

**Nuware India Ltd. Vs. Deputy Commissioner of Income Tax**

**Nuware India Ltd. Vs. Deputy Commissioner of Income Tax**

**SooperKanoon Citation :** [sooperkanoon.com/76057](http://sooperkanoon.com/76057)

**Court :** Income Tax Appellate Tribunal ITAT Delhi

**Decided On :** Jan-31-2008

**Judge :** I Bansal, K Bansal

**Appellant :** Nuware India Ltd.

**Respondent :** Deputy Commissioner of Income Tax

**Judgement :**

1. This appeal of the assessee emanates from the order of the CIT(Appeals), Faridabad, passed on 12.09.2005. The corresponding order of assessment was framed by the Deputy CIT, Central Circle, Faridabad, on 26.2.1999 under the provisions of Section 143(3) read with Section 148 of the Income-tax Act, 1961.
2. Ground No. 1 is residuary in nature, which was not argued by the learned Counsel. Ground No. 1 is to the effect that the learned CIT(A) erred in law and on facts in confirming the action of the Assessing Officer regarding the re-opening of the assessment Under Section 147 of the Act. This ground was not pressed by the learned Counsel during the course of hearing before us. Therefore, these grounds are dismissed.
3. Ground No. 2 is to the effect that on the facts and in the circumstances of the case, the learned CIT(A) erred in confirming the action of the Assessing Officer in making additions or disallowances on the issues which were not the subject matter of the reasons recorded for reopening the assessment. In this connection, the learned Counsel referred to the submissions made before the learned CIT(A) to

the effect that the assessment was reopened for not charging interest on loans and advances made to M/s Rattan Chand Harjas Rai, M/s Rattan Trading Company, and M/s Dalai Consultants (P) Ltd. A copy of the reasons recorded for reopening the assessment was also filed, in which it is inter-alia mentioned that the assessee has been paying interest to banks, whereas interest has not been charged on loans and advances given to M/s Rattan Chand Harjas Rai and M/s Rattan Trading Company, Delhi, of Rs. 2.00 lakh each. In the order for assessment year 1991-92, interest of Rs. 60,000/- was disallowed by holding that the expenditure was not incurred for the purpose of business. This finding was confirmed by the CIT(A). Similar disallowance of Rs. 81,000/- was made in the order for assessment year 1993-94. It is further mentioned that an amount of Rs. 1,35,000/- was disallowed on account of interest paid to M/s Dalai Consultants (P) Ltd. on the basis of findings given in the order for assessment year 1985-86. The addition was confirmed by the CIT(A) on the basis of his order for assessment year 1989-90. On the same basis, an identical amount was disallowed in the order for assessment year 1993-94. Thus, the Assessing Officer had reason to believe that the assessed loss was to be reduced on account of aforesaid disallowance and addition. It was argued that apart from addition and disallowance on the aforesaid grounds, the Assessing Officer made a number of additions and disallowances by making enquiries, as made in regular assessment, which could not have been done in the re-assessment proceedings Under Section 147 of the Act.

3.1 In order to support the aforesaid contention, reliance was placed on the decision of Hon'ble Punjab & Haryana High Court, being the jurisdictional High Court in this case, in the case of Vipan Khanna v.CIT and Ors. . The Hon'ble Court referred to the decision of Hon'ble Supreme Court in the case of Sun Engineering Works (P) Ltd. , and pointed out that the ratio of that decision holds good even after amendment of Section 147, made w.e.f.

1.4.1989. The Assessing Officer had relied on the decision of Hon'ble Supreme Court in the case of V. Jaganmohan Rao , but the Hon'ble High Court pointed out that the interpretation placed by him on that decision was not correct. In other words, he was not correct in holding that once valid proceedings Under Section

147 are started, the whole assessment proceedings start afresh. The Hon'ble Court pointed out that this has been explained by the Apex court itself in the case of Sun Engineering Works P. Ltd. (supra), in which it was pointed out that the previous under-assessment is set aside and the ITO has the jurisdiction and duty to levy tax on the entire income that had escaped assessment during the previous year. Thus, what is set aside is only the previous under-assessment and not the original assessment proceedings. It was pointed out that the letter dated 30.7.1998, issued by the Assessing Officer, related to matters unconnected with the issue of depreciation as also the direction issued by the Deputy Commissioner Under Section 144-A of the Act on 26.10.1998. Therefore, the notice cannot be sustained. The Assessing Officer was directed to proceed with the assessment Under Section 147 in accordance with law. For the sake of clarification, it was repeated that nothing observed by the court would debar the Assessing Officer to bring to tax any other item of income which may have escaped assessment and which comes to the notice during the course of the proceedings Under Section 147 of the Act.

However, he cannot make fishing enquiries to probe if any other income had escaped assessment or not. Such enquiries can also be made if in the first instance some material comes to his notice to suggest that some other item of income may have escaped assessment or had been under-assessed.

3.2 Further, he relied on the decision of Hon'ble Punjab & Haryana High Court in the case of Amrinder Singh Dhiman v. ITO , in which the ratio of the decision in the case of Vipan Khanna was applied. It was pointed out that the assessment proceedings came to an end on account of non-issue of a notice Under Section 143(2) of the Act within the stipulated period. Thereafter, the assessment was reopened in respect of the claim of the assessee Under Section 80-HHC of the Act. However, the Assessing Officer sought information on a number of other issues in respect of which notice Under Section 148 was not issued. The Assessing Officer was not justified to call for such information from the assessee. Accordingly, the Assessing Officer was directed to proceed with the assessment Under Section 147 of the Act and in accordance with law. It was again clarified that the Assessing Officer would be competent to frame the assessment and bring

to tax any other income which might have escaped assessment and which comes to his notice during the proceedings Under Section 147 of the Act.

