IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA Nos. 139 & 140/Coch/2020
(Assessment Years:2009-10 & 2011-12)

Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building I.S. Press Road, Kochi – 682018	vs.	Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]
(Appellant)		(Respondent)

CO Nos. 02 & 03/Coch/2020
(Assessment Years: 2009-10 & 2011-12)

Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]	vs.	Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building, I.S. Press Road, Kochi – 682018
(Appellant)		(Respondent)

Assessee by:	Shri Joseph Markose, Advocate
Revenue by:	Sh. Sanjit K. Das, CIT-DR and Smt. J.M. Jamuna Devi, Sr. DR

Date of Hearing:	24.11.2023
Date of Pronouncement:	30.11.2023

O R D E R

Per Sanjay Arora, AM

This is a set of two Appeals by the Revenue agitating the acceptance of the assessee's appeals contesting it's assessments under section 147 read with sections

143(3) and 144C of the Income Tax Act, 1961 ("the Act") by the Commissioner of Income Tax (Appeals)-1, Kochi [CIT(A)] vide a common order dated 10.12.2019, with corresponding Cross Objections (COs.) by the assessee.

2. The sole issue arising in the instant appeals, projecting though several grounds, is the maintainability of the reassessment proceedings, found as not maintainable by the ld.CIT(A) as there was a true and full disclosure of all material facts necessary for assessment by the assessee, precluding reassessment beyond four years from the end of the relevant assessment year/s, in view whereof the other grounds do not arise for consideration, and which in fact explains the assessee's COs, seeking, in case of an adverse decision, upholding the assessment/s on the jurisdictional aspect, direction to the first appellate authority for a decision on merits on the quantum assessment/s.

3. We begin by reproducing the operative part of the impugned order which, applicable for both the years under reference, reads as under:

"I have gone through the above mentioned decisions. The main contention is whether non-submission of Form 3CL by the assessee would amount to non-disclosure of all material facts, fully and truly, during the course of assessment proceedings. *There is no dispute that Form No. 3CM containing details of all expenses incurred for R&D was submitted by the appellant before the AO*. The scheme of Rule 6(7A), regarding Form 3CL is that, the appellant has to submit the Form to the Competent Authority at DSIR, and DSIR shall send the report in Form No. 3CL referred to in clause (b) to Principal Chief Commissioner of Income Tax or Chief Commissioner of Income Tax or Principal Director General of Income Tax or Director General of Income Tax having jurisdiction over such company. Thus Form 3CL is to be sent by DSIR to DIT(E). It is an internal mechanism between two Government Departments, in which, the assessee has no role and it also has no control. Its role is limited to riling the necessary application with DSIR.

In the instant case, *the case has been reopened beyond 4 years from the end of the relevant assessment year* solely on the reason that the assessee did not submit Form 3CL during assessment proceedings and, therefore, it has not disclosed all material facts, fully and truly, before the AO, which was necessary for scrutiny assessment. In view of the above discussion, in my opinion, it was not the duty or responsibility of the appellant to have filed Form No. 3CL before the AO during assessment proceedings. Since DSIR has already forwarded Form No. 3CL on 30.11.2011, which is much before the date of reopening of assessment u/s. 147, it was the duty of the AO to obtain the same from the competent authority, if it really needed for the purpose of scrutiny assessment. In view of facts of this

case, in my opinion, the AO is not justified in reopening the case u/s. 147 after the expiry of 4 years from the end of the relevant assessment year. *In my opinion, since the appellant had filed Form No. 3CM, all the facts relating to R&D were already before the AO during original scrutiny assessment and the same was examined and considered by the AO.* Therefore, I hold that the reopening u/s. 147 was bad-in-law and reassessment so concluded not valid." (emphasis, ours)

4. We may at the outset clarify two aspects. Firstly, the assessee's COs, filed on 25/6/2020, though out of time by 3 days, were admitted as the delay is saved by the order of the Hon'ble Apex Court in Suo Motu Writ Petition 3/2020 dated 10.01.2022, so that the period from 15.3.2020 to 28.2.2022 is to be excluded in reckoning limitation. Secondly, assessments for both the years stand reopened by the issue of notice u/s.148(1) of the Act dated 14/3/2016. The same is thus beyond 4 years *only* for AY 2009-10, on which basis, finding the disclosure by the assessee as true and full, the ld. CIT(A) has found the reassessment proceedings as bad in law. That is, the same being within 4 years (from the end of the relevant assessment year) for AY 2011-12, his decision is clearly invalid for that year, even as fairly conceded by Shri Markose, the ld. counsel for the assessee, during hearing. The Revenue accordingly succeeds for this year and, consequently, vacating his adjudication for AY 2011-12, we restore the appeal for that year to the file of the ld. CIT(A) for deciding it on quantum on merits in accordance with law after hearing both the parties before him.

5.1 This leaves us with assessment for AY 2009-10. We shall proceed by delineating the law in the matter, reproducing s.147in its relevant part to start with:

Income escaping assessment

147. Income escaping assessment-If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year);

Provided that *where an assessment under sub-section (3) of section 143* or this section has been made for the relevant assessment year, no action shall be taken under this section *after the expiry of four years from the end of the relevant assessment year*, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the 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:

Provided further, ...

Provided also,.....

