आयकर अपीलीय अधिकरण, 'एल' खंडपीठ मुंबई
INCOME TAX APPELLATE TRIBUNAL,MUMBAI "L" BENCH
सर्वश्री राजेन्द्र, लेखा सदस्य एवं राम लाल नेगी, न्यायिक सदस्य
Before S/Sh. Rajendra,Accountant Member & Ram Lal Negi,Judicial Member

आयकर अपील सं/.ITA No.1486, 2631,3643 & 3644/Mum/2006,निर्धारण वर्ष/ Assessment Year-1997-98 to 2000-2001

ACIT-Range-8(1) Room No.210, Aayakar Bhavan M.K. Road,Mumbai-400 020.	Vs.	M/s. Afcons Infrastructure Ltd. Afcons House, 16, Shah Indl. Estate, Veera Desai Road, Azad Nagar, P.O., P.B. No.11978 Andheri (W),Mumbai-400 053. **PAN:AAACA 9067 G**

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

आयकर अपील सं/.ITA No.1371, 2324 ,3251 & 3252/Mum/2006,निर्धारण वर्ष/Assessment Year-1997-98 to 2000-2001

M/s. Afcons Infrastructure Ltd. Mumbai-400 053. **PAN:AAACA 9067 G**	Vs.	ACIT-Range-8(1) Mumbai-400 020.

(अपीलार्थी /Appellant) (प्रत्यर्थी / Respondent)

निर्धारिती ओर से/Assessee by : Shri Nitiesh Joshi
राजस्व की ओर से/ **Revenue by : Shri Jasbir Chauhan**
सुनवाई की तारीख/ Date of Hearing : 08.02.2016
घोषणा की तारीख / Date of Pronouncement **: 12.02.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश
Order u/s.254(1)of the Income-tax Act,1961(Act)

खंडपीठ के अनुसार PER Bench-

Challenging the orders of the Cs.IT(A)-Mumbai,the Assessing Officers(AO.s)and the Assessee have filed cross appeals for the above mentioned four Assessment Years (AY.s.).As the issues involved in the appeals are common,so,we are adjudicating all the appeals by a common order.

ITA Nos.1486 & 2631/Mum/2006 (A.Ys.1997-98 , 98-99) (Departments Appeal):
ITA Nos.1371 & 2324/Mum/2006 (A.Ys.1997-98 to 98-99) (Assessees Appeal) :

2.Assessee-company is engaged in the business of civil construction and undertakes construction of roads,bridges, pile foundations and marine works.The details of dates of filing of returns of income,date of assessment orders,dates of issue of 148 notices,assessed incomes as per section 143(3)r.w.s.147 can be tabulated as under:

Assessment Year	Dt. of filing of original return	Dt. of issue of notice u/s. 148	Assessed income u/s.143 (3) r.w.s.147(Rs.)
1997-98	28.11.1997	25.03.2004	16,99,27,000/-
1998-99	30.11.1998	25.03.2004	15,14,47 ,000/-
1999-2000	30.12.1999	10.03.2004	19,99,00,000/-
2000-01	30.11.2000	10.03.2004	20,52,36,000/-

First we would take the appeals filed by the AO.s.for the AY.s.1997-98 and 1998-99.The AO had issued notices u/s. 148 of the Act.He observed that the assessee had claimed deduction of lease rent of assets which were basically in the nature of financing transaction,that it had

claimed deduction of 1131.31 lakhs,that the lease transactions were not genuine, that the assessee was entitled to claim the interest paid on financial transaction,that it had claimed the repayment of principal amount along with the interest as the deductible expenses in respect of lease rent paid,that the assessee had claimed excess deduction on account of payment of principal amount.He issued a notice u/s.148 of the Act.The assessee objected the re-opening.After considering the available material,the AO held that only the interest component embedded into lease rentals was allowable expenditure,that interest component worked out to Rs.443.02 lakhs,that principal component out of lease rental paid,aggregating to Rs.688.29lakhs was not allowable.