3.3 Reliance was also placed on the decision of Hon'ble Punjab & Haryana High Court in the case of CIT v. M.R. Iron Traders (2004) 189 CTR 154, in which the ratios of the decision in the case of Sun Engineering Works P. Ltd. and Vipin Khanna (supra) were followed. It was pointed out that cash credit entries were there in the books of account of the assessee when assessment was completed Under Section 143(1) of the Act without disputing them. The assessment was reopened on receiving information regarding purchases made by the assessee, which had not been entered in the books of account. However, the matter regarding cash credit entry stood concluded in the original assessment made Under Section 143(1) and no material was shown to have come to the notice of the Assessing Officer causing doubt about the genuineness of the credits. Therefore, this issue could not have been reopened in the course of reassessment proceedings, which were initiated on a totally different ground.

3.4 He also relied on the order of the Tribunal in the case of ACIT v. Sunil Kumar Jain, decided by SMC Bench, Jaipur, in ITA Nos. 1666 & 1667/JP/2006 for assessment years 1999-00 and 2000-01, 110 TTJ 731. In that case, the assessment was reopened in respect of "on money" of Rs. 1.00 lakh paid for purchase of a plot of land. This amount was added Under Section 69 of the Act. The Assessing Officer also made addition Under Section 68 in respect of trading account and towards low withdrawal for house-hold expenses. No linkage was established between the payment of "on money" and the other additions. The case of Vipin Khanna (supra) was referred to and it was mentioned that the Assessing Officer cannot make addition on other accounts, unconnected with the issue for which the assessment was reopened. Accordingly, it was held that such additions could not have been made. We find that the ratio of this order is in contradiction with the ratio of the decision in the case of Vipin Khanna (supra), in which the Hon'ble Jurisdictional High Court had held that nothing observed by the court would debar the Assessing Officer to bring to tax any other item of income which may have escaped assessment and which comes to the notice of the Assessing Officer in the course of re-assessment proceedings. The order of the SMC Bench

is not binding on us, particularly in view of the fact that this order does not conform to the decision in the case of Vipin Khanna and Amrinder Singh Dhiman (supra), being the decisions of the jurisdictional High Court. Reliance was also placed on the order of G.L. Gupta & Sons v. ITO . It was held that the issue regarding trading addition has already been settled at the time of making assessment Under Section 143(1)(a) of the Act. The proceedings were reopened in respect of some other item, which could be completed only qua the items of escaped income. Thus, it was held that the learned CIT(A) was right in deleting those additions. It may be mentioned that the Hon'ble Tribunal has held that the reassessment proceedings were open qua the items of escaped income. Thus, this order will have to be read in the light of the decision of Hon'ble Punjab & Haryana High Court in the case of Vipin Khanna that the Assessing Officer will be within right to bring any other item of escaped income to tax. However, he cannot make fishing enquiries to probe if any other income has escaped assessment or not. He also relied on the decision of Hon'ble ITAT, Nagpur Bench, in the case of ACIT v. Malli Chand Baid (2006) 99 TTJ 1016, in which it was mentioned that when proceedings Under Section 147 are initiated, they are open qua the items of under-assessment. The finality of assessment on other issues cannot be disturbed. It make no difference whether the assessment became final on account of framing order Under Section 143(1) or on account of non-issue of notice Under Section 143(2) of the Act within the stipulated period. The ratio of this order is in line with the decisions of Hon'ble Punjab & Haryana High Court that the re-assessment proceedings are open qua the items of escaped income. We may hasten to add that such items may or may not form the subject matter of the recorded reasons and such income may come to the notice of the Assessing Officer in the course of reassessment proceedings. . He also relied on the decision of Hon'ble ITAT, Chandigarh Bench "A", in the case of Dy. CIT v. Smt. Ranjit Kaur and Ors. (2003)81 TTJ 269, in which it was held that if the assessment is reopened, the Assessing Officer has jurisdiction only for the escaped assessment on the basis of reasons to believe and any other escaped income which may come to his knowledge during the course of proceedings Under Section 147.

3.5 Coming to the words "and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of

proceedings under this section", used in Section 147, the learned Counsel relied on the decision of Hon'ble Delhi High Court in the case of CWT v. D.R. Vadera . The learned Counsel for the revenue had submitted that once assessment proceedings are reopened, the entire gamut can be taken note of by the Assessing Officer and the re-assessment proceedings are not restricted to only those items for which initially the notice was given. The case of the learned Counsel of the assessee was that reassessment proceedings are restricted to the items in respect of which the notice was initially issued. The Hon'ble Court referred to the decision in the case of Jagmohan Rao and Sun Engineering Works P. Ltd. (supra) and pointed out that once an assessment is reopened, the previous under-assessment is set aside. What is set aside is only the previous under-assessment and not the original assessment proceedings. He also referred to the decision of Hon'ble Delhi High Court in the case of CIT v. Pradeep Kumar Gupta (2007) 207 CTR 115, in which it was mentioned that there may well be instances where the reopening may pass muster in the light of some facts, but those facts by themselves may turn out to be insufficient to preserve the assessment itself. Once the provisions of Section 147 and 148 are resorted to, the Assessing Officer must first discharge the burden, of showing that the income had escaped assessment. It is only thereafter that the assessee had to give all the answers. The court held that there was no reason why the initial burden of proof should not rest on the Assessing Officer even where the assessment has gone through Section 143(1) of the Act. On the basis of this part of the judgment, his case was that in respect of any other item of escaped income, it was for the Assessing Officer to discharge the initial burden that income had escaped assessment in respect of those items and it will be only thereafter that the assessee may have to provide all the answers.

