action of the Assessing Officer wholly without jurisdiction. Since the illegality of notice under Section 148 of the Act is apparent from the reasons recorded for initiation of proceedings under Section 147 of the Act, it is a fit case for interference in the exercise of our writ jurisdiction. Sending the petitioner back to the Assessing Officer to raise these objections and requiring him to pass an order thereon would be prolonging the proceedings unnecessarily."

14. Similarly, in Winsome Textiles Industries Ltd. Vs. Union of India& others [2005] 278 ITR 470, it was held that once the assessment had been made under Section 143(3), the genuineness of the claims made in the return had to be examined and the failure of the AO to do so would not permit him to reopen the assessment which had already been completed and had become barred by limitation. Accordingly, the notices issued under Section 148 were quashed. Relevant portion of the judgment reads as under:

"14. The limitation of four years provided in the proviso to Section 147 has been made applicable only to cases where assessments have already been completed under Sub-section (3) of Section 143 or under Section 147. There is a specific purpose behind it. Where the return is processed under Section 143(1)(a), the Assessing Officer has no jurisdiction to examine the genuineness of the claims made in the return of income. He has only limited power of making adjustments on the basis of information available in the return. However, when an assessment is made under Section 143 (3) of the Act, the Assessing Officer has very wide power to examine the genuineness of the claims made in the return and require the assessee to furnish whatever information the Assessing Officer deems necessary. In the present case, the assessment had been made under Section 143(3) of the Act and if the Assessing Officer was of the view that he required profit and loss account and depreciation charts of the assessment years 1995-96 and 1996-97 for examining the correctness of the claim under Section 80IA of the Act, he could have required the assessee to produce the same. Failure of the Assessing Officer to do so, cannot be treated at par with the failure of the assessee to disclose fully and truly all material facts necessary for its assessment."

> *15. The reasons for opening the assessment which had already been concluded on 28.11.2007 and 30.11.2007, thus, do not show that there was any failure on the part of the assessee to disclose fully and truly all the material facts and thus, it was merely a change of opinion and in view of the settled position of law, the petitioner would be entitled for setting aside the said notices issued."*

16. In view of the above we hold that the present reassessment proceedings were not validly invoked and therefore set aside the order passed in consequence thereto by the AO.

17. The reliance placed by the Ld. DR on various case laws as above merit no consideration since they are all distinguishable on facts. In the case of Honda Siel Power Products (supra), the Hon'ble Court had held that the assessee having failed to point out expenses incurred relatable to tax free/exempt income, which prima facie had been claimed as deduction in the income and expenditure account, it tantamounted to omission and failure on the part of the assessee to disclose material facts. The issue in the said case related to disallowance of expenses under section 14 A and the claim of the assessee was that it had disclosed all expenses in its return and books of accounts and it could not therefore be charged with failure to disclose any material facts. In this regard the Hon'ble High Court held that material facts are those facts which would have an adverse effect on the assessee by the higher assessment of income than the one actually made and the assessee having not pointed out which expenses related to exempt income they had failed to disclose fully and truly material facts. In the said case clearly there was failure on the part of the assessee to disclose a material fact of the expenses which related to exempt income and the High Court therefore said mere disclosure of all expenditure in the return of income and the books of account would not be treated as disclosure of all material fact. The

assessee had to necessarily disclose the fact of which expenses had been incurred for earning the exempt income and having not disclosed the same it had failed to disclose facts material to the assessment of income. The decision rendered is not applicable to the facts of the present case and in fact helps the present case of the assessee .As pointed out above the assessee in the present case had not only disclosed the royalty expenses in its return of income and books of account but had disclosed the nature of the said expenses also by way of filing details and agreement pertaining to the same during assessment proceedings. Therefore all material facts stood disclosed by the assessee. Facts cannot include in its meaning the inferences to be drawn from the facts.

18. In the case of NDTV Ltd.(supra) relied upon by the Revenue, the Hon'ble High Court had held the mere disclosure of a transaction at the time of original assessment proceeding to be not true and fair disclosure for the purposes of section 147 since the AO had information indicating the transaction to be sham or bogus. In these factual circumstances the Hon'ble High Court held the mere disclosure of the transaction to be not true and fair. In the case of Dishman Pharmaceuticals(supra) the assessee had not disclosed the substantial interest it had in the company from which it had taken loan and which was therefore treated as deemed dividend in its hand. In the case of Kiran Bhai Jamnadas(supra) the assessment had been framed without scrutiny and therefore the Hon'ble Gujrat High Court had held that the same would mandate the reassessment beyond four years even if the assessee made true disclosure. In the case of P.V.S Beedis (supra) the issue before the Hon'ble Court was whether reassessment could be resorted to on a fact which

was pointed out by the audit party to have been overlooked by the assessing officer.

19. All the above cases are clearly distinguishable on facts, the assessee having been found to have failed to disclose material facts for one reason or the other, while in the present case ,as we have held above, the assessee has disclosed all material facts relating to the issue of Royalty on which the reopening has been resorted to. The case laws relied upon by the Ld. DR , we hold, therefore merit no consideration.

20. We also find merit in the contention of the Ld.Counsel for the assessee that there was no reason at all for reopening the case on the issue of treatment of royalty expenses ,since the same had already been decided in favour of the assessee by the ITAT, before the recording of reasons for reopening the present case. In fact, the ITAT had decided the issue in the very same assessment year, which assessment order had formed the basis for reopening the case i.e A.Y 2009-10. The AO could not have any reasons to believe that income had escaped assessment when the very basis of its belief, being the assessment order of a subsequent year, had been reversed by the ITAT before the recording of reasons by the AO.

21. In view of the above we decide the legal issue in favour of the assessee and hold that the order passed under section 147 was invalid. The assessment order therefore passed is quashed. The CO of the assessee is allowed.

22. Since we have quashed the assessment order we do not consider it necessary to deal with the merits of the case in the revenues appeal fled before us.

23. In the result, the appeal of the Revenue is dismissed and the Cross Objection filed by the assessee is allowed.

Sd/- Sd/-

(SANJAY GARG)
JUDICIAL MEMBER

(ANNAPURNA GUPTA)
ACCOUNTANT MEMBER

Dated : 28/05/2018

Rati

Copy to:

1. The Appellant
2. The Respondent
3. The CIT(A)
4. The CIT
5. The DR

Assistant Registrar,
ITAT, Chandigarh