Explanation 1.- Production before the Assessing Officer of account books or other evidence from which *material evidence* could with *due diligence* have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso. (emphasis, supplied)

The Law

5.2 Power under section 147 of the Act, though very wide, is yet not plenary. Assumption of jurisdiction u/s.147 must therefore be on the basis of materials before the Assessing Officer (AO) which justify inference of escapement of income from assessment, implying a live link or a rational nexus between the two, i.e., the existence of materials and escapement of income from assessment [*ITO vs. Lakhmani Mewal Das* [1976] 103 ITR 437 (SC), *Sheo Nath Singh vs. AAC*[1971]82 ITR 147 (SC)]. The principle behind stipulating such a condition is that there must be, as far as possible, only one assessment for any particular year and, two, the proceedings must receive finality. It may nevertheless be a case where an income was not reported or went unnoticed by the assessing authority, warranting remedial procedure inasmuch as law should apply equally across all tax payers, so that subject to reasonable checks, the power of reassessment becomes a practical necessity. The condition of 'reason to believe' also guards against the exercise degenerating into an investigation exercise or a change of opinion or at the mere whim or fancy of the AO. The law becomes even more stringent where the reassessment proceedings are initiated after a prescribed threshold period, i.e., 4 years (from the end of the relevant assessment

year),*qua* returns which have been subject to regular assessment, i.e., under section 143(3) or 144 of the Act, as in the instant case, with the assumption of jurisdiction u/s.147 being hinged by a further condition of the income escaping assessment being so due to failure, *inter alia*, on the part of the assessee to disclose – fully and truly – all material facts necessary for assessment of his income for the relevant year. Per contra, a true and full disclosure of all material facts necessary for assessment by the assessee who has furnished return of income only would save initiation of reassessment proceedings beyond 4 years where the AO has reason to believe income having escaped assessment. The same, again, a part of well-settled law, is clarified to be in respect of only primary facts [*Calcutta Discount Co. Ltd. vs. ITO* [1961] 41 ITR 191 (SC); *Phool Chand Bajrang Lal vs. ITO* [1993] 203 ITR 456 (SC)]. This is as it is not the assessee's duty, and it can be nobody's case that the assessee is to guide the AO about the possible enquiry or verification that may be carried out or the inference that may be drawn from the primary facts. Again, at the same time, the disclosure has to be true and full, i.e., conveying a clear and honest intent. This is also the purport of *Explanation 1* to section 147 of the Act, which makes it clear that the plea of want of due diligence by the AO is not open to the assessee, who is to therefore lead upfront all material facts necessary for his assessment. The matter before us, in view of the clear law laid down by the Hon'ble Apex Court, which is to be therefore applied, is primarily factual. That is, whether the assessee in the instant case, in possession of Form 3CL dated 30.11.2011, reporting the qualifying expenditure for deduction u/s. 35(2AB) of the Act at Rs. 1875.02 lakhs, eligible for deduction at Rs. 2812.53 lacs, was obliged by law to bring it to the notice of the AO assessing it's income in the original assessment proceedings, culminating in an assessment vide order u/s. 143(3) dated 31/12/2013 allowing deduction u/s. 35(2AB) at Rs. 4111.09 lacs, i.e., as claimed by the assessee per it's returns, original and revised, based on the information available with it at the time of their filing on 29/9/2009 and 26/3/2011 respectively.

The respective cases

5.3 The Revenue contends non-submission of Form 3CL by the assessee to the AO in the original assessment proceedings as in violation of the obligation thereon to have disclosed, fully and truly, all material facts necessary for it's assessment. It is only this Form which quantifies the eligible research expenditure for deduction u/s.35(2AB) of the Act, both on revenue and capital account; Form 3CM being only an approval of the in-house R&D facility for the purpose of section 35(2AB) of the Act and, thus, *sans* any details *qua* the expenditure and, thus, of little consequence in-so-far as the quantum of deduction u/s.35(2AB) is concerned. Reliance is placed on the order by the Tribunal in the assessee's own case for AY 2012-13 (ITA No. 35/Coch/2017, dated 24/7/2017), wherein the claim for deduction u/s. 35(2AB), claimed, similarly, without reference to Form 3CL, was opined for being considered.

The assessee's case, on the other hand, and which found favour with the ld. CIT(A), is that an obligation to furnish Form 3CL by the assessee is not traceable to any requirement of law. Neither section 35(2AB) nor the relevant rule (r. 6), which together lay down the framework and the procedure prescribed in this regard requires so. The same is to be sent directly by the competent authority to *inter alia*, the DGIT, which authority is to communicate the same to the concerned AO. Sure, a copy thereof is marked to the assessee as well, but then how is the assessee to know that the same is not available with the AO for it to furnish copy thereto? This also explains the absence of any requirement in law for submission of Form 3CL by the assessee to, or otherwise inform the AO about it, which, being dated 30.11.2011, was not available with the assessee on the date of filing of the return for the year. Form 3CM, conveying the approval, being available, along with the CA certificate (i.e., toward the relevant expenditure figures), duly obtained, were duly furnished along with the return of income. There has thus been true and full disclosure of all material facts by the assessee, i.e., as mandated by law, which cannot possibly cast an impossible

burden. Reliance was placed on the order by the Tribunal in *Century Seeds Pvt. Ltd. vs. Dy. CIT* (in ITA No. 942/Hyd/2017 dated 20.07.2018, APB pgs. 11 to 15)

Discussion

6.1 We may at this stage reproduce the deduction provision along with the relevant rules in its relevant part as under: -

Expenditure on scientific research.

35. (1) In respect of expenditure on scientific research, the following deductions shall be allowed—

xxxxx

(2AB)(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any drugs, pharmaceuticals, electronic items, computers, telecommunication equipments, chemicals or any other article or thing, notified by the Board incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority, then, there shall be allowed a deduction of a sum equal to one and one-half times of the expenditure so incurred:

Explanation.—For the purposes of this clause, "expenditure on scientific research", in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970 (39 of 1970).

(*2*) No deduction shall be allowed in respect of the expenditure mentioned in clause (*1*) under any other provision of this Act.

(*3*) No company shall be entitled for deduction under clause (*1*) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of accounts maintained for that facility.

(*4*) The prescribed authority shall submit its report in relation to the approval of the said facility to the Director General in such form and within such time as may be prescribed.

(5) ----------

(*6*) No deduction shall be allowed to a company approved under sub-clause (*C*) of clause (*iia*) of sub-section (1) in respect of the expenditure referred to in clause (*1*) which is incurred after the 31st day of March, 2008.