3.6 In reply, the learned DR relied on the decision of Hon'ble Supreme Court in the case of V. Jagmohan Rao and Ors. v. CIT , in which it was held that once proceedings have been validly initiated Under Section 34(1)(b) of the 1922 Act, the ITO had not only the jurisdiction but also duty to levy tax on the entire income that had escaped assessment during that year. Further, he relied on the decision of Hon'ble Delhi High Court in the case of DR. Vadera (supra), in which it was held that on reopening the assessment what is set aside is the previous under-

assessment and the whole assessment proceedings start afresh. It was further mentioned that what is set aside is only the previous under-assessment and not the original assessment proceedings.

He also relied on the decision of Hon'ble Supreme Court in the case of CIT v. Sun Engineering Works P. Ltd. , in which it was pointed out that the words "such income", used in Section 147, clearly refers to the income which is chargeable to tax but had escaped assessment and the jurisdiction of the ITO is confined only to the assessment of escaped income. In the reassessment proceedings, the assessee cannot seek review to concluded items unconnected with escaped income. He also stated that the Assessing Officer had made enquiries in the re-assessment proceedings and thereafter he made assessment based upon the facts which came to his notice. Therefore, the other items on which addition was made also represented income which came to his notice in the re-assessment proceedings. It was his case that the Assessing Officer could validly make addition in respect of such income on the basis of information which came into his possession in the course of re-assessment proceedings and led to inference of under-assessment as mentioned in Explanation-2 to Section 147, even if there were some irregularity in calling for the information.

3.7 In the rejoinder, the learned Counsel relied on the ratio of the decision in the case of Pradeep Kumar Gupta (supra), in which it was held that the Assessing Officer must first discharge the burden of showing that the income has escaped assessment. It is only thereafter that the assessee has to provide all the answers. There is no reason why initial burden of proof should not rest with the Assessing Officer even when the assessment was made Under Section 143(1) of the Act.

4. We have considered the facts of the case and rival submissions. As mentioned earlier, the assessment in this case was reopened in respect of interest relating to M/s Rattan Chand Harjas Rai, M/s Rattan Trading Company and M/s Dalai Consultants Pvt. Ltd. Thereafter, the proceedings were completed by making additions on the aforesaid grounds as well as on a number of other grounds. Section 147 of the Act, regarding "Income escaping assessment", uses the words "assess or re-assess such income and also any other income chargeable to tax

which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section". Prima facie these words empower the Assessing Officer to bring to tax income which had escaped assessment and also income which comes to his notice subsequently in the course of proceedings under this section. The two parts of the aforesaid words are separated by the words "and", which prima facie lead to the inference that even the second portion refers to the income which escaped assessment and which came to his notice subsequently in the course of proceedings under this section. In regard to a case where the return of income has been furnished and the assessment has been made, the words "income chargeable to tax has escaped assessment", are deemed to include within their ambit- (i) income chargeable to tax has been under-assessed, or (ii) such income has been assessed at too low a rate, or (iii) such income has been made the subject of excessive relief under this Act, or (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed. Therefore, in order to bring other items of escaped income, any of the items mentioned in Explanation-2 will also have to be considered.

4.1 We may now examine various decisions of Hon'ble Supreme Court and the High Courts in the matter. In the case of V. Jaganmohan Rao and Ors. (supra) at page 380, it was held that it is, therefore, manifest that once assessment is reopened by issuing a notice under Sub-section (2) of Section 22 (of 1922 Act), the previous underassessment is set aside and whole assessment proceedings start afresh. When once valid proceedings are started Under Section 34(1)(b), the ITO had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year. This judgment has two portions, namely, that once the assessment is reopened, the previous under-assessment is set aside and the whole assessment proceedings start afresh. The second portion is that once the proceedings are initiated Under Section 34(1)(b), the ITO had not only the jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year. If we examine the provision contained in the Explanation-2 to Section 147, a case where income chargeable to tax has been under-assessed would also be a case of income escaping assessment. Therefore, it becomes clear that once an assessment is reopened, the previous under-assessment is set aside and the whole assessment proceedings start

afresh. In the case of Sun Engineering Works P. Ltd. (supra), the judgment in the case of V. Jaganmohan Rao was explained. It was pointed out that the view that once proceedings are initiated Under Section 147, the original assessment is wiped off and the whole assessment proceedings start afresh, is applicable only to the extent that the previous under-assessment is set aside and the ITO has jurisdiction to levy tax on the entire income that had escaped assessment during the year. Therefore, what is set aside is only the under-assessment and not the original assessment proceedings. In the re-assessment proceedings, the assessee cannot re-agitate the matter which stood concluded by stating that other income which had been assessed originally was at too high a figure. From this judgment, it appears to us that while the Assessing Officer will be within his right to tax the income which escaped assessment and any other income which comes to his notice in the course of reassessment proceedings, but the assessee will not be entitled to reopen the concluded issues by stating that on some other item he was assessed at a higher figure than what was warranted under the law. This also becomes clear from the heading of Section 147 "Income escaping assessment". Coming to the decision of Hon'ble Delhi High Court in the case of D.R. Vadera (supra), the question in that case was whether, the WTO could also enhance the value of two immovable properties for assessment years 1966-67 and 1967-68 while completing re-assessments under Section 147 of the Act? The Hon'ble Court referred to the decisions in the case of V. Jaganmohan Rao & Sun Engineering Works P. Ltd. and pointed out that an order made in respect of the escaped item does not affect the operative force of the original assessment, particularly if it has acquired finality, and the original order retains both its character and identity. It is only in a case of under-assessment that the assessment of net income/wealth and tax due has to be recomputed on the entire taxable wealth/income, as the case may be. Therefore, the question was answered in favour of the revenue and against the assessee, thereby holding that when the assessment was reopened on the issue of the valuation of shares, the valuation of the property could also be considered in the re-assessment, if there was any under-assessment in that regard. Thus, this decision goes against the case of the assessee to the extent that in a case where under-assessed income comes to the notice of the Assessing Officer, he will be empowered to tax such income also. Coming to the case of

