IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH "A", LUCKNOW

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND SHRI. A. K. GARODIA, ACCOUNTANT MEMBER

ITA Nos.380 to 384/LKW/2012
Assessment Years:2001-02 to 2004-05 & 2006-07

Asstt. CIT-1 Kanpur	v.	M/s Northern Tannery 150 Ft. Road, Jajmau Kanpur
		PAN:AAAFN6778L
(Appellant)		(Respondent)

C.O. Nos. 75 to 79/LKW/2012
[In ITA Nos.380 to 384/LKW/2012]
Assessment Years:2001-02 to 2004-05 & 2006-07

M/s Northern Tannery 150 Ft. Road, Jajmau Kanpur	v.	Dy. CIT-II Kanpur
		PAN:AAAFN6778L
(Appellant)		(Respondent)

Department by :	Alok Mitra, D.R.		
Assessee by:	Shri. S.S. Gupta, C.A. and Shri. Ashish Jaiswal, Advocate		
Date of hearing:	15	07	2014
Date of pronouncement:	18	09	2014

O R D E R

PER SUNIL KUMAR YADAV:

These appeals are preferred by the Revenue against the respective order of the ld. CIT(A). The assessee has also filed cross objections in support of the orders of the ld. CIT(A).

2. These appeals and cross objections were heard together, therefore, they are being disposed of through this consolidated order. We, however, prefer to adjudicate them one after the other.

I.T.A. No.380/LKW/2012 & C.O. No.75/LKW/2012:

3. Through this appeal, the Revenue has assailed the order of the ld. CIT(A), inter alia, on various grounds which are as under:-

1. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in annulling the assessment under section 147/143(3) of Income Tax Act, 1961, dated 05.12.2007 without appreciating the facts and circumstances of the case brought on record by the Assessing Officer.

2. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in annulling the said assessment on the ground that there had been no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, ignoring the detailed facts mentioned by the assessing officer, in the reasons recorded by him for issue of the notice u/s 148, showing that the assessee had consciously made wrong claim of deduction, etc. and that there had thus been failure on its part to disclose fully and truly all material facts necessary for its assessment.

3. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in holding that the notice under section 148 was issued without any sanction of law without appreciating the fact that the assessee, during the course of assessment proceedings accepted that "as far as the matter of jurisdiction of the Assessing Officer for issuing the above referred notice u/s 148 is concerned, we have no objection to it".

4. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in annulling the assessment under

section 147/143(3) of Income Tax Act, 1961, dated 05.12.2007 without appreciating the fact that the amendment in the Act was made with retrospective effect vide Direct Taxes (Amendment) Act, 2005.

5. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in admitting the additional grounds of the assessee during appellate proceedings, without giving any specific finding as to the admissibility of the same.

6. That the order of the Ld. CIT (A)-II, Kanpur dated 23.03.2012 needs to be quashed and the order passed by the Assessing Officer dated 05.12.2007 restored.

4. Though various grounds are raised through this appeal, but they all relate to the validity of reopening of the assessment.

5. The facts in brief borne out from the record are that the return of income was filed by the assessee on 31.10.2001 declaring total income of Rs.50,53,271/-. The return was processed under section 143(1) of the Income-tax Act, 1961 (hereinafter called in short “the Act") on 21.2.2002. The case was subsequently picked up for scrutiny and regular assessment was made under section 143(3) of the Act vide order dated 19.7.2002 on a total income of Rs.57,49,890/- after allowing deduction under section 80HHC of the Act of Rs.1,44,25,859/-.

6. Subsequent to the completion of assessment, it was noticed by the Assessing Officer that Export Incentive of Rs.1,27,96,982/- was comprised of Duty Drawback of Rs.94,22,838/- and premium on transfer of license of Rs.33,74,144/- and export turnover of the assessee exceeded Rs.10 crores. In view of the amendment made through Taxation Law (Amendment) Act, 2005, the Assessing Officer formed a belief that deduction under section 80HHC of the Act was not allowable to the

assessee on profit on account of license because its export turnover exceeded Rs.10 crores and the conditions laid down in clauses (a) and (b) of third and fourth proviso of sub-section (3) of section 80HHC of the Act were not satisfied. The Assessing Officer, therefore, formed a reason to believe that excess deduction of Rs.22,68,756/- was allowed to the assessee because it had failed to disclose fully and truly all material facts necessary for its assessment. He accordingly issued notice under section 148 of the Act on 26.3.2007 after getting the approval of the ld. Commissioner of Income-tax-1, Kanpur as prescribed under section 151(1) of the Act on 23.3.2007.

7. Thereafter notice under section 142(1) of the Act was issued on 1.11.2007, as the assessee failed to file return of income in response to the notice issued under section 148 of the Act. On 8.11.2007, the assessee filed a letter stating therein that the original return filed on 30.10.2001 may please be treated as return filed in compliance to notice dated 26.3.2007 issued under section 148 of the Act. Accordingly, the assessment was framed reducing the deduction under section 80HHC of the Act.

8. An appeal was preferred before the ld. CIT(A) raising a preliminary objection that the assessment was reopened after a period of four years from the end of the relevant assessment year on the basis of amendment brought in section 80HHC of the Act through Taxation Law (Amendment) Act, 2005 and without recording reasons that the income escaped assessment for the said assessment year by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for that assessment year. A written submission was also filed before the ld. CIT(A) and the ld. CIT(A) took cognizance of the same and finally concluded that the assessment was reopened after a period of four years without bringing anything on record that the income was escaped assessment for such assessment year by the

reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. The ld. CIT(A) has also placed reliance upon various judgments on this issue and was of the view that the assessee could not anticipate assessment in succeeding years while filing the return of income, therefore, on the basis of the statutory amendment, the assessment cannot be reopened after a period of four years from the end of the relevant assessment year. The relevant observations of the ld. CIT(A) are extracted hereunder for the sake of reference:-

> *"Having gone through the assessment records (for A.Y. 01-02), I find that the letter of the assessee (dt. 08.08.2008) through which the assessee raised the objection is very much part of the assessment records. The relevant portions of the impugned letter are extracted as under:*
>
> > *"Sub: A.Y. 2001-02 & 2002-03, notice u/s. 148/1432) - Reg.*
> >
> > *At the outset it is very humbly submitted that notice u/s 148 is illegal in as much as regular assessment u/s 143(3) has already been completed and 1st appeal also been decided……."*
>
> *The Hon'ble Supreme Court in the case of GKN drive Shaft v/s ITO (supra) have held that*
>
> > *". ..... The notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case ..... the Assessing Officer has to dispose of the objections filed by passing a speaking order,, before proceeding with the assessments ....."*
>
> *This ruling of the Hon'ble Apex Court in the law of the land under Article 141 of the Constitution and, thus, if the appellant objects to the reopening of the case, the AO has to adhere to the aforesaid*

procedure of meting out the objection raised by the assessee. On perusal of the case records, I find that the AO has not passed any order disposing of the aforesaid objection of the assessee before taking up the assessment proceedings; instead, the AO has straightway passed the assessment order dated 08.08.2008. The objections with respect to the reopening have not been discussed even in the assessment order. Thus, non-compliance with the ruling of the Hon'ble Supreme Court in this regard would vitiate the entire assessment proceedings, and, therefore, the assessment is liable to be annulled.