The relevant rule is r. 6, the relevant part of which reads as under: -

Prescribed authority for expenditure on scientific research.
6. (1) ……..

(1B) For the purposes of sub-section (2AB) of section 35, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research.

(4) The application required to be furnished by a company under sub-section (2AB) of section 35 shall be in Form No. 3CK.

(5A) The prescribed authority shall, if he is satisfied that the conditions provided in this rule and in sub-section (2AB) of section 35 of the Act are fulfilled, pass an order in writing in Form No. 3CM:

Provided that a reasonable opportunity of being heard shall be granted to the company before rejecting an application.

(7) Approval of a programme under sub-section (2AA) shall be subject to the following conditions:— (a) to (h)

(7A) Approval of expenditure incurred on in-house research and development facility by a company under sub-section (2AB) of section 35 shall be subject to the following conditions, namely :—

(a) The facility should not relate purely to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature;
(b) The prescribed authority shall submit its report in relation to the approval of in-house Research and Development facility in Form No.3CL to the Director General (Income–tax Exemptions) within sixty days of its granting approval;
(c) The company shall maintain a separate account for each approved facility; which shall be audited annually and a copy thereof shall be furnished to the Secretary, Department of Scientific and Industrial Research by 31st day of October of each succeeding year.
(d) Assets acquired in respect of development of scientific research and development facility shall not be disposed of without the approval of the Secretary, Department of Scientific and Industrial Research.

6.2 As apparent, the deduction u/s. 35(2AB) of the Act is to an approved (by the prescribed authority, being the Secretary, Department of Scientific and Industrial Research, GoI) research and development facility. This approval is conveyed in two stages. Form 3CM signifying approval to the in-house facility, i.e., of it being an eligible facility, and Form 3CL quantifying the eligible expenditure. While Form 3CM is issued to the approved facility, signifying its eligibility to claim deduction (u/s.35(2AB)), Form 3CL is to the Director General (Exemptions) within 60 days of the former. Form 3CL follows Form 3CM followed by furnishing an audit report in Form 3CL(A) by the approved facility by 31st October of each year. Our purpose here

is not dwell into these provisions, but ascertain, on the basis of the procedure laid down, the primacy of these documents *qua* claim for deduction u/s. 35(2AB) of the Act, and even as we observe no doubt or dispute in this regard; the same being the basis for the AO holding a belief as to escapement of income, the exercise confirms the same, besides providing an overview of the relevant provisions and the claim of the assessee in relation to a deduction u/s. 35, including section 35(2AB) of the Act.

6.3 Our first observation in the matter is that there has been an incorrect assumption of facts by the ld. CIT(A) for AY 2009-10 as well, and which, further, forms the basis of his finding as to the assessee having not withheld any material fact necessary for being allowed deduction u/s.35(2AB), so that there is, thus, an invalid assumption of jurisdiction by the AO. *We say so in view of his finding that there is no dispute that Form 3CM contains details of expenditure incurred for R&D as submitted by the appellant before the AO*. Where indeed so; the relevant details as approved by the prescribed authority being in the possession of the AO, furnishing of the same by the assessee would not be of much consequence insofar as the allowance of deduction u/s.35(2AB) of the Act is concerned; no prejudice being caused to the Revenue. *Rather, in such a case it is difficult to say if the AO can be said to form a belief as to escapement of income*. However, as afore-noted, Form 3CM is *sans* any reference to any expenditure, which is the subject matter of Form 3CL, upon the assessee furnishing the audited statement of qualifying expenditure (in Form 3CL(A) for the approval by the prescribed authority, which is in Form 3CL. This itself is sufficient to dislodge the assessee's case, which found acceptance by the ld. CIT(A) on that basis, and the resultant acceptance of the Revenue's appeal before us. So, however, inasmuch as the said finding by the ld. CIT(A) is not based on any submission by the assessee before him, which would, where so, qualify to be regarded as misleading, and who therefore ought not to be prejudiced on that count, as indeed the vehement arguments raised before us in the matter by the assessee, who

is definitely entitled to defend the impugned order on any aspect decided against it, we proceed further to adjudicate in the matter *de hors* the said finding, which is unfortunate inasmuch as the same is grossly erroneous and shows a complete disregard of the basic facts of the case by the first appellate authority, who has in fact not referred to extant provisions, i.e., as applicable for the relevant year/period.

6.4 The controversy arising thus lies in a very narrow compass, i.e., whether non furnishing Form 3CL quantifying eligible expenditure u/s. 35(2AB) at Rs. 1875.02 lacs and, thus, deduction there-under at Rs. 2812.53 lacs, as against the claimed sum of Rs. 4111.09 lacs, could be regarded in law as non-disclosure within the meaning of *proviso* to section 147 r/w *Explanation 1* thereto. We pose the question arising thus as there is, even as we find it to be so, no quarrel on F/3CL being a relevant document and, thus, a material information in allowing deduction u/s. 35(2AB) of the Act.

It is thus abundantly clear that the answer to the controversy arising is the scope of the obligation cast on the assessee by section 147, and reference to section 35(2AB), i.e., the section under which deduction is being sought, as well as the relevant rule, is only toward the same. We may here pause to consider as to why the law in the first place postulates the condition of a true and full disclosure of all material facts necessary for his assessment by the assessee which, as afore-noted, only would, i.e., save non-filing of return, bar assumption of jurisdiction u/s. 147 of the Act beyond 4 years where the AO has a reason to believe income having escaped assessment. This reason, clearly, is that the primary burden to prove it's return of income, and the claims preferred thereby, is on the assessee, who only is in the intimate know of his affairs. (*CIT v. Calcutta Agency Ltd*. [1951] 19 ITR 191 (SC)*CIT v. R. Venkataswamy Naidu* [1956] 29 ITR 529 (SC)(also see: *Lakshmiratan Cotton Mills Co. v. CIT* [1969] 73 ITR 634 (SC).