Vipan Khanna (supra), the facts were that the return of income for assessment year 1992-93 was processed Under Section 143(1)(a) and thereafter re-assessment proceedings were started Under Section 148 in respect of excessive claim of depreciation. Thereafter, notices Under Section 143(2) and 142(1) were issued calling information on six issues. The notice was challenged in the writ petition on the ground that the information called for was unconnected with the excessive claim of depreciation. The notice was cancelled by the Hon'ble Court in so far as it related to matters unconnected with the issue of depreciation. However, it was clarified that the Assessing Officer will be free to bring to tax any other item of income which may have escaped assessment and which comes to his notice during the course of proceedings Under Section 147. In our case, the assessee has not challenged the issuance of notices by the Assessing Officer in the course of proceedings and, therefore, there is no question of quashing the notice by any High Court in the writ petition proceedings.

Therefore, the operative portion of the judgment, in so far as we are concerned, is that the Assessing Officer will be within his jurisdiction to bring escaped income to tax and also income which comes to his notice in the course of re-assessment proceedings. The facts of the case of Amrinder Singh Dhiman are identical with the facts of the case of Vipan Khanna (supra), in which the Hon'ble Court quashed the notice calling for information sought by the department vide communication dated 25.1.2002 in so far as it was unrelated to the matter of under-assessment. The Assessing Officer was directed to complete the re-assessment in accordance with law and it was clarified that the Assessing Officer would be competent to frame the assessment to bring to tax any other item of income which might have escaped assessment and which comes to his notice during the proceedings Under Section 147 of the Act. Thus, the ratio of this case also does not come to the aid of the assessee as the notice issued by the Assessing Officer was not set aside by any High Court. The question in the case of Pradeep Kumar Gupta (supra) decided by Hon'ble Delhi High Court was whether, the initiation of re-assessment proceedings on the basis of the statement of Shri Anand Prakash, whose cross-examination was sought by the assessee but was not given, was valid or not? The Hon'ble Court pointed out that it was mandatory for the revenue to produce to Shri Anand Prakash for cross-examination as specifically demand by the assessee.

The facts on which decision to invoke Section 147 is predicated may in some cases be sufficient both for decision to carry out re-assessment as well as to justify or sustain the fresh assessment. However, there may well be instances where the reopening may pass muster in the light of some facts, but those facts by themselves may turn out to be insufficient to preserve the assessment itself. Once Section 147 is invoked, the Assessing Officer must first discharge the burden of showing that income had escaped assessment. It is only thereafter that the assessee has to provide all the answers.

That case required cross-examination of Shri Anand Prakash for the purpose of showing that there was escapement of income and such cross-examination was specifically demanded by the assessee, which was not given. The Hon'ble Court held that the initial burden rested on the Assessing Officer even when the assessment had been made Under Section 143(1) of the Act. This decision has no bearing on the facts of our case because the re-assessment proceedings have gone through and while coming to other items of escaped income, it will have to be seen whether the Assessing Officer has sufficiently established the case of the revenue or not. In the light of aforesaid discussion, it is clear that the unambiguous ruling of various decisions by the Hon'ble Supreme Court and the High Courts is that the Assessing Officer can bring to tax not only the items of escaped income which formed the basis of reopening the assessment but also income which comes to his notice in the course of re-assessment proceedings. We have already pointed out that the ratio of the order of the Tribunal (Jaipur 'SMC Bench) in the case of Sunil Kumar Jain (supra) is not in consonance with the decision of Hon'ble Punjab & Haryana High Court in the case of Vipan Khanna (supra). In the case of G.L. Gupta & Sons (supra), it was pointed out by the Tribunal that as per decision in the case of Vipan Khanna, the Assessing Officer could not only assess or reassess escaped income in respect of which proceedings Under Section 147 were initiated, but also any other income chargeable to tax which may have escaped assessment and which comes to his notice in the course of reassessment proceedings. However, it was pointed out that the whole of the assessment cannot be made de-novo. The re-assessment can be made only in respect of the items mentioned above. The issue regarding trading results had already been settled at the time making assessment Under Section 143(1)(a) and,

therefore, addition on this ground could not be made in the re-assessment proceedings. It appears to us that the Hon'ble Tribunal did not take into account the provision contained in Explanation-2 to Section 147 as it was not pointed out to them, under Clause (c) of which a case where income chargeable to tax has been under-assessed is also a case of income escaping assessment. Therefore, each item of addition made in this case will have to be examined under the aforesaid provision to come to the conclusion whether there was any under-assessment. In the case of Malli Chand Baid (supra), it was pointed out that re-assessment proceedings are open only qua items of under-assessment. The finality of assessment on other issues remains undisturbed irrespective of the fact whether the assessment was made Under Section 143(1), 143(3) or 144 of the Act. It was not the case of the revenue in that case that it had come across any material in the course of proceedings Under Section 147 and, therefore, there could have been no reason to believe that there was under-assessment on account of other items of income escaped assessment. Again, we are constrained to say that the Hon'ble Tribunal did not consider the provision contained in Explanation-2 to Section 147 as it might not have been referred to them. Such is also the case with the order in the case of Smt. Ranjit Kaur and Ors..

