IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'F' MUMBAI

BEFORE SHRI B.R. MITTAL (JUDICIAL MEMBER) AND SHRI P.M. JAGTAP (ACCOUNTANT MEMBER)

ITA No. 4613/Mum/2005
Assessment Year-1998-99

M/s. Telco Dadajee Dhackjee Ltd., C/o Tata Motors Ltd., 3rd Floor, Nanavati Mahalaya, 18. Homi Mody Street, Fort, Mumbai-400 001 PAN-AAACM4485A	Vs.	The DCIT, Circle 2(3), Aayakar Bhavan, Mumbai-400 020
(Appellant)		(Respondent)

Appellant by: Shri Tejas Shah
Respondent by: Shri Subachhan Ram

Date of Hearing : 29.6.2012
Date of pronouncement:29.6.2012

O R D E R

PER B.R. MITTAL (JM)

The assessee filed this appeal for assessment year 1998-99 against order of Ld. CIT(A) dt. 24.3.2005 on following grounds:

*"1.**Expenditure towards Non-Compete Fees-Rs. 75,00,000/-***

The Ld. CIT(A) has erred both on facts and in law in upholding that the expenditure of Rs. 75,00,000/- towards non-compete fees is not deductible. The Ld. CIT(A) ought to have appreciated that the expenditure was incurred by the company for the business of dealing in automobile sales and servicing and hence was an admissible expenditure

*2.**Depreciation on leased premises – Rs. 1,41,858/-***

The Ld. CIT(A) has erred in upholding the disallowance of depreciation on leased premises amounting to Res. 1,41,858/-. The Ld. CIT(A) ought to have appreciated that the claim of the company is fully tenable since these assets were used for the business carried on by it."

2. Later on assessee filed an additional ground of appeal which is as under:

"The proceedings initiated by the AO u/s. 147 are bad in law and without and/or in excess of jurisdiction and consequently re-assessment order passed by him u/s. 147 should be quashed and annulled."

The Division Bench admitted the additional ground taken by the assessee.

3. Since there was a difference of opinion between the Ld. Members constituting the Division Bench of ITAT Mumbai in respect of the additional ground taken by the assessee which goes to the root of the validity of the assessment order passed by the AO, the matter was referred to Learned Third Member u/s. 255(4) of the I.T. Act, 1961 for his opinion in regard to question(s) referred to therein.

4. Ld. Third Member (the then Senior Vice President) vide his order dt. 12.5.2010, after hearing the Ld. Representatives of the parties, considering the facts and circumstances of the case and for the reasons mentioned therein, has concurred with the proposed order of Ld. Judicial Member on the question(s) referred to him.

5. In view of above, as per majority view, the assessment order passed by AO is illegal and void abinitio. Therefore, the same is quashed.

6. In the result, a ppeal filed by the assessee for assessment year 1998-99 is allowed.

Order pronounced in the Open Court at the time of hearing i.e. on 29th June, 2012

Sd/-	***Sd/-***
(P.M. JAGTAP)	(B.R. MITTAL)
Accountant Member	Judicial Member

Mumbai, Dated 29th June, 2012
Rj

Copy to :

1. *The Appellant*
2. *The Respondent*
3. *The CIT-concerned*
4. *The CIT(A)-concerned*
5. *The DR 'F' Bench*

True Copy

By Order

Asstt. Registrar, I.T.A.T, Mumbai

		Date	Initials	
1.	Draft dictated on:	29.06.2012		Sr. PS/PS
2.	Draft placed before author:	29.6.2012		Sr. PS/PS
3.	Draft proposed & placed before the second member:			JM/AM
4.	Draft discussed/approved by Second Member:			JM/AM
5.	Approved Draft comes to the Sr. PS/PS:			Sr. PS/PS
6.	Order pronounced on:			Sr. PS/PS
7.	File sent to the Bench Clerk:			
8.	Date on which file goes to the Head Clerk:			Sr. PS/PS
9.	Date on which file goes to AR			
10.	Date of dispatch of Order:			

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, 'F', MUMBAI

BEFORE SHRI R V EASWAR, SENIOR VICE PRESIDENT
(THIRD MEMBER)

I T A No: 4613/Mum/2005
(Assessment Year: 1998-99)

Telco Dadajee Dhackjee Limited, Mumbai (PAN: AAACM4485A)	...	Appellant
Vs		
Deputy Commissioner of Income Tax Circle 2(3), Mumbai	...	Respondent

Appellant by: Shri Dinesh Vyas
Respondent by: Shri Hemant Lal

ORDER

The following points of difference have been referred to me by the Hon'ble President under section 255(4) of the Income Tax Act, 1961: -

"Whether on the facts and circumstances of the case;

i) proceedings initiated by the AO u/s 147 is liable to be confirmed or quashed where there was no fresh material available with the AO and the assessment had been completed originally u/s 143(1)?

ii) the order of the AO is liable to be quashed or to be set aside where copy of the reasons recorded for taking action u/s 147 were not provided to the assessee in spite of specific requests?"