There can again be no quarrel on the proposition that the assessee can furnish only what is available with it, as surely law cannot impose an impossible burden.

Sure, the assessee was constrained for want of Form 3CL at the time of filing it's return of income. What, however, we wonder, prevented it from stating so in the computation of income (copy on record), i.e., *that the deduction under section .35(2AB) of the Act is, for want of Form 3CL, being claimed on the basis of Form 3CM and the Auditor's certificate*? Further, if it wanted to be heard, where Form 3CL certified a different figure of the qualifying expenditure, resulting in a lower deduction u/s. 35(2AB), it could state so as well, adding words to that effect. *Further, what, again, one may ask, prevented the assessee to, on receipt of Form 3CL, furnish a copy of the same in the assessment proceedings, reiterating it's stand – where so, of deduction u/s.35(2AB), as having been, nevertheless, rightly claimed, stating reasons for the same*?

These, and such-like actions would have, without doubt, qualified the assessee's disclosure as <u>full</u> and <u>true</u>, as required by law. This is particularly so in view of the huge variation (rs. 1298.56 lacs) between it's claim u/s. 35(2AB) and that quantified by the prescribed authority through Form 3CL. Our answer to the question posed, in view of the fore-going, is an emphatic 'No'. The assessee cannot, in our clear view, under the given facts and circumstances, be said to have met the requirement of a true and full disclosure of all the material facts necessary for assessment. Reference herein may also be made to *Explanation 1* to section 147 of the Act, which clarifies that even production of relevant documents cannot by itself be regarded as meeting the requirement of a proper disclosure. This is, as explained by the Hon'ble Courts [viz. *Indo-Aden Salt Mfg. and Tdg. Co. Pvt. Ltd. v. CIT* [1986] 159 ITR 624 (SC)], the document may well be embedded in the voluminous record and likely to be missed by the AO, who should therefore be clearly informed. Though not applicable on facts, is yet relevant inasmuch as even if Form 3CL had indeed been submitted by the assessee as part of it's return of income, which runs for a company of it's size into a voluminous record, it clearly stating in it's computation of income that deduction u/s. 35(2AB) is being claimed not as per Form 3CL, stating the

difference, as indeed, briefly, the reason/s for the same, only would suffice the requirement of law, i.e., the disclosure as envisaged by section 147 of the Act for barring initiation of assessment after 4 years. Now if the assessee, in view of the said difference, ought to have done so if Form 3CL was available at the time of filing the return of income, why shouldn't it be so during the course of the assessment proceedings on receipt of the said Form? *The requirement of true and full disclosure is, without doubt, not confined to the return of income, but is toward its assessment*. The argument of non-availability of Form 3CL at the time of filing the return, though true, is thus in law a false plea. The further plea that it could not possibly presume that the office of DGIT(E) would not have forwarded the copy of Form 3CL on its receipt to the AO, is, again, untenable, both on facts and in law. On facts, the very fact that the AO did not propose reduction of deduction u/s. 35(2AB) in assessment proceedings, makes it evident of he being unaware of Form 3CL approving a reduced amount of deduction there-under, of which the assessee was aware. *Could, one may ask, it be possible otherwise, i.e., that the AO proceeds to allow deduction u/s. 35(2AB) without regard to Form 3CL*? Even so, this presumption is not available to be drawn by the assessee, who has, by keeping silent in the matter, clearly taken advantage of the ignorance of the AO. The unavailability of this presumption is for two reasons. First, the obligation of full and true disclosure cast by law on the assessee. Two, there is nothing in the procedure u/r. 6 indicating DGIT(E) conveying Form 3CL to the respective AOs. Rather, as afore-noted, in view of *Explanation 1* to sec. 147, even the availability of Form 3CL with the AO would not absolve the assessee from, in view of the variation in the deduction claimed per the return and that later approved by the prescribed authority, to state reasons in support of it's claim as made, or otherwise, where in agreement with the revision, revise it's return, or otherwise bring this to the fore, so that deduction is allowed thereto in assessment on a consideration of it's case. In fact, even if the AO still ignores the same, no fault, in terms of disclosure, can be attributed to the assessee.

6.5 Reference to the provision of s. 35(2AB) and r. 6 for the purpose, is again not apposite. The reason is not far to seek and, in fact, self-evident. The same, as afore-noted, provide the frame work for grant of deduction u/s. 35(2AB), i.e., the eligibility criterion; the approval, including the authority and the manner in which the same is to be sought; *and the quantification of deduction thereby.* It is the last limb which is under consideration, and *qua* which the assessee's conduct is being examined with reference to the requirement of a *true and full disclosure*, which pre-empts any reassessment where the same is sought to be initiated beyond 4 years of the relevant assessment year. It would be, to our mind, wholly incorrect to, in determining true and full disclosure, be guided by and, in any case, guided solely by the procedure prescribed by the relevant deduction provision, being s. 35(2AB) r/w r. 6 in the instant case. On the contrary, it is this requirement itself, keeping in view the fundamental/elementary position that the primary burden to prove it's claim for exemption of, or deduction from, income is on the assessee, which should guide one in determining if the same is met. The matter of proper disclosure, that being the undisputed position in law, becomes essentially factual, to be accordingly determined in the facts and circumstances of the case, with reference to the procedure prescribed by law. There is in fact a clear finding by the Tribunal in the assessee's own case for AY 2012-13, as we shall presently see, holding that each and every item of the expenditure claimed is to be examined by the AO during assessment, and which, unless contested by the assessee in this respect, further obliges it to do so.