4.2 In a nutshell, the proposition of law on this issue is summarized here. In re-assessment proceedings, the Assessing Officer may assess not only the income which escaped assessment as per the reasons recorded, but also any other income which comes to his notice. However, such income has also to be in the nature of escaped income. In coming to the conclusion regarding the fact whether such income escaped or not, the provision contained in Explanation-2 to Section 147 will have to be considered. The original assessment stands otherwise and the Assessing Officer cannot make fishing enquiries in respect of matters concluded in the original assessment. This will also apply where original assessment terminated on account of the fact that the return was processed Under Section 143(1)(a) and no notice was issued Under Section 143(2) within the time permitted under the statute.

Consequently, ground No. 2 is decided accordingly.

4.3 Thus, we will now have to examine whether in respect of any other income assessed, it can be said that such income came to the notice of the Assessing Officer in the re-assessment proceedings.

5. Ground Nos. 4 and 5 pertain to the escaped income for which reasons were recorded by the Assessing Officer. Ground No. 4 is to the effect that the learned CIT(A) erred in confirming the addition of Rs. 81,000/- made on account of alleged interest on advance to M/s Rattan Trading Company and M/s Rattan Chand Harjas Rai. Ground No. 5 is to the effect that the learned CIT(A) erred in confirming the disallowance of Rs. 1,35,000/- on account of interest paid to M/s Dalai Consultants (P) Ltd. It was the case of both the parties that these grounds stand covered by the consolidated order of Hon'ble ITAT, Delhi Bench "E", New Delhi, in the case of the assessee for assessment years 1991-92 and 1992-93 in ITA Nos. 6252(Del)/95 and others dated 30.10.2003, a copy of Which was filed before us by the learned Counsel. In paragraphs 63 to 66 of the order, the Hon'ble Tribunal pointed out that the case of the revenue was that the assessee had made interest-free advances to M/s Rattan Chand Harjas Rai and Rattan Trading Company for non-business purposes. Therefore, interest paid by the assessee to the extent it related to advances made to these parties was disallowed. On hearing both the sides and considering the material on record, it was found that the grounds stood covered by the orders of the ITAT for assessment years 1990-91 & 1991-92, referred to in the order. Accordingly, the appeal of the assessee was allowed. In regard to the disallowance of interest in respect of M/s Dalai Consultants (P) Ltd., it was again pointed out that the ground stood covered by the order of ITAT in the appeal for assessment year 1990-91. Both the parties agreed that the facts of that year were same as the facts for assessment year 1990-91.

Therefore, relying on that order, the appeal of the assessee was allowed. As mentioned earlier, it is the case of both the parties that facts in respect of both the grounds are same as in ITA No.6252(Del)/95 (supra). Respectfully following order in that appeal, these grounds are allowed.

6. Ground No. 3 is to the -effect that the learned CIT(A) erred in confirming the trading addition of Rs. 34,29,334/-. In this connection, it is mentioned in the

assessment order that the gross profit ratio in this year was minus 8.60% as compared with 14.05% in the year 1993-94 and 28.5% in assessment year 1992-93. Thus, there was a trading loss in this year as against profits made in earlier years. The assessee was required to furnish the reasons for fall in gross profit. It was explained that the cost of raw-material consumed has gone up by 12% compared with the earlier year due to increase in rate of moulding powder, which was the main raw-material. In this connection, copies of purchase bills were filed to show that the increase in rate was up by 15% to 20%. It was further explained that the increase in the cost of production could not be passed on to the customer due to stiff competition in the market. Sale bills were also produced to show that there was no corresponding increase in the sale-rate. It was also explained that valuation of some of the finished goods was done at a lower rate as the goods were lying in stock for a long time. It was also explained that the production in this year was lower compared to the earlier year and fixed expenses, like fuel etc. remained more or less the same, leading to trading loss. The Assessing Officer drew a tabular chart for comparing the results of this year vis-a-vis the results of earlier two years and pointed out that there was a sharp increase in consumption of packing material, for which no explanation was furnished. It was also pointed out that the argument that production had gone down was not correct. It was also pointed out that consumption of power increased from Rs. 6.11 lakh to Rs. 7.72 lakh.

Therefore, the assessee's argument on this issue also does not stand to reason as there was only a nominal increase. The Assessing Officer noted the following discrepancies: i) Page Nos. 1 to 4 of the stock register of finished goods maintained for financial year 1993-94 reflect the stock position of Dinner set (48 pieces). On 2.6.93 (page 1 of the said stock register) there were 96 dinner sets in the stock as 95 dinner sets had been received on the said date. Immediately thereafter on 5.6.93, 68 sets (by over writing on some original figure) were shown to have been issued and the balance was shown as 38 dinner sets which should have been 28. Thus, there is a difference of 10 dinner sets.

ii) Page Nos. 5 to 13 of the said register reflects stock position of dinner sets (15 pieces). In the said account certain over writings had been made after erasing the

original entries. Few such instances noticed are as under: On 13.4.93 by making over writing in the issue column the original figure has changed as 66 thereby reflecting the stock at NIL.

On 13.5.93 the stock was shown at 146 sets Out of this 68 sets were shown to have been issued on 14.5.93. The figure of 68 has subsequently been changed to 28 sets. The closing balance originally was rightly shown as 78 (146-68). Since there had been a manipulation in the issue column, therefore, the stock of dinner sets had been changed from 78 to 118. Therefore, it is evident that the stock register may not be relied upon.