3.Aggrieved by the orders of the AO.s.,the assessee preferred appeals before the First Appellate Authority (FAA).Before him it was argued that the proviso to explanation 2 to Section 147 was applicable to the facts of the cases,that the orders passed by the AO.s.were not as per the provisions of the Act.After considering the submissions of the assessee and the assessment orders,he held that the orders passed by the AO.s.were contrary to the provisions of the Act.Allowing the appeals filed by the assessee,he held that the AO.s.had wrongly issued notice u/s.148 of the Act for both the AY.s.

4.Before us,Departmental Representative(DR)stated that the matters could be decided on mertis.The Authorised Representative(AR)contended that the notice u/s.148 was issued after four years,that the AO had not mentioned as to how the failure of the assessee was responsible for escapement of income,that the assessee had disclosed all the necessary facts in the return of income.He relied upon the case of Hindustan Lever(268ITR362)and referred to the page 31,39,96 and 104-6 of the paper book.

5.We have heard the rival submissions and perused the material before us.We would like to reproduce the reasons recorded by the AO for re-opening the assessment and same read as under:

> *"On perusal of the records it is noticed that the lease rentals amounting to Rs.1 1.31 crores was allowed to the assessee for A. Y. I 997-98. From the lease agreement it is observed that the enjoyment of the property taken on lease, the lessee apart from paying the rent had to ensure its maintenance on proper condition. In the event of loss or destruction also, it was to continue to pay the lease rent if asset survived for lease period the lessee had the option to acquire the asset at a nominal price. On the other hand the lessor comes in the picture even at the time of purchase., only to make the payment that too only when authorised by the lessee to do so. Hence for all the intents and purposes, the lessee is the owner of the asset and the lessor the financier making payment at the time of purchase. The arrangements only ensured that the lesser in all circumstances gets buck the money advanced and nothing more. Such an arrangement cannot be treated as a genuine lease agreement but a financing transaction. In such situation only the interest paid on loan taken is an allowable deduction and not the repayment of the principal amount".”*

A cursory glance at the reasons reveal that though the assessment was reopened after a period of four years,the AO.s.had not mentioned as to how failure of the assessee had resulted in the escapement of income.We are of the opinion that if the AO wants to invoke the provisions of section147 after a period of four years,he has to compulsorily elaborate that there was failure on part of the assessee to disclose truly and fully the relevant facts to decide the taxability of that particular year.The courts are of the view that not only the fact of failure of the assessee has to be mentioned it has to be explained as to how assessee had failed and his failure ended in under assessment/escapement of income.Here,we would like to reproduce a portion of judgment of Hindustan Lever Ltd. (supra)and same reads as under:

"*Where an assessment under sub-section (3) of section 143 of the Income-tax Act, 1961, has been made for an assessment year, no action can be taken under section 147 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 disclose all material facts necessary for his assessment for that assessment year. The reasons recorded for issuing notice 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 not disclosed by the assessee fully and truly was necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard 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.*

Similarly,in the case of German Remedies Ltd.(287 ITR 494),the Hon'ble Bombay High Court has held as follow:

"*That failure on the part of the assessee to disclose full and true material had not been alleged. In the circumstances, the notice having been issued beyond four years from the last date of the relevant assessment year without alleging any failure to disclose full and true material facts was liable to be set aside. While granting approval to the notice it was obligatory on the part of the Commissioner to verify whether there was any failure on the part of the assessee to disclose full and true relevant facts in the return of income filed for the assessment of income of that assessment year. It was also obligatory on the part of the Commissioner to consider whether or not power to reopen was being invoked within a period of four years from the end of the assessment year to which the proceedings related. None of these aspects had been considered by him. The notices and consequently the order justifying reasons recorded were unsustainable.*