The procedure of communication of Form 3CL direct by the prescribed authority to the Revenue giving rise to the presumption that the same would stand communicated to the AO, is, as afore-noted, not supported by the rule. The presumption, nevertheless, fails on facts, i.e., on the assessee receiving Form 3CL approving a reduced deduction u/s. 35(2AB) (w.r.t. that claimed) on which the assessee is not questioned during assessment. And which ought to have impelled the assessee to, in discharge of it's primary obligation, furnishing Form 3CL, either

revise it's claim downward, or state it's reasons for persisting with it's claim, or both, i.e., in case of partial scaling down of it's claim. Why, in a given case, the AO may himself question the assessee on it's higher claim, implying knowledge of Form 3CL with the AO, validating the presumption afore-said, which would entitle the assessee to proceed accordingly. The assessee's disclosure obligation undergoes a qualitative change in light of this fact. *Again, could the assessee's conduct be faulted where Form 3CL reports deduction in the same sum as claimed by the assessee*? We say so to emphasizes the need to calibrate the conduct toward true and full disclosure with the facts & circumstances of the case, which cannot be held as a constant or absolute.

6.6 We may next consider the case law relied upon by the parties, making the same as a part of their respective paper-books, and through which we were taken (in part) during hearing. We shall proceed in seriatim, i.e., in the same order in which the same were referred to during hearing. The first is by the Tribunal in *Century Seeds Pvt. Ltd.* (supra) wherein; the impugned order being u/s.263 of the Act, the Tribunal took the view that the AO in allowing deduction u/s. 35(2AB) of the Act, claimed in excess of that specified in Form 3CL, had taken a possible view. Inasmuch as revision may be on a full disclosure of facts; *the assessee relying on due consideration thereof by the AO in assessment, how we wonder does the same assist the assessee's case*? If anything, it supports the Revenue's case inasmuch as there had been due consideration of Form 3CL in assessment, not made disregarding or *de hors* the same, as in the instant case. It is again well-settled that the revisionary authority is not bound to make enquiry or record final conclusion in the matter. The Tribunal's opinion that once the research facility has been approved, the entire expenditure claim is to be allowed u/s. 35(2AB) of the Act is, therefore, unwarranted and, rather, an excess of jurisdiction, discountenanced by the higher courts, who have, both in the context of 263, as in *CIT v. Mahavar Traders* [1996] 220 ITR 167 (MP)(where, in it's words, the Tribunal itself started making inquiries); or *CIT vs. Eastern Medikit*

Ltd. [2011] 337 ITR 56 (Del)(where the Tribunal proceeded to decide the issue on merits, converting itself into a court of first instance), as well as generally, disapproved such a course being adopted, being no more than a usurpation of power. Reference in this context may also be made, *inter alia*, to *CIT vs. Toyota Motor Corp*. [2008] 306 ITR 49 (Del) [affirmed in [2008] 306 ITR 52 (SC)].

6.7 The next decision relied upon is by the Tribunal in the assessee's own case for AY 2012-13 (at APB pgs. 16-46/DPB pgs. 3-33). In the facts of the case Form 3CL (dated 28.10.2016) was filed by the assessee at the stage of the proceedings before the DRP and, in any case, on 17.5.2017, in rectification proceedings. That is, after the completion of assessment on 31.3.2017. The Tribunal restored the matter back to the file of the AO for consideration of 3CL inasmuch as there was a variance between the assessee's claim and that approved by the prescribed authority per the said Form. In its words:

"16. We have ---------- However, we are of the opinion that the amount which is eligible for such weighted deduction *have to be computed considering Form 3CL* and if the figures in Form 3CL is at variance with the claim, the Assessing Officer has to carefully check whether each of the item included in such claim is coming within the purview of section 35(2AB) of the Act. Issue is remitted back to the Assessing Officer for this purpose." (pg. 12)

The same, though again not on the point of disclosure *per se*, it yet, in ratio, again supports the Revenue's case inasmuch as it clarifies that in case of variance between the amount claimed and that approved under F/3CL, the latter assumes an added significance. Rather, the very fact of variance, *which is with reference to Form 3CL* (and not F/3CM, as presumed by CIT(A)), itself signifies its primacy, which in fact is not in dispute, being rather the basis on which the AO forms his 'reason to believe'.

6.8 The only other decision relied upon, which is by the assessee, and the only one which concerns true and full disclosure *per se*, is by the Hon'ble Apex Court in *New Delhi Television Ltd. vs. Dy. CIT* (CA No. 1008 of 2020, dated 03.04.2020). The

same, in ratio, which alone is binding (*The Mavilayi Service Co-operative Bank Ltd. Ltd. & Ors. v. CIT* [2021] 431 ITR 1 (SC); *Sree Bhagavathi Textiles Ltd. v. CIT* [2000] 244 ITR 496 (Ker)), again validates the view taken by us. We shall, nevertheless, begin by reproducing the only part (of the decision) through which we were taken during hearing: -

"31. The revenue now has come up with the plea that certain documents were not supplied but according to us *all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment*. The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 03.08.2012 in the case of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the same date itself. Therefore, the entire material was available with the revenue."

NNPLC, Shri Markose would clarify, is a third party. Inasmuch as it had communicated the relevant details to the Dy. DIT (Inv.), the same were, thus, to be regarded as available with the AO. A parallel was sought to be thus drawn with the prescribed authority in the instant case having similarly conveyed Form 3CL to the DGIT (E). The parallel drawn, and the basis of the argument is, on the face of it, flawed. This is as the documents stated as not supplied were found by the Hon'ble Court as not primary documents, stating that, therefore, in it's view, the same were not required to be supplied. The latter part of the para, on which Sh. Markos would emphasize, the Hon'ble Court goes ahead to state that even these, or that stated in the main, i.e., details of subscribers, <u>were available with the AO</u>, is thus rendered of little consequence. We may here clarify that our stating that no presumption arises as to the transmission of F/3CL to the AO by DGIT(E), is in view of the obligation cast on the assessee u/s. 147, *which is to the AO,* and, two, to meet the assessee's reliance on the said procedure for drawing a contrary presumption.