Page Nos. 6 and 7 of the said stock register clearly reveals that on 3.8.93 there were 124 dinner sets out of which 25 dinner sets were issued on 4.8.93 thereby leaving a balance of 99 sets. After erasing the actual date again the same date was mentioned as 4.8.93 and 200 sets were shown to have been issued which is not possible.

Consequent upon such manipulation several entries made thereafter have also been manipulated by way of erasing the original figures of issue and balance as well as the date, particular and bill number.

Further examination of page No. 7 of the said register clearly reveals that certain No. of dinner sets had been shown under receipt column on 5.8.93 and 7.8.93 which had been erased subsequently.

Thus, the original entry made on 8.8.93 could not tally with the stock position. The manipulation was made by deleting the complete entries in that row, which otherwise reveals the following particulars:

| Date   | Particulars       | Bill No. | Receipt | Issue                              | Balance |
|--------|-------------------|----------|---------|------------------------------------|---------|
| 8.8.93 | issued to packing | 1164     | - 60    | 329 (completely department erased) |         |
| 8.8.93 | -do-              | 1164     | - 25    | 104 (originally 304)               |         |
| 9.8.93 | -do-              | 1165     | - 15    | 089 (originally 289)               |         |

Photocopies of pages 1, 5, 6, & 7 of the said stock register were annexed to the assessment order.

In these circumstances, the AO rejected the book results and estimated the gross profit ratio at 22.8%, leading to addition of Rs. 34,49,334/-.

6.1 It was represented before the learned CIT(A) that the Assessing Officer rejected the trading results after pointing out certain defects in the books of account. It was also stated that the assessee effected change in the method of valuation of stock under which the opening stock was valued at cost and closing stock was valued at market price, which was claimed to be lower than the cost price. Thus, on the basis of these facts the books were rejected and gross profit rate was estimated at 22.8%. It was explained that the alleged difference of 10 dinner sets was nothing but clerical error and the same was rectified on the subsequent page. The over-writings were the result of human errors which were not in the realm of impossibilities and occurred in the normal course. 200 dinner sets were received from M/s A.S. Box Makers, which were wrongly posted under the issue column. The learned CIT(A) considered the facts of the case and rival submissions both in respect of valuation as well as defects in the stock register. It was pointed out that the Hon'ble Gauhati High Court in the case of Doom Dooma , held that it was not open to the assessee to adopt one method of accounting for opening stock and a different method of accounting for the closing stock. The assessee does not get a right to change the method merely because he suffered huge losses. He also referred to the decision of Hon'ble Allahabad High Court in the case of Awadesh Pratap Singh Abdul Rahman And Brothers v. CIT , in which it was pointed out that it will be difficult to list various kinds of defects in the books of account of the assessee, which may warrant the rejection of books. In that case, stock register was not maintained and sales were not verifiable in absence of cash memos. The vouchers of expenses were also filed and the income was ridiculously low compared to a high turnover. The Tribunal found as a fact that the claim of the assessee regarding acceptance of the books was not sustainable. This finding was confirmed by the Hon'ble High Court. In view of these judgments, the rejection of books of account and adoption of gross profit rate at 22.8%, based on figures of earlier years, was held to be justified.

6.2 Before us, it was pointed out that the list of closing stock was filed, which was placed in the paper book on pages 1 to 71. The assessee was in possession of slow moving stock whose value deteriorated with the passage of time. There was a stiff competition in the market. Therefore, the value of such slow moving stock was adopted at market value. References were also made to the reasons

furnished in the course of assessment for trading loss and comparative figure of gross profit ratios in this year vis-a-vis in last two years, placed in the paper book on pages 75 and 78. It was mentioned that the books were produced, as evidenced from page 95 of the paper book, being a letter dated 16.2.1999 addressed to the Assessing Officer. The case of the learned Counsel was that this issue stood concluded when notice Under Section 143(2) was not issued within the statutory time limit. In any case, the facts did not lead to a conclusion that there was any suppression of profit either on account of defects in maintenance of stock register or in respect of the valuation of the closing stock. On the other hand, the learned DR relied on the order of the learned CIT(A).

6.3 We have considered the facts of the case and rival submissions. We find that the assessee had represented before the Assessing Officer that it was following cost price or market price, whichever is lower, for the purpose of valuation of stock, as seen from page 2 of the paper book. This page also shows that item wise quantitative details were furnished in respect of all the items. It is also true that the Assessing Officer noticed some defects and over-writings in the stock register. He found that in respect of certain items, the value was shown as per market price, which was lower than the cost price.

However, he did not quantify the amount of under-assessed income where there were discrepancies in quantitative details. He also did not look into the matter whether there was slow moving stock, which could not have been sold at even the cost price. However, based upon the aforesaid discrepancies, he came to the conclusion that the books were not reliable and estimated the gross profit ratio, an action confirmed by the learned CIT(A). On perusal of the aforesaid submissions, we find that the factum of over-writing has not been denied by the learned Counsel for the assessee. It was the case of the assessee before the learned CIT(A) that the over-writings were merely clerical mistakes, which did not have any impact on the profits of the assessee, as correct figures were adopted by giving quantitative details. In the context of these facts, the first issue to be seen is whether the kind of addition made by the Assessing Officer could have become subject matter of assessment Under Section 147 of the Act. At the time of making original assessment, which in this case is Under Section 143(1)(a); the factum of over-