The other argument of the appellant in this regard (i.e. challenge to the reopening) is that in view of the proviso to Section 147, the act of issuance of notice beyond 04 years from the end of the relevant assessment year was illegal and void.

For easy reference and better understanding, the impugned proviso to Section 147 is extracted as under:

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 failure 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 the assessment year :

In this regard it would be also worthwhile to see the reasons recorded by the AO before issuing the notice u/s 148. The reasons recorded by the AO are extracted as under:

> *"Return declaring income of Rs.2,76,53,150/- and capital gain of Rs.38,35,174/- was filed on 31.10.2001 which was*

processed u/s 143(1) on 31.03.2003 on the returned income. Later on the assessment was completed u/s 143(3) of I.T. Act, 1961 at total income of Rs.2,94,44,311/- and capital gain of Rs. 38,65,174/-. A perusal of the record shows that during the year under consideration, the assessee company has claimed deduction u/s 80HHC amounting to Rs.5,92,97,792/- but the same was restricted to Rs. 5,83,06,629/-."

It has further been noticed that assessee has shown export incentives of Rs.11,23,19,512/- which includes DEPB of Rs.10,66,61,250/-. These incentives have been considered for the purpose of deduction u/s 80HHC.

Vide taxation laws (Second Amendments) Act 2005, a material change has been brought in the provisions of section 28 read with section 80HHC of the I. T. Act, 1961. As per this amendment, certain conditions are required to be satisfied by the exporter for claiming benefit of DEPB / DFRC in the computation of deduction u/s 80HHC. During the year the assessee company has declared DEPB amounting to Rs.10,66,61,250/-. Therefore, for computation of deduction u/s 80HHC it is necessary to examine the nature of export incentives shown by the assessee company. Therefore, it appears that the assessee has been allowed excess deduction u/s 80HHC for which the proceedings are required to be initiated u/s 147 of the I. T. Act, 1961. Hence the notice u/s 148 is required to be issued for re-computing the correct amount of deduction u/s 80HHC allowable to the assessee in the light of the amended provisions of Section 28 and Section 80HHC brought about by taxation laws (Second Amendment) Act. 2005 which has been made effective w.e.f. 01.04.1998 " (emphasis supplied).

Discussion & Decision:

On computing the period between the end of the relevant assessment year and the date of issuance of the notices under section 148, it is evident that the notice has been issued beyond a

period of four years from the end of the relevant assessment year. The first proviso to section 147 of the Act lays down that where an assessment under sub-section (3) of section 143 or the said section has been made for the relevant assessment year, no shall be taken under the section after expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure 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. Thus, for the purpose of invoking section 147 after the expiry of four year from the end of the relevant assessment year, the income chargeable to tax should have escaped assessment by reason of failure on the part of the assessee either (i) 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 (ii) to disclose fully and truly all material facts necessary for his assessment. In the facts of the present case is an undisputed position that there is no failure on the part of the assessee insofar as the first condition is concerned. Insofar as the second condition, viz. failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is concerned, on a plain reading of the reasons recorded (supra), it is apparent that the same are totally silent as regards any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year.

From the reasons recorded, it is also clear that the AO has issued the impugned notice u/s 148 of the Act with a view to examine the nature of export incentives shown by the assessee company. There is not a whisper in the reasons recorded that the income chargeable to tax had escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that assessment year.

Reference in this regard is made to the decision of the Hon. Bombay High Court in the case of Hindustan Lever Ltd. v. R B Wadkar, Asst. CIT [2004] 268 ITR 332 (Bom) where in the Hon. Court under similar circumstances had observed:

The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. Non substitution or "deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safe-guard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented

by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.

In this fact of the matter, the proviso to section 147 comes to the aid of the appellant and would render the issue of notice u/s 148 after the expiry of 04 years as void and illegal. In coming to such conclusion, I am also fortified by the decision of the Hon'ble Gujarat High Court in the case of Sadbhav Engineering Ltd. v/s DCIT (date of order 20.07.2010, Spl. Civil Application No. 5846 of 2010) and also by the decision of the same High Court in the case of Garden Silk Mills v/s DCIT (222 ITR 27 (Guj)). To the same effect is the decision of the Hon. Jurisdictional High Court in the case of Foramer v/s CIT (247 ITR 436), which has since then been confirmed by the Hon. SC in the same case reported in 264 ITR 566.

When looking at the issue de-hors the reasons recorded, I find that it is true that when there is a statutory amendment with retrospective effect, the statutory amendment has to operate as if law as amended was there on the statute book. However, on the question whether the appellant had actually failed to disclose fully and truly all material facts necessary for assessment, it is obvious that when the appellant filed it return of income in the year 2001 it could not have assumed that such a legislative amendment was going to be made with retrospective effect from the year 1998. In the facts of the present case when the appellant had clearly disclosed all the exports incentives by entering them on the credit side of the P & L account, it could never be said by any stretch of imagination that in the year 2001, when the assessee filed its return claiming deduction u/s 80HHC on the export incentives including that on DEPB, the appellant had failed to disclose all material facts. Under similar circumstances of reopening (in view of the retrospective amendment in the IT Act) beyond four years, the Hon'ble Gujarat High Court in the case of Denish Industries Ltd. v/s CIT (271 ITR 340) struck down

the issue of notice u/s 148 of the Act. The head note of this case reads as under:

> *"REASSESSMENT - NOTICE - CONDITION PRECEDENT - ASSESSEE ALLOWED DEPRECIATION AND INVESTMENT ALLOWANCE ON CAPITALIZED INTEREST FOR POST - INSTALLATION PERIOD FOR ASSESSMENT YEAR 1983-84 - ACTUAL COST - DEFINITION - CHAN6E OF LAW WITH RETROSPECTIVE EFFECT - REOPENING OF ASSESSMENT ON LAST DAY OF TENTH YEAR FROM EXPIRY OF ASSESSMENT YEAR ON BASIS OF RETROSPECTIVE AMENDMENT -NO FAILURE ON PART OF ASSESSEE TO DISCLOSE TRULY AND FULLY ALL MATERIAL FACTS - NOTICE INVALID - INCOME-TAX ACT, 1961 ss. 43(1), Expln. 8,147,148 - CONSTITUTION OF INDIA, ART. 226"*

Further, the Hon'ble Calcutta High Court in its decision in the case of Modern Tribotex India Ltd. v/s DCIT 212 ITR 496, at page 512 have observed:

"An assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation."