2. The facts have been narrated in considerable detail in the orders of the learned Members and I do not propose to repeat them except where it is absolutely essential. In my opinion, Question No. ii) is more fundamental to the dispute before me and requires to be resolved first. There is no dispute that the copy of the reasons

recorded for issuing notice under section 148 were not provided to the assessee despite specific request. In this situation, it seems to me that the only course open to me is to quash the reassessment proceedings. The contention of the learned Senior Departmental Representative was that the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. ITO (2003) 259 ITR 19 (SC) only lays down a procedure or a course of action to be adopted by the Assessing Officer and if the reasons for reopening the assessment are not supplied to the assessee despite the assessee's request, the assessment itself cannot be quashed or held ab initio void. He invited my attention to the following orders / judgments where this point arose but despite the same the reassessments orders were merely set aside for being redone after supplying the reasons to the assessee: -

(1) Datamatics Ltd. vs. ACIT (2008) 110 ITD 24 (Mum)
(2) Smt Kamlesh Sharma vs. ITO (2006) 287 ITR 337 (Del)
(3) Areva T&D India Ltd. vs. ACIT (2007) 294 ITR 233 (Mad)
(4) CIT vs. Jai Prakash Singh (1996) 219 ITR 737 (SC)
(5) ITO vs. Smt Gurinder Kaur (2006) 102 ITD 189 (Del)
(6) S Narayanappa & Ors vs CIT (1967) 63 ITR 219 (SC)

3. The learned counsel for the assessee strongly relied on the judgment of the Hon'ble Bombay High Court in CIT vs. Fomento Resorts and Hotels Ltd. in Tax Appeal No.71 of 2006 dated 27 11.2006 (copy filed), in which it was held that giving of reasons must be considered as implicit in section 11 of the Expenditure Tax Act, 1987 and if it is not done and the rules of natural justice are violated, the assessment must be quashed. My attention was also drawn to the order of the Tribunal in the aforesaid case in ETA No: 1 & 5/PN/2001

dated 04.04.2006. It was also submitted that the judgment of the Hon'ble Bombay High Court (Panaji Bench) has been confirmed by the Supreme Court by dismissing the Special Leave Petition filed by the CIT by order dated 16.07.2007. The copy of the order of the Supreme Court has also been filed. The judgment of the Hon'ble Bombay High Court (supra) was sought to be distinguished by the learned Senior DR by submitting that it was rendered under a different enactment which did not provide for furnishing of reasons for reopening the assessment to the assessee and since the Bombay High Court has referred to furnishing of reasons for passing an order, it is distinguishable also on the ground that section 148 notice is not an order and failure to furnish reasons recorded for issue of a notice under section 148 of the Income Tax Act is not fatal to the validity of the reopening.

4. I have carefully considered the above submissions. It is true that in the case of GKN Driveshafts (India) Ltd. (supra) the Supreme Court has not held that that non-furnishing of the reasons for reopening the assessment affects the validity of the notice under section 148 and what has been held therein is that in such a case the reassessment order should be set aside and the proceedings should be restored to the Assessing Officer with a direction to him to furnish the reasons to the assessee, hear the assessee's objections and pass an order on the objections and then proceed to complete the reassessment order. However, in the case of Fomento Resorts and Hotels Ltd., which arose under the Expenditure Tax Act, the Tribunal held that if the reasons for reopening the expenditure tax assessment under section 11 of the