We may though, if only for the sake of clarity, state the background facts of the case to appreciate both the arguments as well as our opinion thereon, better. NNPLC is a UK-based subsidiary of the assessee, an India company. NNPLC issued step-up bonds for US$ 100M in July, 2007, i.e., during the previous year relevant to AY 2008-09, through Bank of New York, which were to be redeemed at a premium of 7.5% after 5 years. They were however redeemed in advance at a discounted amount of US$ 74.2M in November, 2009. *This information was available with the AO*. However, in assessment (for AY 2008-09), he was of the view that as NNPLC *had no financial worth*, it could not issue convertible bonds unless the assessee, it's parent company, had furnished corporate guarantee to secure the interest of the subscribers. He, accordingly, inferred issue of guarantee by the assessee, and imputed a fees of 4.68% in its respect, assessing the same as the assessee's income on 03.08.2012, the same date on which he passed orders in the case of other group companies, viz., NDTV Lab Ltd. and NDTV Lifestyle Ltd. In the assessment proceedings for AY 2009-10, DRP found that the monies raised by the assessee's subsidiaries, including NNPLC, by the issue of bonds, were not genuine transactions, and represented the assessee's own monies. Reassessment proceedings were initiated for AY 2008-09 vide notice dated 31.03.2015. NNPLC being a non-functional company, nobody would invest therein and, further, get back only 74% of the capital invested. The money invested in NNPLC, which went into liquidation on 28.3.2011, finally came back in a circuitous manner to the assessee. The funds raised during the year were inferred as the assessee's money, proposing to add the same, at Rs.405.09 crores, as the assessee's income. This was contested by the assessee, who remained unsuccessful up to the stage of Hon'ble High Court, on three grounds:

(a) absence of reasons to believe;

(b) proper disclosure of all material facts;

(c) proper invocation of second *proviso* to section 147 of the Act.

The assessee was unsuccessful on ground (a), but succeeded on other two, of which the second (b) concerns us. The Hon'ble Court found enough material brought on record by the Revenue subsequent to assessment for the AO to form a reason to believe escapement of income from assessment, which is to be a *prima facie* opinion. On full and true disclosure, it, relying on it's Constitutional Bench decision in *Calcutta Discount Co. Ltd.* (supra), which it observed as seminal, holding the field and providing guidance, reproducing there-from (at para 32), held as under: -

'33. *In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer*. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee *had disclosed all primary facts* before the assessing officer, and it was not required to give any further assistance to the assessing officer *by disclosure of other facts*. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case, the assessing officer on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee. This the assessing officer could have done even at that stage *on the basis of the facts which he already knew*. The other facts relied upon by revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion that there is non-disclosure of true and material facts by the assessee." (emphasis, ours)

It went on to analyse those facts, opining that all the necessary facts were in the knowledge of the AO who, on the basis of the facts he already knew, viz. the details of the subscribers; the redemption in advance and at a discounted price; etc., if he wanted to, could have set up a case now being sought to. The AO had in fact accepted the genuineness of the transaction, and on that basis made an addition for guarantee fee. Reference in this context be also made to paras 28 to 30 of the decision.

It would be apparent to the reader that it is a clear case of change of opinion by the AO who could, on the basis of the material before him, invoke the charge of round tripping, i.e., as by the DRP. There was, however, no whisper of the transaction being not genuine, and the money raised being the assessee's money, which came about only in view of the findings by the DRP for the subsequent year. The AO, on the contrary, regarding the same as genuine, considered it proper to, treating it on an

arm's length basis, apply the extant guarantee fee rate thereon. In fact, up to the Hon'ble High Court, the case of the Revenue, as observed by the Hon'ble Apex Court in the succeeding paras (paras 34 & 35), was with reference to the second *proviso* to section 147 of the Act; it rather having filed an affidavit before the said Court averring that it was not relying on non-disclosure. The reference to the documents (in para 31), which the Revenue contends for the first time as not supplied, was thus a *volte face* by it, who had been successful before the Hon'ble High Court on the basis of the second *proviso* to section 147 of the Act. Though not relevant for our purpose, we may yet state that the charge of improper disclosure did not find favour with the Hon'ble Apex Court inasmuch as there was no reference thereto either in the reasons recorded u/s.148(2) or in the notice u/s. 148(1) of the Act, i.e., what had been opined by the Hon'ble High Court earlier, and which was in fact not specifically challenged before the Apex Court. In the facts of the instant case, admittedly, both Forms 3CM and 3CL are primary documents. It is only the unavailability of Form 3CL at the time of furnishing the return that the assessee did not either restrict it's claim for deduction u/s.35(2AB) on its basis, or otherwise, meeting the same, made out a case *qua* the deduction claimed, stating the facts upfront. This is precisely what the assessee ought to have done on receipt of Form 3CL, which reflected a much lower deduction; the primary burden to prove it's returns and its claim for exemption/deduction being on the assessee (*Govindarajulu Mudaliar (A.) v. CIT* [1958] 34 ITR 807 (810)(SC); *H.E. Nizam Religious Endowment Trust v. CIT* [1966] 59 ITR 582 (SC); *CIT v. Joseph John* [1968] 67 ITR 74 (SC)).This is a clear case of non-disclosure by the assessee, whose conduct in, though aware, maintaining silence, could in fact be regarded as dishonest.

There is as such no correspondence between the facts of the two cases, only in the context of which the observations relied upon become relevant and can be appreciated. As afore-stated, for our purpose, what is relevant is the law as explained by the Hon'ble Apex Court by placing total reliance on *Calcutta Discount Co. Ltd*.

(supra), coupled with it's observations (at paras 28 & 29) stating no material information had been, as a matter of fact, withheld by the assessee. The said decision would thus be of no assistance to the assessee.