The Hon'ble Sujrat High Court, in the case of Doshion Ltd. Vs ITO (Guj.) 2012 has rejected the reopening the case of u/s.147 after 4 years in view of Retrospective amendment to the expl. to section 80IA by F (No.2) Act, 2009, w.e.f. 01/04/2000 (i.e. the assessing being Worker Contractor, not eligible for deduction u/s. 80IA) as there has been no failure on the part of the assessee to disclose truly and fully all material facts.

The Hon'ble Bombay High court has also held the similar view in the case of CIT Vs. M/s. K.Mohan & Co. (Exports) (Bom.), 2012

and rejected the reopening u/s.147 in view of retrospective amendment to section 80HHC by Taxation Laws (Amendments) Act, 2005, w.e.f. 01/04/98 as there has been no failure on the part of the assessee to disclose truly and fully all material facts. The Hon'ble Madras High Court has also upheld the rejection of reopening u/s.147 in view of retrospective amendment brought in section 80HHC. in the case of CIT Vs Baer Shoes (Mad.).

In the case of Rallis India Vs. Aojt (Bom.), the reopening u/s.147 in view of Amendment vide FA 2009 w.e.f. 01/04/2001 as inserted clause (i) to expl. to section 115JB (Provision for Doubtful Debt, which was allowed by A.O in A.Y. 2004-05, was to be added for profit computation U/S.115JB), has been rejected even within 4 years. The reliance has been placed on the Hon'ble Supreme Court's decision reached in the case of Max India, 295 ITR 282 (SC), wherein it is held that the validity of reopening has to be determined on the basis of Law as it stands on the date of issue of notice u/s.148.

In the case of Ganesh Housing Corporation Ltd. Vs DCIT (Guj.), 2012, the Hon'ble Gujrat High Court has reiterated its stand of rejection of reopening u/s.147 in view of retrospective amendment brought by FA (NO.2) Act, 2009, w.e.f. 01/04/2000 by insertion of expl. to section 80IB (10) [i.e. a contractor is not eligible for deduction u/s.80IB(10)]

Finally, the reliance is also placed on the latest case law reported in 66 DTR 233 (Guj), 2012 in the case of Vinayak Construction vs. ITO & ANR wherein assessee's claim for deduction was granted on the basis of statutory provisions prevailing at the relevant time and reopening sought to be made beyond four years, on the basis of the statutory amendment brought into the statute book with retrospective effect, was not sustainable since there was no failure to disclose truly and fully all material facts.

In the light of the above discussions, I am of the considered opinion that in view of non failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, for the assessment year, the conditions precedent for n of the powers under Section 147 was not fulfilled. Thus, the impugned notice u/s 148 was without any sanction of law and, therefore, the assessment made in pursuance to such notice, is liable to be annulled and, accordingly, is annulled."

9. Aggrieved, the Revenue has preferred an appeal before the Tribunal and has placed reliance upon the assessment order. During the course of hearing, the ld. D.R., Shri. Alok Mitra could not establish that the income has escaped assessment by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

10. The ld. counsel for the assessee, on the other hand, has placed a strong reliance upon the order of the ld. CIT(A).

11. Having carefully examined the orders of the lower authorities in the light of the rival submissions, we find that undisputedly assessment was reopened after expiry of four years from the end of the relevant assessment year i.e. assessment year 2001-02. As per proviso to section 147 of the Act, the assessment can only be reopened after the period of four years from the end of the relevant assessment year, if the Assessing Officer makes out a case that the income chargeable to tax has escaped assessment for such assessment year by the reason of failure on the part of the assessee either to make a return under section 139 of the Act or in response to notice under sub-section (1) of section 142 of the Act or 148 of the Act or to disclose fully and truly all material facts necessary for its

assessment for that assessment year. For the sake of reference, we extract the proviso to section 147 of the Act as under:-

> *"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 failure 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."*

12. In the instant case, the assessment was sought to be reopened on the basis of the amendment brought in section 80HHC of the Act by Taxation Law (Amendment) Act, 2005 whereas the assessment was completed under section 143(3) of the Act on 19.7.2002 on the return filed on 31.10.2001. Therefore, at the time of filing the return, assessee cannot anticipate or visualize any future amendment which can be formed to be the basis for reopening assessment on the ground that income has escaped assessment by the reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

13. We have also carefully examined various judgments referred to by the ld. CIT(A) in his order and we are of the considered view that reopening on the basis of the amendment after a period of four years from the end of the assessment year is not possible. Accordingly, we find ourselves in agreement with the order of the ld. CIT(A) and we confirm the same. Accordingly, the Revenue's appeals stands dismissed.

14. The Cross Objection is filed in support of the order of the ld. CIT(A). Since the order of the ld. CIT(A) is confirmed in the foregoing

paras, the cross objection filed by the assessee has become infructuous and accordingly we dismiss the same.

I.T.A. No.381/LKW/2012 & C.O. No.76/LKW/2012:

15. Through this appeal, the Revenue has assailed the order of the ld. CIT(A) on various grounds, which are as under:-

1. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, has erred in law and on facts in annulling the assessment under section 147/143(3) of Income Tax Act, 1961, dated 27.11.2009, without appreciating the facts and circumstances of the case brought on record by the assessing officer.

2. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in holding that Assessing Officer had not passed any order disposing of the objections raised by the assessee to the reopening of its case, ignoring the fact that such objections had been duly considered by the Assessing Officer in his assessment order dated 27.11.2009 and had been found unacceptable for reasons discussed therein.

3. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on fact in holding that since in this case an assessment dated 27.03.2006 had earlier been made under section 144/147, by reason of the first proviso to Section 147 the case could not have been reopened, after the expiry of four years from the end of the relevant assessment year, unless income chargeable to tax had escaped assessment by reason of failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. That in holding thus the Ld. CIT(A) has totally ignored the clarification given by the Assessing Officer in the assessment order, that in this case the earlier proceedings initiated under section 148, resulting in the assessment dated 27.03.2006 under section 144, had been held null and void vide the Ld. ITAT's order dated 07.11.2008 in ITA

No. 640(LUC)/08, and that only the order/intimation under section 143(1) thus survived in this case.

4. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in annulling the assessment under section 147/143(3) of Income Tax Act, 1961, dated 27.11.2009, without appreciating the fact that the amendment in the Act was made with retrospective effect vide Direct Taxes (Amendment) Act, 2005.

5. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in admitting the additional grounds of the assessee during appellate proceedings, without given any specific finding as to the admissibility of the same.

6. That the order of the Ld. CIT (A)-II, Kanpur dated 23.03.2012 needs to be quashed and the order passed by the Assessing Officer dated 27.11.2009 to be restored.

16. Though various grounds are raised, but they all relate to the validity of reopening of assessment on the ground that the assessment was reopened after expiry of four years from the end of the relevant assessment year.

17. The facts in brief borne out from the orders of the lower authorities are that the original return of income was filed on 31.10.2002 declaring total taxable income at Rs.79,83,570/-. The return was processed under section 143(1) of the Act vide order dated 31.3.2003. Subsequently the assessment was reopened and the assessment was completed under section 147/144 of the Act on 27.3.2006 determining the total income at Rs.1,82,68,410/-.

18. Assessee challenged the order of the Assessing Officer before the ld. CIT(A), who vide his order dated 30.6.2008 allowed certain relief to the

assessee. Aggrieved the assessee as well as the Revenue challenged the aforesaid appellate order before the Tribunal and the Tribunal vide its order dated 7.11.2008 in I.T.A. No.640/LKW/2008 disposed of both the appeals concluding therein that the proceedings initiated by the Assessing Officer under section 147 of the Act in the case of the assessee was null and void. After having given effect to the aforesaid order of the Tribunal, the proceedings under section 148 of the Act initiated earlier became null and void. As a result thereof, the order passed under section 147/144 of the Act dated 27.3.2006 also became infructuous. Thus, only the processing of return under section 143(1) of the Act dated 31.3.2003 survives.

19. Subsequently on the basis of amendment in section 80HHC of the Act by the Taxation Law (Amendment) Act, 2005, the Assessing Officer formed a belief that income to the extent of Rs.62,48,950/- has escaped assessment and he accordingly after recording reasons and also having obtained approval from the concerned authority, reopened the assessment and issued notice on 25.2.2009 under section 148 of the Act. In response to the notice under section 148 of the Act, assessee filed a written reply dated 23.3.2009 intimating that the return of income filed earlier under section 139(1) of the Act may be taken as the return filed in response to the notice under section 148 of the Act. Subsequently, a statutory notice under section 143(2) of the Act was also issued calling upon the assessee to make necessary compliance on the given date and time. In the meanwhile, assessee filed an objection against the initiation of reassessment proceedings which has been disposed of vide order dated 31.8.2009. The relevant observation of the Assessing Officer is extracted hereunder:-

> *"4. These provisions stipulate that no notice u/s 148 is to be issued after the expiry of the four year from the end of the relevant*

assessment year unless the commissioner or Chief Commissioner satisfied on the reasons recorded by the A.O. considering it to be a fit case for the issue of notice. While examining the facts of the assessee's case, it is noted that the Hon'ble ITAT in ITA No.640(LUC)08 considered the grounds of appeal preferred by the assessee which included his prayer that the proceedings initiated u/s 148 were bad in law. After considering the facts of the case and also after hearing the parties at length, the Hon'ble ITAT accepted the assessee's argument and concluded that the proceedings initiated u/s 148 were bad in law and accordingly subsequent proceedings were liable to be set aside. For the sake Of clarity, the text of the operative directions recorded in para 11 of the aforesaid order of the Hon'ble ITAT are reproduced hereinunder verbatim:-

"For the reasons stated hereinabove, we hold that the reopening itself is bad in law and for all the subsequent proceedings is liable to be set aside. Assessee's C.O. is allowed. Departmental appeal thus tans and dismissed"

In view of the aforesaid, it is concluded that since the earlier proceedings initiated u/s 147 were held to be null and void, the contention of the assessee that the assessment was earlier completed u/s 147 is devoid of merit and, is not acceptable. As regards further submissions of the assessee that there were no valid reasons while initiating instant proceedings it is brought on record that the jurisdictional Allahabad High Court while deciding the issue of notice u/s 148 in the case of M/s Ema India Ltd. reported in 226 CTR 559 dated 16.09.2009 placed reliance in the case of Praful Chunni Lal Patel decided by the Hon'ble Gujrat High Court and concluded in para 24 (226 CTR 559) as under:-

"24. In this context, in the case of Praful Chunilal Patel (supra), Gujarat High Court has further observed as follows:-

"Explanation 2 to s. 147 of the Act applies to the entire section and it enumerates deemed cases where income has escaped

assessment. Clause (a) thereof covers a case were no return is filed though the income had exceeded the maximum amount which is not chargeable to Income tax. In such cases, in order to put it beyond the pale of doubt or controversy, the provision is made that they will be deemed to be cases of escaped assessment so as to warrant the proceedings even beyond the said period of four years, since in that event, the case would fall in the enabling part of the proviso. Clause (b) deals_with cases where no assessment is made and the AO notices that the income is understated or excessive loss deduction, allowance or relief is claimed in the return. These would be cases where the return is accepted without scrutiny and no formal assessment is made. Clause (c) would cover cases where in the assessment already made, income was underassessed or assessed too low or excessive relief is given or excessive loss or depreciation allowance or other allowance under the Act has been computed. In the aforesaid deemed cases of escapement of income, the AO can initiate the proceedings on finding or discovering such cases and no debate whether they constitute cases of escapement of income, would be permissible.

As noted above, the provisions of section 147 require that the AO should have reason to believe that any income chargeable to tax has escaped assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the AO has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words 'reason to believe' cannot mean that the AO should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and if he likes from any information that he receives'. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment.

The justification for his belief is not to be judged from the standards of proof required for coming to a final decision."

5. In the case of the assessee, it is noted that the income of Rs.62,48,950/- had escaped assessment which was based upon cogent documentary evidences which were duly communicated to the assessee also. The operative portion of the reasons recorded u/s 147 of the Income Tax Act, 1961 are as under:-

The assessee has claimed deduction u/s 80HHC at Rs.1,31,75,723/- which is excessive and incorrect in view of amendment made in section 80HHC by Taxation Law Amendment Act, 2005. Since the export turnover of the assessee exceeded Rs.10 crores, it was not entitled for deduction u/s 80HHC on account of import entitlement premium of Rs.1,09,07,856/-. The assessee has wrongly included above amount while computing deduction u/s 80HHC. Secondly, the export turnover which was not realized by the assessee within the extended period up to 31.03.2007 had also not to be taken into account while computing the deduction u/s 80HHC. After giving effect of these two factors and considering the order of Id. CIT(A), the actual amount of deduction u/s 80HHC allowable to the assesses comes to Rs.72,47,502/- as against deduction of Rs.1,31,75,723/- claimed by the assessee and allowed to it while processing its return u/s 143(1) of the Act. Thus on this issue alone, the income is short assessed by Rs.59,28,221/-. After giving effect of the deduction allowable u/s 80HHC and also various additions as confirmed by the Ld. CIT(A), the total income of the assessee is determined at Rs.1,42,32,520/- as against its returned income of Rs. 79,83,570/-. Thus the amount of income escaped is determined at Rs.62,48,950/-."