Expenditure Tax Act are not furnished, the reassessment is without jurisdiction and is liable to be quashed. In this order the Tribunal has referred to the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) and also to the judgment of the Hon'ble Bombay High Court in the case of Devji Ravji Patel vs. Balasubramaniam and Others (1994) 210 ITR 925 (Bom). Section 11 of the Expenditure Tax Act provides for chargeable expenditure escaping assessment. It does not expressly provide for recording of reasons before issuing the notice of reassessment. Section 148(2) of the Income Tax Act expressly states that before issuing a notice of reassessment the Assessing Officer shall record his reasons for doing so. I do not think that there is any material difference between the two provisions because it has been held by the Panaji Bench of the Hon'ble Bombay High Court in the judgment cited supra that giving of reasons in support of an order is part of complying with the rules of natural justice and, therefore, no fault can be found with the order of the Tribunal holding that the notice issued under section 11 of the Expenditure Tax Act without recording reasons is invalid. Section 148(2) of the Income Tax Act only makes it explicit what was already implicit in the section. The judgment of the Hon'ble Bombay High Court has become final, the Supreme Court having dismissed the Special Leave Petition filed by the Department against the same. In addition to the above, a Division Bench of the Tribunal in Mumbai has held in its order dated 30.10.2009 in ITA No: 7626/Mum/2004 in the case of Videsh Sanchar Nigam Ltd. vs. JCIT, that if the Assessing

Officer has not furnished the reasons for reopening the assessment under section 148, the entire proceedings are null and void. In coming to this conclusion the Tribunal has referred to the judgment of the Panaji Bench of the Bombay High Court in CIT vs. Fomento Resorts and Hotels Ltd. 9supra) in paragraph 14.9 of its order In this order the Tribunal has also referred to the order of the Delhi Bench of the Tribunal in the case of ITO vs. Smt Gurinder Kaur (supra) cited by the learned Senior DR before me and has pointed out that the order of the Delhi Bench of the Tribunal is not in consonance with the view taken by the Delhi High Court in the case of New Bank of India Ltd. vs. ITO (1982) 136 ITR 679 (Del). There is thus an order of a Division Bench of the Tribunal in Mumbai which supports the assessee's contention that if the reasons for reopening the assessment are not furnished to the assessee, that is fatal to the validity of notice of reopening issued under section 148 of the Income Tax Act.

5. The learned Senior DR drew my attention to two judgments of the Hon'ble Bombay High Court being (a) Allana Cold Storage Ltd. vs ITO (2006) 287 ITR 1 (Bom); and (b) Ajanta Pharma Ltd. vs. ACIT (2007) 295 ITR 218 (Bom). I have respectfully gone through these two judgments. In the case of Ajanta Pharma Ltd. (supra), the facts show that the reasons for reopening the assessment were supplied to the assessee but the assessee's objections were not properly considered by the Assessing Officer. The Hon'ble High Court, therefore, set aside the reassessment proceedings and directed the Assessing Officer to dispose off the objections of the assessee by following the due

procedure of law and in conformity with the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra). In the case of Allana Cold Storage Ltd. (supra) also, as paragraph 3 of the judgment would show, the reasons for reopening the assessment were supplied to the assessee but only on 21.03.2006 when the assessment was about to get barred by time. The assessee filed their objections to the reasons on 23.03.2006 and requested for personal hearing. But the Assessing Officer straightaway passed the reassessment order including the decision on the objections filed by the assessee. Thus, both the cases cited by the learned Senior DR are cases where the Assessing Officer did supply the reasons recorded for reopening the assessment. In the present case, however, there is no dispute that the reasons recorded for reopening the assessment were never supplied to the assessee. The facts being different, the cited judgments are not applicable.

6. In the light of the binding judgment of the Panaji Bench of the Hon'ble Bombay High Court (supra) and the order of the Tribunal in the case of Videsh Sanchar Nigam Ltd. (supra) and respectfully following the same, I hold that since the Assessing Officer did not furnish the reasons recorded for reopening the assessment to the assessee despite specific request, the reassessment order is liable to be quashed as null and void. The point of difference No: ii) is answered accordingly.

7. I now proceed to resolve the first point of difference. So far as this question is concerned, both the learned Members agreed that

there is no fresh material for reopening the assessment. However, the learned Accountant Member is of the opinion that there is no need for any fresh material because the return filed by the assessee was only processed under section 143(1) of the Act and there was no assessment made under section 143(3). The learned counsel for the assessee has strongly relied on the recent judgment of the Supreme Court in CIT vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC). The objection of the learned Senior DR is that in the cited judgment the original assessment was completed under section 143(3) and thus there was a presumption that the Assessing Officer has considered the issue and formed an opinion regarding the acceptability of the assessee's claim, whereas in the present case there was no original assessment under section 143(3) and it was only a case of the assessee's return being processed under section 143(1). While therefore contending that the judgment of the Supreme Court in the case of CIT vs. Kelvinator of India Ltd. (supra) is not applicable, the learned Senior DR submitted that the present case is fully covered by the earlier judgment of the Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC).