writing in the stock register was not there on record. It was also not known that in respect of a number of items, the closing stock had been valued at a lower figure than even the value adopted in opening stock on the ground that there were slow-moving goods in the inventory. No doubt, the Assessing Officer did not have prior knowledge of these matters and he issued a notice to the assessee to explain the reasons for fall in gross profit ratio. This notice was not challenged in writ petition and, consequently it was not set aside by any High Court. The assessee furnished the details and, therefore, it can be very well said that the Assessing Officer came to know about some other income which escaped assessment. It may be mentioned here that under Sub-clause (i) of Clause (c) of Explanation-2, a case where income chargeable to tax has been under-assessed is also a case where income chargeable to tax has escaped assessment. This statutory provision cannot be ignored, as discussed earlier, in construing the words "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", used in main Section 147. Thus, under-assessment arising on account of discrepancies in stock register and under-valuation of stock could rightly be made subject matter of re-assessment proceedings. The next question is whether, the Assessing Officer was justified in summarily estimating gross profit ratio at 22.8% of the sales? We are of the view that such a course could not have been adopted in the re-assessment proceedings as this assessment has to be made on the basis of any other income which came to his notice. The Assessing Officer had the stock register and inventory before him. He should have examined the explanation of the assessee with respect to the discrepancies pointed out by him and thereafter quantified the additions to be made in respect of discrepancy in quantitative details and on ground of under-valuation of stock. In respect of the latter, it may be pointed out that if there were sufficient reasons for valuing closing stock at lower than the cost price or even the value mentioned in opening stock, these reasons have to be considered in the light of the fact that the assessee was following cost price or market price, which is lower, for the purpose of valuing the stock. In view thereof, we think it fit to restore the matter to the file of the Assessing Officer to find out -(i) the actual discrepancy in the stock register and value of stock to be added to the income on account of such discrepancy, and (ii) valuation of stock on cost or

market price, whichever is lower, after considering the sale bills in respect of the slow moving stock.

Thereafter, he shall decide the issue afresh after hearing the assessee. Accordingly, this ground is treated as allowed for statistical purposes.

7. Ground No. 6 is against disallowance of commission of Rs. 1,69,109/- paid to the selling agents. In this connection, it is mentioned in the assessment order that in the course of assessment proceedings, the assessee was asked to justify the claim. It was submitted that the commission was paid to Merchandising Corporation for collecting orders and payments from Super Bazar Cooperative Society, Delhi. Commission was paid to M/s Western Marketing, who was the main dealer in Gujarat, for supplies made by the assessee directly to various parties in Gujarat. Other parties were also paid commissions in the similar manner for the sales made in different States. The Assessing Officer mentioned that there was no evidence on record to prove the services rendered by any commission agents. All the sales had been effected by the assessee directly to the customers. Super Bazar Cooperative Society was a government controlled concern and in respect of any sale effected to this party, there was no need to pay any commission. Therefore, the expenditure was disallowed. The case of the assessee before the learned CIT(A) was more or less the same as before the Assessing Officer.

Having considered the facts of the case and submissions made before him, he came to the conclusion that there was no evidence regarding the rendering of services by the commission agents. In fact, the assessee stated before the Assessing Officer that the expenses may be verified from the agents directly. In absence of any primary evidence to the effect that the expenditure was incurred wholly and exclusively in the course of business, the learned CIT(A) confirmed the disallowance made by the Assessing Officer.

7.1 Before us, the learned Counsel for the assessee referred to pages 74,75 & 99 of the paper book. Page 74 gives the break-up of the commission expenditure in terms of various parties. Paragraph 1 of page 75 contains the submissions made before the Assessing Officer, which have already been stated. Page 10 contains

the submissions made before the learned CIT(A), by which it is inter-alia mentioned that the agents had been rendering services in the past and they were paid commission by way of account payee cheques. Copies of bills raised by the agents were stated to be enclosed, however, such bills were not there in the paper book filed by the assessee before us. It may be mentioned here that no evidence regarding payment of similar commissions to these parties in the past was placed in the paper book filed before us.

Coming to the legal submissions, reliance was placed on the decision of Hon'ble Delhi High Court in the case of Pradeep Kumar Gupta (supra). As pointed out earlier, this case deals with the validity of reopening of the assessment and not for bringing any other income to tax in proceedings of re-assessment validly initiated Under Section 147. The Hon'ble Court had pointed out that the initial burden to prove that the income escaped assessment for reopening the assessment rested with the Assessing Officer even where the assessee has gone through Under Section 143(1) of the Act. It is not a case where the assessee has challenged the reopening of the assessment. It is also not a case where the notice issued by the Assessing Officer was challenged in writ petition and cancelled by the High Court. Therefore, the question to be seen is whether the income was under-assessed in the original assessment. The facts are that the assessee had made a claim for deduction of commission of Rs. 1,69,109/-. There is no evidence that any of the agents rendered any service to the assessee. There is no evidence before us that such payments were made in the past. Merely stating that such payments were made in the past does not establish the fact without any supporting document. In this situation, the payments made by way of cheques does not lead to an inference that the expenditure was incurred wholly and exclusively for the purpose of business. Therefore, the case is one of under-assessment of income and the Assessing Officer could have brought the impugned amount to tax in re-assessment proceedings notwithstanding the fact that this item was not covered in the reasons recorded by the Assessing Officer.

Accordingly, this ground is dismissed.

8. Ground No. 7 is against the addition of Rs. 4,20,949/- made on account of differences between the balances of various parties. In this connection, it is mentioned in the assessment order that copies of accounts of the creditors were obtained directly from them. Differences were found in the accounts of 20 parties, totaling to Rs. 4,20,949/-.