It is said that the proviso to the section 147 was incorporated to prevent misuse of re-opening the assessments by the AO.s after period of four years.Tax laws envisage that completed assessment should not be disturbed without solid reasons.We hold that the Proviso casts onus on the AO to prove failure of the assessee and that if the AO fails to do so,then assessment passed by him in pursuance of re-opening notice,looses legal validity and sanctity.At this juncture, we would like to consider the matter of Tecumseh Products India Pvt. Ltd. (361 ITR 429)of the Hon'ble AP High Court which deals with issue of the re-opening of assessment after expiry of period of four years.The Hon'ble Court has held as under:

"Before any notice is issued after the expiry of four years, the officer concerned must be satisfied that there had been an escapement in assessment of income, which is chargeable to tax and that this is because of the failure on the part of the assessee to make a return under section 139 of the Income-tax Act, 1961, or in response to a notice issued under sub-section (1) of section 142 or section 148 for not disclosing the material facts.These conditions must be reflected in the notice itself. In the absence of the conditions, exercise of jurisdiction in issuance of the notice under the provision is patently illegal."

Similarly,in the case of General Motors India Pvt.Ltd.(360ITR527)the Hon'ble Gujarat High Court had also dealt with the identical issue.In that matter the assessee had challenged the validity of the notice issue u/s.148 after the expiry of four years.Deciding the writ petition in favour of the assessee,the Hon'ble Court held as follow:

"...there was not even a whisper to the effect that income had escaped assessment on account of any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment…….in the absence of any satisfaction having been recorded by the Assessing Officer that the income had escaped by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration, assumption of jurisdiction under section 147 was not valid and, therefore,notice under section 148 could not be sustained."

From the above discussion,it is clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the AO having reason to believe that any income chargeable to tax had escaped assessment, it must also be established as a fact that such escapement of assessment had been occasioned by either the assessee failing to make a return under section 139 either, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.
Undisputed facts of the present cases are that the assessee original assessment was completed u/s.143(3) of the Act,that the AO had not mentioned,in the reasons recorded for reopening of the assessments,that because of the failure of the assessee to disclose the material facts truly and fully income had escaped assessment.As the basic and first pre-requisite for issuing the notice is not fulfilled,so,the assessment orders passed in pursuance of such notices have to held to be invalid.Considering the facts and circumstances of both the cases,we are of the opinion that the orders of the FAA does not suffer from any legal or factual infirmity. So, upholding his orders for both the years i.e.1997-98 and 1998-99,we decide the effective ground of appeal against the AO.

6.We have held that the reassessments for the above mentioned AY.s.are invalid.So,the appeals filed by the assessee for the AY.s.1997-98 and 1998-99 are not being adjudicated treating the same of academic nature.

ITA/3251 & 3252/Mum/2006-AY.s.1999-00,2000-01 Assessee's Appeal:
ITA/3643 &3644/Mum/2006-AY.s 1999-00,2000-01 Department's Appeal:

7.While deciding the appeals for the AY.s.1999-00and 2000-01,the FAA upheld the re-opening of the assessments for those years.He held that the AO had initiated the re-assessment proceedings within a period of four4 yrs from the end of the relevant AY, that the proviso to section 147 of the Act was not applicable, that the AO had validly issued notices u/s. 148 of the Act. He further held that assessee was entitled for deduction of the whole lease rent , that it was entitled for relief for both the AY.s under consideration.

6.Before us,the AR argued that while re-opening the assessments the AO had mentioned the same reasons that were recorded for the earlier years,that it was a case of change of opinion,that while issuing the notice for the AY.1999-2000 the AO had mentioned the lease rental figure of 1997-98,that the assessee had disclosed all the relevant material,that it had given break up of lease rent,that there was no escapement of income,that interest component and depreciation would be more than the principal component of the lease transaction.He relied upon the case of Prima Paper and Engineering Industry(364 ITR 222).For the AY. 2001-02, he advanced the similar arguments.He further stated that total lease rent(Rs.12.71 Crores)was less than Depreciation (Rs.12.89 Crores)and Interest(Rs.3.55 Crores) amount,that there was no escapement of income for that year also.