6. Therefore, the contention of the assessee that the A.O. was not having valid reason before the initiation of instant proceedings does not hold good and is accordingly rejected. It is further brought on record that the assessee has not contested the proposed

additions on merits and in his detailed written reply the assumption of jurisdiction u/s 147 has been challenged. Though verbal arguments were made on 20.11.2009 reiterating the arguments made in the written reply dated 20.10.2009 filed before the undersigned on 03.11.2009. The copy of the aforesaid written reply running into six pages is enclosed herewith as Annexure-A and forms part of this order. Therefore, it is concluded that the facts highlighted in the reasons recorded u/s 147 of the Income Tax Act, 1961 are absolute in the case of the assessee and accordingly the income of Rs.59,28,221 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961."

20. Having disposed of the objection, the Assessing Officer assessed the income at Rs.1,39,11,790/- under section 147/143 of the Act.

21. Aggrieved, the assessee preferred an appeal before the ld. CIT(A) mainly on the issue that the assessment was reopened after expiry of four years from the end of the assessment year i.e. assessment year 2002-03 on the basis of the amendment made in the Taxation Law (Amendment) Act, 2005. Finding force in the contention of the assessee, the ld. CIT(A) annulled the assessment, having observed that the assessment was reopened on the basis of subsequent amendment brought by the Taxation Law (Amendment) Act, 2005 after expiry of four years from the end of the impugned assessment year i.e. assessment year 2002-03.

22. Now the Revenue is in appeal before the Tribunal and has placed heavy reliance upon the order of the Assessing Officer.

23. The ld. counsel for the assessee, on the other hand, has placed heavy reliance upon the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT [2012] 348 ITR 391, in which the Hon'ble High Court has quashed the amendment only to the extent that the

operation of the said section could be given effect from the date of amendment and not in respect of earlier assessment years of the assessee whose export turnover is above Rs.10 crores. Therefore, once retrospective amendment has been quashed and held to be unconstitutional, the assessment cannot be reopened on the basis of the said amendment.

24. Having given a thoughtful consideration to the rival submissions and from a careful perusal of the orders of the authorities below, we find that the Assessing Officer has rejected contentions of the assessee with regard to the validity of the reopening of assessment on the ground that the assessment was reopened after expiry of four years from the end of the assessment year. In this regard, we find force in the contentions of the Revenue as the assessment order which was sought to be reopened by the Assessing Officer was only an intimation under section 143(1) of the Act and not a regular assessment under section 143(3) of the Act. Therefore, proviso to section 147 of the Act would not apply, but in the light of the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra), through which retrospective amendment was quashed, the assessment cannot be reopened on the basis of the said retrospective amendment. The relevant observations of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra) are also extracted hereunder for the sake of reference:-

> *"Although in taxing statute laxity is permissible and after giving a benefit to the assessee based on some specific conditions, such benefit can definitely be curtailed out, the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the*

revenue withdraws such benefit and imposes a new condition which the citizen at that stage is incapable of complying whereas if such promise was not there, the citizen could have arranged his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. In the instant case, the object of the amendment, as it appears from the statements of the Finance Minister while moving the bill, is to get rid of the alleged wrong decision of the Tribunal interpreting the then provision of the statute in a way beneficial to the assessee, which according to the Finance Minister, was never the intention of the legislature. If such be the position, the revenue has definitely right to challenge the decision of the Tribunal as a wrong one before the higher forum, but on a plea of delay in disposal of appeal if filed, without challenging the decision of the Tribunal before the High Court or the Supreme Court, the revenue cannot curtail such benefits by proposing amendment, incorporating a new provision in the Statute from an anterior date. According to the existing law enacted by the Parliament itself, wrong orders passed by a Tribunal should be challenged by aggrieved party before the appropriate High Court and if such party is aggrieved, by order of the High Court, he should move to the Supreme Court. [Para 20]

Even in a case, where taxing statute is declared invalid for some technical defect, the law is that in order to validate the tax collected under an invalid legislation, the legislature must lawfully revalidate the law.

In the instant case, there is no defect in the original legislation but the Tribunal has interpreted the language of the valid piece of legislation in a way, which benefits the assessee. In such a case, for overcoming the adverse decision of the Tribunal, the legislature cannot delete a valid piece of legislation and incorporate a totally new one with retrospective effect. The effect of this amendment is that it is by passing the existing law enacted by the Parliament of

preferring appeal against the order passed by the Tribunal, which is still the law of the land. [Para 21.1]

No doubt, the legislature has the power to curtail the benefit of a taxing statute conferred upon the assessee by prospective legislation but such curtailment with retrospective effect cannot be made for overcoming the effect of a judicial decision without taking recourse to the provision of appeal prescribed by law on the plea of delay. Moreover, the present amendment has been made at a point of time when the application of section 80HHC has already been exhausted and the same was not even in the statute book. In such situation, it is not permissible to take away the benefit already granted through a concluded scheme by introducing fresh amendment by virtue of which an expired scheme has been revived with benefit conferred upon only a limited section and snatching the same from some other sections. [Para 22]

The instant case is not one where the executive has failed to carry out the object of the Parliament necessitating exercise of control by retrospective amendment what the executive ought to have achieved. In the instant case, according to the Finance Minister presenting the Bill, a valid piece of legislation has been wrongly interpreted by the Tribunal. According to the existing law, if a valid piece of legislation is wrongly interpreted by the Tribunal, the aggrieved party should move higher judicial forum for correct interpretation. The impugned amendment granting benefit restricting it to a class of assessee whose turnover is less than Rs. 10 crore is permissible prospectively but the way it has been enacted, it takes away an enjoyed right of a class of citizens who availed of the benefit by complying with the requirements of the then provisions of law. [Para 25]

On consideration of the entire materials on record, there is substance in the contention of the petitioners that the impugned amendment is violative for its retrospective operation in order to

overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessment have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assessees. [Para 26]

Accordingly, the impugned amendment is quashed only to the extent that the operation of the said section could be given effect to from the date of amendment and not in respect of earlier assessment years of the assessee whose export turnover is above Rs. 10 crore. In other words, the retrospective amendment should not be detrimental to any of the assessee."