Sine these differences were not reconciled, the amount was added to the income of the assessee. It was represented before the learned CIT(A) that the assessee was not granted an opportunity to reconcile the accounts by furnishing it the copies of accounts received from the creditors. This submission was found to be factually incorrect as the reconciliation statement in case of M/s Nuchem Chemicals was filed, in respect of which the major difference of Rs. 3,22,531/- was there.

After considering the submissions of the assessee, the learned CIT(A) came to the conclusion that the assessee could not reconcile the differences and consequently upheld the action of the Assessing Officer.

8.1 Before us, the learned Counsel referred to page 100 of the paper book, being representation made before the learned CIT(A). It was pointed out that the nature of difference in the account is not clear from the assessment order. The section under which the impugned amount has been brought to tax is also not known. If it is the case of the Assessing Officer that these liabilities ceased to exist, it was for him to prove so by bringing the case within the four corners of the provisions contained in Section 41(1). A reference was made to the decision of Hon'ble Supreme Court in the case of CIT v. Sugauli Sugar Works (P) Ltd. , in which it was held that the entries made in the accounts of the debtor, unilaterally writing off of the debt, without any action on the part of the creditor will not enable the debtor to say that the liability had come to an end. This applied even where the period of limitation prescribed under the Limitation Act came to an end. Apart from that, such an action does not confer any benefit on the debtor. Therefore, it was held that the amounts written off by the debtor would not constitute income Under Section 41(1). In reply, the learned DR relied on the orders of the Assessing Officer and the learned CIT(A).

8.2 We have considered the facts of the case and rival submissions. It is found that neither the assessment order nor the order of the learned CIT(A) gives details of the nature of differences in the accounts namely, whether the credit balances were more or less or both in the books of the assessee when compared with the confirmed accounts received from those parties. It is also not shown how the sum total of these differences could be said to be the income of the assessee.

Therefore, we are of the view that the impugned amount cannot be said to be any other income which came to the notice of the Assessing Officer in the re-assessment proceedings. Accordingly, we are of the view that the learned CIT(A) erred in upholding this addition. Thus, this ground is allowed.

9. Ground No. 8 is against disallowance of various sums from expenses incurred for vehicle running and maintenance; rent, rates and lease charges; telephone expenses; unclaimed and unpaid bonus, legal and professional charges and sales promotion expenses. The disallowance from vehicle running and maintenance expenses was made on the same basis on which such disallowances were made in past assessments on estimated basis. The rent, rates and lease charges were found to be pertaining to the earlier years. However, no finding has been given whether these expenses were crystallized during this year or not.

Unclaimed bonus was disallowed on the ground that there was no liability to pay this amount. The legal charges were disallowed by stating that the payment was made for handling the matter relating to infringement of Section 48 of Cr.P. The learned CIT(A) upheld the disallowance by relying on the finding in the earlier years. The disallowance of bonus was upheld as it was shown as unclaimed bonus.

The legal expenses were disallowed as the nature of dispute was not explained to the learned CIT(A).

9.1 Before us, the learned Counsel for the assessee referred to page 101 of the paper book, at which it was mentioned that the amounts had already been added Under Section 43B in earlier years. He referred to the decision in the case of Sayaji Iron & Engineering Co. v. CIT , in which it was pointed out that a company

is a fictional entity which cannot consume the benefit of the assets of the company and, therefore, there could not be an element of personal user of the asset. Therefore, if certain benefits are given to directors and employees as per terms of their service, the expenditure will be business expenditure. This decision was followed by Hon'ble ITAT, Delhi Bench "D", in its order in the case of Dy. CIT v. Haryana Oxygen Ltd. (2001) 76 ITD 32. On the other hand, the learned DR relied on the orders of the authorities below.

9.2 We have considered the facts of the case and rival submissions. The disallowance out of telephone expenses and vehicle running and maintenance expenses on the basis of the orders of past years cannot be said to be any other income which came to the notice of the Assessing Officer in the course of re-assessment proceedings. Various facts of this and earlier years were known when assessment was completed Under Section 143(1). Such is also the case in respect of sales promotion expenses as it was mentioned that in absence of details furnished by the assessee, it could not be ascertained whether in past such expenses were clubbed under the head "sales promotion expenses". as so far as unclaimed bonus is concerned, it was explained that the same had been disallowed by the assessee in the two years on its own, Under Section 43-B of the Act. In the case of additional finance charges, it is not known whether they crystallized in the relevant year or in any earlier year. Thus, various additions are such that they do not fall within the ambit of the words "any other income coming to the notice of the Assessing Officer". Therefore, we are of the view that the learned CIT(A) erred in upholding the disallowance of the impugned expenditure.

Thus, ground No. 8 is allowed.

10. Ground No. 9 is to the effect that the Assessing Officer erred in not allowing the assessed loss. In the course of hearing before us, the learned Counsel pointed out that the loss for this year was assessed at Rs. 21,94,580/-. However, the assessed losses of earlier years were not added to the loss of this year. When questioned as to how it could be done, it was stated that the Assessing Officer should have at least mentioned the assessed losses of earlier years in this order. When questioned whether the Assessing Officer was determining the loss of this

year or earlier years in this order, it was pointed out that it was incumbent on the Assessing Officer to mention previous assessed losses in this order. No particular argument was made by the learned DR in this matter. Section 147 provides for assessment or re-assessment of the income of the year and not of any earlier year. There was no requirement or need to mention of assessed losses of earlier years in this order as per requirement of this section. The question of absorption of losses of earlier years and this year will arise only in the year in which the assessee is assessed at positive income, which falls outside the domain of the Assessing Officer who framed re-assessment proceedings for this year. Thus, the ground is dismissed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**