8. I have carefully considered the controversy. In the present case the return filed by the assessee on 30.11.1998 was accepted under section 143(1). In the return the assessee had claimed deduction for payment of non compete fees of Rs.75.00 lakhs which included payment of Rs.15.00 lakhs to a Director. The assessee had also claimed deprecation of Rs.1,41,858/- on leased premises. The

Assessing Officer issued notice under section 148 on the ground that these were not allowable expenses and income chargeable to tax had escaped assessment. He accordingly disallowed both the items in the reassessment order. The learned Judicial Member has taken the view that there was no fresh material to support the formation of the belief that income chargeable to tax had escaped assessment. The Balance Sheet, Profit and Loss Account and other details were filed with the return of income and it was not permissible for the Assessing Officer, after a gap of five years, and in the absence of any fresh tangible material, to come to the conclusion that income chargeable to tax had escaped assessment. The learned Accountant Member has however taken the view, dissenting from learned Judicial Member that the case is covered by the judgment of the Supreme Court in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (supra). He opined that in a case where the return was merely processed under section 143(1) and no assessment was made under section 143(3), if the Assessing Officer forms the belief that income chargeable to tax has escaped assessment on the basis of material available in the return itself, it is not a case of a mere change of opinion. The reopening in such a case would be valid.

9. After careful consideration of the matter I am inclined, with respect, to agree with the view taken by the learned Judicial Member. In my humble opinion, the recent judgment of the Supreme Court in the case of CIT vs. (1) Kelvinator of India Ltd. and (2) Eicher Ltd. [2010] 320 ITR 561 (SC) covers the present case. The contention of the

Department that this judgment only covers cases where the first assessment was made under section 143(3) and that it does not apply to cases where the return was first processed under section 143(1) is, with respect, not acceptable because the Supreme Court was expounding to the provisions of section 147 and the words "*reason to believe*" appearing therein. It was held that a schematic interpretation has to be given to these words, failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of a mere change of opinion. It was further held that there is a conceptual difference between the power to review and the power to reassess and section 147 cannot be interpreted in such a manner to give a power of review. The contention of the Department before me is that where no view has been taken as to the correctness of the return in the first instance, the Assessing Officer cannot be said to exercise a power of review when he reopens the assessment which has been earlier passed under 143(1). This argument is similar to the argument that if no opinion can be said to have been formed by the Assessing Officer when the return was merely processed under section 143(1), by issuing notice under section 148 he cannot be said to have changed his opinion. So far so good. But it needs to be remembered that section 147 applies both to section 143(1) as well as section 143(3) and, therefore, except to the extent that the reassessment notice issued under section 148 in a case where the original assessment was made under section 143(1) cannot be challenged on the ground of a mere change of opinion, still it is open to an assessee to challenge the

notice on the ground that there is no reason to believe that income chargeable to tax has escaped assessment. The reason to believe must have a live link with the formation of the belief that income chargeable to tax had escaped assessment when the return was processed and accepted under section 143(1). To hold that in every case where a return was processed and accepted under section 143(1) the Assessing Officer will be free to reopen the same under section 148 even in the absence of a live link between the reasons recorded and the formation of the belief would be to make the conditions of section 147 and section 148 otiose as regards notices of reopening issued in cases where the return was originally processed under section 143(1). There is no exclusion in section 147 to the effect that where the return was earlier processed under section 143(1) it is not necessary for the Assessing Officer to hold or entertain a belief that income chargeable to tax had escaped assessment for the reasons recorded by him. Therefore, the condition that the Assessing Officer must have reason to believe and the further condition that those reasons must have a live link with the formation of the belief is applicable equally to cases where the return was processed under section 143(1) as also to cases where the return was examined and an assessment was made by a speaking order under section 143(3). The only distinction recognized in section 147 between the two is where it is provided by the proviso that where the earlier assessment was made under section 143(3), no action for reopening the assessment can be taken after the expiry of four years from the end of the relevant

assessment year unless income chargeable to tax has escaped assessment because of the failure on the part of the assessee to file a return or to disclose fully and truly all material facts necessary for the assessment. Such an exception has not been provided for in a case where the return has been processed under section 143(1) in which case the proviso will have no application. If it is correct that an intimation under section 143(1) as well as an assessment order under section 143(3) are both amenable to section 147, it should also be conceded that even in a case where the original return was merely processed under section 143(1) the Assessing Officer must nave reason to believe that income chargeable to tax has escaped assessment. He has also to record reasons under section 148(2) for reopening the earlier assessment made under section 143(1). All that has been excluded is that the assessee, in whose case the return was first processed under section 143(1), cannot challenge the notice of reopening on the ground that it is prompted by a mere change of opinion. Only to this limited extent there is a disability on the part of the assessee to challenge the notice of reopening in a case where his return was earlier processed under section 143(1) of the Act.