25. Since the basis for reopening of the assessment has been quashed by the Hon'ble High Court of Gujarat, the issue of reopening either before or after four years from the end of the relevant assessment year becomes irrelevant. Therefore, in the light of the aforesaid judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra), we hold that reopening, on the basis of the retrospective amendment of section 80HHC of the Act by the Taxation Law (Amendment) Act, 2005, is illegal and we accordingly hold that the assessment framed consequent thereto is also illegal and deserves to be annulled. Accordingly, we confirm the order of the ld. CIT(A) on this issue annulling the assessment for the impugned assessment year. Accordingly Revenue's appeal stands dismissed.

26. Since the cross objection is filed in support of the order of the ld. CIT(A) and the order of the ld. CIT(A) is confirmed, the cross objection of the assessee becomes infructuous.

I.T.A. No.382/LKW/2012 & C.O. No.77/LKW/2012:

27. Through this appeal, the Revenue has assailed the order of the ld. CIT(A) on the following grounds:-

1. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, has erred in law and on facts in annulling the assessment under section 147/143(3) of Income Tax Act, 1961, dated 05.12.2007, without appreciating the facts and circumstances of the case brought on record by the assessing officer.

2. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in annulling the said assessment dated 05.12.2007 by holding that in this case an assessment u/s 143(3) had earlier been made and hence, by reason of the first proviso to section 147 the case could not have been reopened, after the expiry of four years from the end of the relevant assessment year, unless income chargeable to tax had escaped assessment by reason of failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. That, in holding thus, the Ld. Commissioner of Income Tax (Appeals), has grossly overlooked the fact that the notice u/s 147, in respect of A.Yr. 2003-04, had been issued on 04.08.2006; i.e. well before the stipulated period of four years from expiry of the assessment year, and hence the first proviso was not at all applicable in this case.

3. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, has erred in law and on facts in as much as, in his "decision" and "discussion and decision" at pages 12 to 17 of the impugned appellate order, without at all applying his mind to the facts of the present case, he has reproduced verbatim the facts and reasoning given in his appellate order dated 23.03.2012 in the same appellant's case for A.Yr. 2001-02, even though such facts and reasoning have no bearing on the present case.

4. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, has erred in law and on facts in annulling the assessment under section 147/143(3) of the Income Tax Act, 1961, dated 05.12.2007 without appreciating the fact that the reassessment was made in view of the amendment in section 80HHC of the Act, brought about with retrospective effect vide Direct Taxes (Amendment) Act, 2005.

5. That the order of the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, dated 23.03.2012 needs to be quashed and the order passed by the Assessing Officer dated 05.12.2007 to be restored.

28. Though various grounds are raised by the Revenue, but they all relate to the validity of reopening of assessment on the ground of amendment in section 80HHC of the Act with retrospective effect by the Taxation Law (Amendment) Act, 2005.

29. In this case, the return was filed on 27.11.2003 and assessment under section 143(3) of the Act was completed on 17.6.2005 on the basis of amendment in section 80HHC of the Act brought through the Taxation Law (Amendment) Act, 2005, the assessment was reopened and notice under section 148 of the Act was issued on 4.8.2006. In response thereto assessee filed a letter stating therein that the return filed under section 139(1) of the Act be treated to be the return filed in compliance to the said notice. Accordingly assessment was framed and deduction under section 80HHC of the Act was computed in the light of amendment brought in section 80HHC of the Act.

30. Aggrieved, assessee preferred an appeal before the ld. CIT(A) raising various grounds on merit beside raising a ground with regard to the validity of the reopening of assessment that it was reopened after expiry of

four years from the end of the assessment year i.e. assessment year 2003-04. The ld. CIT(A) accordingly has annulled the assessment.

31. Aggrieved, the Revenue has preferred an appeal before the Tribunal and has placed reliance upon the assessment order.

32. The ld. counsel for the assessee, on the other hand, has placed reliance upon the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra) with the submission that the Hon'ble High Court has already quashed the retrospective amendment in section 80HHC of the Act, therefore, on the basis of retrospective amendment, the reopening is not valid and the assessment done consequent to the amendment deserves to be quashed.

33. Having heard the rival submissions and from a careful perusal of the orders of the lower authorities, we find that the assessment was reopened on the basis of the amendment in section 80HHC of the Act brought through the Taxation Law (Amendment) Act, 2005 within a period of four years from the end of the impugned assessment year i.e. assessment year 2003-04 by issuing notice under section 148 of the Act on 4.8.2006. Before the Assessing Officer, the assessee has joined assessment proceedings and the assessment was completed and deduction under section 80HHC of the Act was worked out as per amended provisions. Before the ld. CIT(A), first time the validity of reopening was assailed and the ld. CIT(A) following his decision for assessment years 2001-02 and 2002-03 annulled the assessment. During the course of hearing, our attention was invited to the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra), in which retrospective amendment was quashed and held to be unsustainable by the Hon'ble High Court. Therefore, the assessment cannot be reopened on the basis of retrospective amendment. In the foregoing paragraphs, we have

categorically held that on the basis of retrospective amendment, the assessment cannot be reopened. We, accordingly, following the same again hold in this appeal that reopening of the assessment is not valid as it was done on the basis of retrospective amendment in section 80HHC of the Act, which was already quashed by the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra). Accordingly we find no infirmity in the order of the ld. CIT(A) who has rightly annulled the assessment.

34. Since the appeal of the Revenue is dismissed and the order of the ld. CIT(A) is confirmed, the cross objection which is in support of the order of the ld. CIT(A), has become infructuous and we dismiss the same.

I.T.A. No.383/LKW/2012 & C.O. No.78/LKW/2012:

35. Through this appeal, the Revenue has assailed the order of the ld. CIT(A), inter alia, on various grounds which are as under:-

1. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, has erred in law and on facts in directing to allow deduction on the amount of Rs.16,95,955/- u/s 80HHC of the Income Tax Act without appreciating the facts that the evidence, regarding extension of time by the Competent Authority for receipt of said export sale proceeds, was not produced before the Assessing Officer by the assessee.

2. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has not given any clear finding in his order whether such evidence, of extension of time by the Competent Authority, was produced before him during appellate proceedings and, even if such evidence was so produced, the Ld. CIT(A) has erred in admitting the same in violation of the provision of Rule 46A of the I.T. Rules 1962.