In Sum

7. The assessee's case (for AY 2009-10) fails to pass muster in view of the clear law in the matter, and the simple, undisputed facts: the prime relevance of Form 3CL, even as highlighted by the Tribunal in assessee's own case for AY 2012-13, being in fact undisputed, particularly considering that the claim for deduction made was much higher than that on the basis of expenditure approved thus by the prescribed authority. It is this variance, and not F/3CL *per se*, that is the undisclosed primary, material fact. The plea of presumption of the said Form being in the knowledge of the AO is not supported by the rule, i.e., not available legally and, besides, falls flat on facts, i.e., in view of a complete absence of any enquiry or reference thereto in the original assessment and, therefore, a false plea by the assessee, who is obliged by law to disclose, fully and truly, all material facts necessary for assessment to the AO. Why, the knowledge of Form 3CL being at a variance with the assessee's claim with the AO, i.e., at the time of original assessment, may, *where so*, eschew reassessment proceedings even for AY 2011-12, rendering the same as a change of opinion. The two aspects are inter-related, with there being decisions, as in *Ganga Saran & Sons P. Ltd. v. ITO* [1981] 130 ITR 1 (SC), wherein the Hon'ble Apex Court found no failure on the part of the assessee to disclose material facts, holding, on that basis, the AO could not have a reason to believe that any part of income had escaped assessment.

The matter is to be examined from the stand-point of the obligation on the assessee to disclose all material facts necessary for assessment, fully and truly, i.e. as mandated by law, and which, a positive requirement, we have, giving our reasons, found as not discharged. We are supported in our view by the decisions cited here-in-above, as well as that relied upon by the parties before us. The matter, as for AY

2011-12, shall travel to the file of the ld. CIT(A) for adjudicating the quantum adjustments in assessment under appeal before him after hearing the parties per a speaking order.

We decide accordingly.

8. In the result, the Revenue's appeals as well as the Assessee's COs, are allowed.

Order pronounced on November 30, 2023 under Rule 34 of The Income Tax(Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: November 30, 2023

NB: This is the corrected copy of the order dated 30.11.2023, i.e., after giving effect to the errors/omissions listed in Corrigendum order dated 11.12.2023.
DG/n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA Nos. 139 & 140/Coch/2020
(Assessment Years:2009-10 & 2011-12)

Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building I.S. Press Road, Kochi – 682018	vs.	Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]
(Appellant)		(Respondent)

CO Nos. 02 & 03/Coch/2020
(Assessment Years: 2009-10 & 2011-12)

Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]	vs.	Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building, I.S. Press Road, Kochi – 682018
(Appellant)		(Respondent)

CORRIGENDUM

Order under section 254(1) of the Income Tax Act, 1961 ('the Act') in the captioned appeal was passed on 30.11.2023. It is, however, found that there have occurred certain typing errors and omissions in the said order, which are, therefore, sought to be rectified through this corrigendum order. The same being only correction of those errors, do not therefore *per se* cause any prejudice to either party. The details are as under:

1. The word 'the' be read before the word 'basis' in line 3 of para 6.3 (pg. 9)

2. The word ‘found’ at line 6 of sub-para 1 of para 6.4 (at pg. 10) be read as ‘find’.
3. The words ‘viz. *Indo-Aden Salt Mfg. and Tdg. Co. Pvt. Ltd. v. CIT* [1986] 159 ITR 624 (SC)’, be inserted after the words ‘Hon'ble Courts’ in sub-para 4 of para 6.4 (at page 11) of the order.
4. The word ‘the’ be read before the word ‘manner’ in line 4, and the word ‘a’ be read before the words ‘true and full disclosure’ in line 7 of sub-para 1of para 6.5 (pg. 13)
5. The word ‘the’ be read before the words ‘case of the Revenue’ in sub-para 3 of para 6.8 (pg. 19)

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: December 11, 2023
n.p.

Copy to:

6. The Appellant
7. The Respondent
8. The Pr. CIT concerned
9. The Sr. DR, ITAT, Cochin
10. Guard File

By Order

Assistant Registrar
ITAT, Cochin

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA Nos. 139 & 140/Coch/2020
(Assessment Years:2009-10 & 2011-12)

Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building I.S. Press Road, Kochi – 682018	vs.	Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]
(Appellant)		(Respondent)

CO Nos. 02 & 03/Coch/2020
(Assessment Years: 2009-10 & 2011-12)

Appollo Tyres Ltd. 3rd Floor, Areekal Mansion Near Manorama Junction Panampalliy Nagar Kochi 682036 [PAN: AAACA6990Q]	vs.	Asst. CIT, Corporate Circle-1(1) 4th Floor, C.R. Building, I.S. Press Road, Kochi – 682018
(Appellant)		(Respondent)

Assessee by:	Shri Joseph Markose, Advocate
Revenue by:	Sh. Sanjit K. Das, CIT-DR and Smt. J.M. Jamuna Devi, Sr. DR

Date of Hearing:	24.11.2023
Date of Pronouncement:	30.11.2023

O R D E R

Per Sanjay Arora, AM

This is a set of two Appeals by the Revenue agitating the acceptance of the assessee's appeals contesting it's assessments under section 147 read with sections 143(3) and 144C of the Income Tax Act, 1961 ("the Act") by the Commissioner of Income Tax (Appeals)-1, Kochi [CIT(A)] vide a common order dated 10.12.2019, with corresponding Cross Objections (COs.) by the assessee.

2. The sole issue arising in the instant appeals, projecting though several grounds, is the maintainability of the reassessment proceedings, found as not maintainable by the ld.CIT(A) as there was a true and full disclosure of all material facts necessary for assessment by the assessee, precluding reassessment beyond four years from the end of the relevant assessment year/s, in view whereof the other grounds do not arise for consideration, and which in fact explains the assessee's COs, seeking, in case of an adverse decision, upholding the assessment/s on the jurisdictional aspect, direction to the first appellate authority for a decision on merits on the quantum assessment/s.