10. The reliance placed by the learned Senior DR on the judgment of the Supreme Court in ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) would be apposite in all cases where the return was processed under section 143(1) but later notice was issued under section 148 and the assessee challenges the notice on the ground that it is prompted by a mere change of opinion. In this judgment it was

held that there was no assessment under section 143(1) in the sense that the return is scrutinized and an opinion is formed about the assessee's claims and contentions and, therefore, it is not possible to say that when the Assessing Officer reopens the assessment under section 148, it was prompted by a mere change of opinion (please see observations at page 510 top). Except to this limited extent, the notice of reopening issued in a case where the return was first processed under section 143(1) is open to challenge on all grounds available to the assessee, including the ground that there was no reason to believe that income chargeable to tax had escaped assessment or that the materials before the Assessing Officer had no live link or nexus with the formation of such belief or that the reasons are based on gossip or rumour or were a mere pretence. This is made clear by the observations of the Court at page 512 of the report where it was held that "so long as the ingredients of section 147 are fulfilled" the Assessing Officer can reopen the proceedings even where intimation under section 143(1) had been issued. Thus fulfillment of the conditions of section 147, including the one that there should be "reason to believe", is essential for the validity of the notice under section 148. It is while expounding the words "reason to believe" that the Supreme Court in the later judgment in CIT vs. Kelvinator of India Ltd. (supra) held that there should be "tangible material" to come to the conclusion that income had escaped assessment. Thus, in my humble understanding of both the judgments, while resorting to section 147 even in a case where only an intimation had been issued under section

143(1)(a) it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment.

11. What the assessee contended before me and which contention had found favour with the learned Judicial Member is that there was no such tangible material before the Assessing Officer from which he can entertain the belief that the allowance of the non compete fees and the depreciation resulted in escapement of income chargeable to tax. In the reassessment order the Assessing Officer has stated in paragraph 3.2.3 that after the return was processed, it was noticed that the assessee has understated its income by claiming the aforesaid two items of expenditure. He has not referred to any tangible material before him, in terms of the judgment of the Supreme Court in CIT vs. Kelvinator of India Ltd. (supra), on the basis of which he entertained the prima facie belief that income chargeable to tax has escaped assessment. Though it is not possible to challenge the action of the Assessing Officer on the ground of a change of opinion because in the present case the return was earlier merely processed under section 143(1), his action can be challenged on the basis of the law declared by the Supreme Court in the aforesaid judgment. The learned Judicial Member has held in paragraph 13 that there was no material before the Assessing Officer for such a belief. The learned Accountant Member has not disputed that there was no tangible material before the Assessing Officer on the basis of which he can reopen the assessment. He has, however, held that it is not necessary for the

Assessing Officer to have some tangible material before him to issue notice under section 148 in a case where the return was originally processed under section 143(1). With respect, I am unable to subscribe to this view for the reasons stated in the earlier paragraphs. In my humble opinion, on a proper understanding of the judgments of the Supreme Court both in the case of ACIT vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) and CIT vs. Kelvinator of India Ltd. (supra), it is still open to an assessee to challenge the notice under section 148, in a case where the return was earlier processed under section 143(1), on the ground that there was no tangible material before the Assessing Officer to enable him to entertain a prima facie belief that income chargeable to tax has escaped assessment. I may also add that neither before the learned Members who heard the appeal originally nor before me did the Department produce any tangible material on the basis of which the reasons were recorded to demonstrate that there was a live link or nexus between them and the requisite belief.

12. In the view I have taken, I do not consider it necessary to refer to the various authorities cited by both the sides. I accordingly answer the point of difference No. i) by holding that the proceedings initiated by the Assessing Officer under section 147 are liable to be quashed on the ground that there was no tangible material before the Assessing Officer, even though the assessment was completed originally under section 143(1).

13. The appeal will now be placed before the Bench which originally heard it for giving effect to the majority.

Sd/-
(R V Easwar)
Senior Vice President

Mumbai, Dated 12th May 2010
saldanha