3. That the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in directing to allow deduction on

the amount of Rs.43,38,342/- u/s 80HHC of the Act without appreciating the facts that as per "'the amended provisions of S.28 and S.80HHC consequent to the Taxation Laws (Amendment) Act 2005, the entire amount of Rs.79,49,120/- is not eligible for deduction u/s 80HHC of the I.T. Act.

4. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in restricting the addition of Rs.1,00,000/-, on account of fall in G.P., to Rs.50,000/-, without appreciating the facts brought on record by the Assessing Officer and without giving any cogent reasons for making such restriction.

5. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in restricting the disallowance of Rs.2,23,506/-, on account of Car and telephone expenses, to Rs.1,50,000/-, without appreciating the facts brought on record by the Assessing Officer and without giving any cogent reason for making such restriction.

6. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in deleting the additions/disallowances of Rs.10,08,379/-, on account of manufacturing expenses, miscellaneous expenses, repair of furniture & fixture, building repair expenses and foreign travel expenses, without appreciating the facts brought on record by the Assessing Officer.

7. That the order of the Ld. Commissioner of Income Tax (Appeals)-II, Kanpur, dated 23.03.2012 needs to be quashed and the order passed by the Assessing Officer dated 30.11.2006 to be restored.

36. With regard to ground No.1, it is noticed from the orders of the lower authorities that while raising the claim for deduction under section 80HHC of the Act, the assessee has moved an application for extension of time before the competent authority (Canara Bank) for realization of export

sale invoice till 31.5.2005. In the absence of any evidence with regard to the grant of extension of time, the Assessing Officer did not allow deduction under section 80HHC of the Act on sale proceeds which has not been realized within six months and accordingly reduced the turnover by Rs.19,24,539/-.

37. When an appeal was preferred before the ld. CIT(A), the ld. CIT(A) accepted the contention of the assessee with regard to the request for extension of time and concluded that only Rs.2,28,544/- was left to be realized.

38. Aggrieved, the Revenue has preferred an appeal before the Tribunal with the submission that the assessee has not received sale proceeds of Rs.19,24,539/- within the prescribed time though he has claimed that he sought extension of time through Canara Bank vide letter dated 22.10.2004 upto 31.3.2005, but no extension was ever granted to the assessee. Therefore, the ld. CIT(A) has wrongly observed that time sought by the assessee was extended and accordingly reduced the unrealized amount to only Rs.2,28,544/-.

39. During the course of hearing of the appeal, the ld. counsel for the assessee was asked to produce grant of extension of time, but no evidence has been furnished in this regard by the ld. counsel for the assessee. In the absence of any evidence with regard to the extension of time, the contention of the assessee cannot be accepted that time was extended for realization of the aforesaid amount. In the absence of any documentary evidence with regard to the extension of time, we are unable to accept the findings of the ld. CIT(A) in this regard. We accordingly set aside the findings of the ld. CIT(A) in this regard and restore that of the Assessing Officer that the unrealized amount of Rs.19,24,539/- do not qualify for deduction under section 80HHC of the Act.

40. Ground No.2 relates to the violation of the provisions of rule 46A of the Rule. Since no additional evidence was filed before the ld. CIT(A), there is no violation of provisions of rule 46A of the Rule. Accordingly we reject this ground.

41. So far as ground No.3 is concerned, we are of the view that since this ground relates to the computation of deduction under section 80HHC of the Act in the light of Taxation Law (Amendment) Act, 2005 and retrospective amendment has been quashed by the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra), therefore, this ground requires to be re-examined in the light of the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT (supra) and compute the deduction under section 80HHC of the Act following the principle laid down by the Hon'ble Apex Court in the case of Topman Export vs. CIT [2012] 342 ITR 49 (SC). Accordingly the order of the ld. CIT(A) in this regard is set aside and the matter is restored the file of the Assessing Officer to re-adjudicate the issue afresh in terms indicated above after affording opportunity to the assessee.

42. Ground No.4 relates to the restriction of addition of Rs.1 lakh on account of fall in G.P. to Rs.50,000/-. The addition of Rs.1 lakh was made on ad hoc basis. Later on the ld. CIT(A) reduced it to Rs.50,000/-. We, therefore, find no infirmity in the reduction of addition made on ad hoc basis. Accordingly we confirm the same.

43. Ground No.5 relates to the disallowance of Rs.2,23,506/- on account of Car and Telephone expenses which was reduced to Rs.1.50 lakhs by the ld. CIT(A). Since this disallowance was made on ad hoc basis which was reduced by the ld. CIT(A), therefore, we find no infirmity in the reduction of the disallowance and accordingly we confirm the order of the

ld. CIT(A) in this regard, as the element of personal use cannot be ruled out.

44. Ground No.6 relates to the disallowance of Rs.10,08,379/- on account of miscellaneous expenses, repair of furniture and fixture expenses, building repair expenses and foreign travel expenses.

45. We have carefully examined the disallowances made by the Assessing Officer and adjudication of the same by the ld. CIT(A) and we find that the disallowances were made on ad hoc basis without pointing out any defect in the bills, vouchers, etc. We, therefore, find no merit in the disallowances and for the same reason the ld. CIT(A) has deleted the disallowances. We, therefore, find no infirmity in the order of the ld. CIT(A) and accordingly we confirm the same.

46. Grounds No.7 is general in nature and needs no specific adjudication.

47. The cross objection filed by the assessee is in support of the order of the ld. CIT(A). Since we have confirmed the order of the ld. CIT(A), the cross objection of the assessee has become infructuous except ground No.3 which relates to the deletion of addition of Rs.50,000/- restricted by the ld. CIT(A) and this ground was adjudicated by us in the Revenue's appeal. Accordingly, the cross objection of the assessee is dismissed being infructuous.

I.T.A. No.384/LKW/2012 & C.O. No.79/LKW/2012:

48. This appeal is preferred by the Revenue against the order of the ld. CIT(A), inter alia, on various grounds which are as under:-

1. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in deleting the addition of Rs.8,61,770/-, on account of interest payable, proportionate to

funds diverted from Jujmau Unit to Banthar Unit for making investment in the purchase of land, without appreciating the facts brought on record by the Assessing Officer.

2. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in deleting the said addition of Rs.8,61,770/- without appreciating the fact that the addition was made in view of the proviso to section 36(l)(iii) of the Income Tax Act, 1961.

3. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in deleting the addition of Rs.3,95,440/-, on account of disallowance of expenses which were capital in nature, without appreciating the fact that the capital nature of the same had been admitted by the assessee during the course of assessment proceedings.

4. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in restricting the addition of Rs.2,00,000/-, on account of fall in G.P., to Rs.1,00,000/-, without appreciating the facts brought on record by the Assessing Officer and ignoring the fact that the assessee had agreed to the addition during the assessment proceedings.

5. The Ld. Commissioner of Income Tax (Appeals)-II, Kanpur has erred in law and on facts in restricting the addition of Rs.77,570/-, on account of fooding and lodging expenses, to Rs.38,785/-, without appreciating the facts brought on record by the Assessing Officer and ignoring the fact that assessee had -agreed to the disallowance during the assessment proceeding.

6. That the order of the ld. CIT(A)-II, Kanpur dated 23.3.2012 needs to be quashed and the order passed by the Assessing Officer dated 18.12.2008 to be restored.

49. Apropos grounds No.1 and 2, it is noticed that the Assessing Officer has made disallowance of interest on the ground that the assessee-firm has diverted its funds to the tune of Rs.1,43,52,850/- on account of purchase of land for Bhanthar unit of the factory and construction thereof. The factory at Bhanthar had not been commenced its production till the end of the previous year, therefore, the interest payable proportionate to the funds diverted from making investment in the Bhanthar unit was capitalized in view of the provisions of section 36(1)(iii) of the Act. The Assessing Officer accordingly disallowed the corresponding interest at Rs.8,81,170/-.

50. An appeal was preferred before the ld. CIT(A), who noted from the audited balance sheet as on 31.3.2006 that the assessee was having sufficient fund of Rs.14.25 crores. Therefore, the amount of investment of Rs.1,43,52,850/- is approximately 10% as compared to interest free funds. The ld. CIT(A) accordingly held that the Assessing Officer had a look at only one part of the financial statement, whereas he has completely ignored the portion of financial statement containing the interest free funds. He accordingly deleted the addition. The relevant observations of the ld. CIT(A) are extracted hereunder for the sake of reference:-

> *"7. As regards Ground No. 2 regarding disallowance of interest on unsecured loans Rs. 861770/-. I am inclined to accept the submission of A.R supported by evidence that the A.O has not appreciated that there also interest free fund in the possession of appellant in the form of current liabilities and sundry creditors. These funds is more than 14.25 crores. This fact is verifiable from the audited balance sheet as on 31-03-2006. This amount of investment of Rs.1,43,52,850/- which is (approximately 10%) as compared to these interest free funds, is beyond any doubt met out of these interest free funds. The Id. AO had a look at only one part of the financial*

statement, whereas he has completely ignored the portion of financial statement containing the interest free funds therefore, I am of the view that the allegations made by the AO that the interest bearing funds towards purchase of factory at Bhanthar Unit are incorrect. Reliance is also placed on the decision reached in the case of CIT Vs Reliance Utilizers & Power Ltd., 221 CTR 435 (Bom.), 2009, and S.A.Builders, 288 ITR 1 (SC), 2007. Hence ground No. 2 is allowed."

51. Aggrieved, the Revenue has preferred an appeal before the Tribunal and has placed reliance upon the order of the Assessing Officer. Whereas the ld. counsel for the assessee has submitted that at the relevant point of time assessee had surplus interest free funds, therefore, it cannot be held that the borrowed funds were diverted for investment in the purchase of land and construction of factory building.

52. Having carefully examined the orders of the lower authorities, we find that at the relevant point of time, assessee was having surplus interest free funds, therefore, no borrowed funds were diverted for purchase of land and construction of factory building thereon in order to capitalize interest. Accordingly we subscribe the order of the ld. CIT(A) on this issue and reject the ground of the Revenue.

53. Apropos ground No.3, it is noticed that the Assessing Officer has made disallowance of expenditure of expenditure incurred on purchase of Knives and Blades, having held it to be capital expenditure.

54. In appeal, the ld. CIT(A) deleted the addition after treating it to be revenue expenditure, having observed that the assessee-firm is running a tannery and it has to replace the old and worn out blades/knives. Thus, these are in the nature of consumable stores and to be replaced frequently.

55. Aggrieved, the Revenue has preferred an appeal before the Tribunal and simply placed reliance upon the order of the Assessing Officer, whereas the ld. counsel for the assessee has contended that the purchase of blades and knives are Revenue expenditure.

56. Having gone through the orders of the lower authorities in the light of rival submissions, we find that undisputedly the assessee firm is running a tannery and it has to replace the old and worn out blades/knives. Therefore, the expenditure incurred in replacing the same cannot be called to be capital expenditure. Accordingly we subscribe the view of the ld. CIT(A) on this issue and reject the ground taken by the Revenue.

57. Ground No.4 relates to restriction of addition of Rs.2 lakhs on account of fall in G.P. to Rs.1 lakh. This addition was made by the Assessing Officer on ad hoc basis.

58. The restriction of deletion was challenged by the Revenue in its appeal and the assessee has challenged the confirmation of addition of Rs.1 lakh.

59. Having carefully examined the orders of the authorities below, we find that this addition was made on ad hoc basis without pointing out any defect or rejecting the books of account. We, therefore, find no merit in this addition. Accordingly we delete the same.

60. Ground No.5 relates to restriction of disallowance from Rs.77,570/- to Rs.38,785/- by the ld. CIT(A) on the ground that these expenses are not supported by vouchers and the Assessing Officer had made ad hoc disallowance of 10% out of fooding and lodging expenses which was restricted to 5% by the ld. CIT(A).

61. Since the addition was made purely on ad hoc basis, we find no infirmity in the reduction of the same. Accordingly, we confirm the order of the ld. CIT(A) on this issue.

62. In the cross objection, except ground No.3 relating to restriction of disallowance on account of fall in G.P. from Rs.2 lakhs to Rs.1 lakh, which was also adjudicated by us in the Revenue's appeal whereby we deleted the entire addition, all the grounds are in support of the order of the ld. CIT(A). Since the order of the ld. CIT(A) is confirmed in other grounds, the remaining grounds are in support of the order of the ld. CIT(A), they have become infructuous and accordingly we reject the same. Accordingly, the cross objection of the assessee is partly allowed.

63. In the result, appeals of the Revenue in I.T.A. Nos.380,381,382 & 384/LKW/2012 are dismissed and appeal in I.T.A. No.383/LKW/2012 is partly allowed for statistical purposes, whereas the cross objections of the assessee in C.O. Nos.75 to 78/LKW/2012 are dismissed and C.O. Nos.79/LKW/2012 is partly allowed.

Order was pronounced in the open court on the date mentioned on the caption page.

Sd/-	Sd/-
[A. K. GARODIA]	[SUNIL KUMAR YADAV]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

DATED: 18th September, 2014

JJ:0409

Copy forwarded to:

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

Assistant Registrar