7.We have heard the rival submissions and perused the material before us.We find that while filing the returns for both the AY.s.the assessee had furnished all the details of the lease rentals in the computations of income(pg.33 PB for AY.1999-00 and pg.103 of the PB for AY.2000-01.)Besides,accounting policy with regard to the rental income and breakup of rent was also made available to the AO.s.(Pg.41,111&129 of the PB.for AY.1999-2000).Similar details were there for the AY.2000-01.Thus,during the original assessment proceedings,the assessee had supplied all the necessary details for both the AY.s.In other words, ,no new material had come in possession of the AO to disturb the completed assessment.He had changed his opinion about the treatment to be given rental income.In our opinion,in absence

of some cogent material AO cannot initiate proceedings u/s.147 of the Act.We also find that if the order of the FAA was to be implemented there would not be any escapement of income for any of the years.In both the years the depreciation and interest would be more than the rental income,if the transaction with regard to leased assets was to be treated financial transaction.With regard to the argument that the AO had not formed any opinion,as he had not discussed anything in the assessment order,we would like to mention that in the matter of Prima Paper and Engineering Industry(supra)the Hon'ble Jurisdictional High Court has held as under:

> *It is well settled that the power to reopen an assessment is not a power of review and mere change of opinion would not justify reopening of an assessment. This would apply even when assessment sought to be reopened is within four years from the end of the assessment year. Revenue does not dispute the fact that the issue with regard to which the reopening is sought to be done was the subject matter of discussion and deliberation before the Assessing officer during the original proceedings leading to the order dated 29th April, 2003. In these circumstances, it is an undisputed position that the Assessing Officer did have occasion to apply his mind to the deduction claimed by the respondent-Assessee before allowing the same. The objection of the revenue that there was no opinion formed during the original assessment proceeding as the order dated 29th April, 2003 did not deal with the same is unsustainable. The mere fact that the assessment order does not discuss the issue of deduction under Section 80IA (4) of the Act would not lead to the conclusion that the Assessing officer had made no opinion with regard to the issue. The Tribunal has reached a finding of fact that question with regard to claim for deduction under Section 80IA of the Act was raised by the Assessing Officer and responded too by the respondent-Assessee. This position is also not disputed by the revenue.Merely because the issue is not discussed in the assessment order would not lead to a conclusion that no opinion was formed as to subject of the query."*

Considering the above,we are of the opinion that the re-opening was not based on valid reasons and there was no escapement of income for both the years.After deliberating upon the peculiar facts and circumstances of the cases,we are reversing the orders of the FAA.Effective ground of appeal,for both the AY.s.are decided in favour of the assessee.As the re-opening has been treated invalid for these years also,so,we are not adjudicating the appeals of the AO.s.,as,same turn out to be academic in nature.

As a result,appeals filed by the AO for the AY.1997-98 and 1998-99 are dismissed and appeals of the assessee for the AY.s.1999-00 and 2000-01 are allowed.

फलतःनिर्धारिती अधिकारी द्वारा नि.व.1997-98 तथा 1998-99 के लिए दाखिल की गईं अपीलें नामंजूर की जाती हैं और निर्धारिती की नि.व.1999-00 तथा 2000-01 की अपीलें मंजूर की जाती हैं.

Order pronounced in the open court on 12th February, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 12 फरवरी, 2016 को की गई।

Sd/-	**Sd/-**
(राम लाल नेगी /Ram Lal Negi)	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य / **JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई/Mumbai,दिनांक/Date: 12.02. 2016

व.नि.स.*Jv.Sr.PS.*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR A Bench, ITAT, Mumbai /विभागीय प्रतिनिधि**, ए** खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**