3. We begin by reproducing the operative part of the impugned order which, applicable for both the years under reference, reads as under:

"I have gone through the above mentioned decisions. The main contention is whether non-submission of Form 3CL by the assessee would amount to non-disclosure of all material facts, fully and truly, during the course of assessment proceedings. *There is no dispute that Form No. 3CM containing details of all expenses incurred for R&D was submitted by the appellant before the AO*. The scheme of Rule 6(7A), regarding Form 3CL is that, the appellant has to submit the Form to the Competent Authority at DSIR, and DSIR shall send the report in Form No. 3CL referred to in clause (b) to Principal Chief Commissioner of Income Tax or Chief Commissioner of Income Tax or Principal Director General of Income Tax or Director General of Income Tax having jurisdiction over such company. Thus Form 3CL is to be sent by DSIR to DIT(E). It is an internal mechanism between two Government Departments, in which, the assessee has no role and it also has no control. Its role is limited to riling the necessary application with DSIR.

In the instant case, *the case has been reopened beyond 4 years from the end of the relevant assessment year* solely on the reason that the assessee did not submit Form 3CL during assessment proceedings and, therefore, it has not disclosed all material facts, fully and truly, before the AO, which was necessary for scrutiny assessment. In view of the above discussion, in my opinion, it was not the duty or responsibility of the appellant to have filed

Form No. 3CL before the AO during assessment proceedings. Since DSIR has already forwarded Form No. 3CL on 30.11.2011, which is much before the date of reopening of assessment u/s. 147, it was the duty of the AO to obtain the same from the competent authority, if it really needed for the purpose of scrutiny assessment. In view of facts of this case, in my opinion, the AO is not justified in reopening the case u/s. 147 after the expiry of 4 years from the end of the relevant assessment year. *In my opinion, since the appellant had filed Form No. 3CM, all the facts relating to R&D were already before the AO during original scrutiny assessment and the same was examined and considered by the AO.* Therefore, I hold that the reopening u/s. 147 was bad-in-law and reassessment so concluded not valid." (emphasis, ours)

4. We may at the outset clarify two aspects. Firstly, the assessee's COs, filed on 25/6/2020, though out of time by 3 days, were admitted as the delay is saved by the order of the Hon'ble Apex Court in Suo Motu Writ Petition 3/2020 dated 10.01.2022, so that the period from 15.3.2020 to 28.2.2022 is to be excluded in reckoning limitation. Secondly, assessments for both the years stand reopened by the issue of notice u/s.148(1) of the Act dated 14/3/2016. The same is thus beyond 4 years *only* for AY 2009-10, on which basis, finding the disclosure by the assessee as true and full, the ld. CIT(A) has found the reassessment proceedings as bad in law. That is, the same being within 4 years (from the end of the relevant assessment year) for AY 2011-12, his decision is clearly invalid for that year, even as fairly conceded by Shri Markose, the ld. counsel for the assessee, during hearing. The Revenue accordingly succeeds for this year and, consequently, vacating his adjudication for AY 2011-12, we restore the appeal for that year to the file of the ld. CIT(A) for deciding it on quantum on merits in accordance with law after hearing both the parties before him.

5.1 This leaves us with assessment for AY 2009-10. We shall proceed by delineating the law in the matter, reproducing s.147in its relevant part to start with:

Income escaping assessment

147. Income escaping assessment-If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or

the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year);

Provided that *where an assessment under sub-section (3) of section 143* or this section has been made for the relevant assessment year, no action shall be taken under this section *after the expiry of four years from the end of the relevant assessment year*, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the 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:

Provided further, ...

Provided also,.....

Explanation 1.- Production before the Assessing Officer of account books or other evidence from which *material evidence* could with *due diligence* have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso. (emphasis, supplied)

The Law

5.2 Power under section 147 of the Act, though very wide, is yet not plenary. Assumption of jurisdiction u/s.147 must therefore be on the basis of materials before the Assessing Officer (AO) which justify inference of escapement of income from assessment, implying a live link or a rational nexus between the two, i.e., the existence of materials and escapement of income from assessment [*ITO vs. Lakhmani Mewal Das* [1976] 103 ITR 437 (SC), *Sheo Nath Singh vs. AAC*[1971]82 ITR 147 (SC)]. The principle behind stipulating such a condition is that there must be, as far as possible, only one assessment for any particular year and, two, the proceedings must receive finality. It may nevertheless be a case where an income was not reported or went unnoticed by the assessing authority, warranting remedial procedure inasmuch as law should apply equally across all tax payers, so that subject to reasonable checks, the power of reassessment becomes a practical necessity. The condition of 'reason to believe' also guards against the exercise degenerating into an investigation exercise or a change of opinion or at the mere whim or fancy of the AO. The law

becomes even more stringent where the reassessment proceedings are initiated after a prescribed threshold period, i.e., 4 years (from the end of the relevant assessment year),*qua* returns which have been subject to regular assessment, i.e., under section 143(3) or 144 of the Act, as in the instant case, with the assumption of jurisdiction u/s.147 being hinged by a further condition of the income escaping assessment being so due to failure, *inter alia*, on the part of the assessee to disclose – fully and truly – all material facts necessary for assessment of his income for the relevant year. Per contra, a true and full disclosure of all material facts necessary for assessment by the assessee who has furnished return of income only would save initiation of reassessment proceedings beyond 4 years where the AO has reason to believe income having escaped assessment. The same, again, a part of well-settled law, is clarified to be in respect of only primary facts [*Calcutta Discount Co. Ltd. vs. ITO* [1961] 41 ITR 191 (SC); *Phool Chand Bajrang Lal vs. ITO* [1993] 203 ITR 456 (SC)]. This is as it is not the assessee's duty, and it can be nobody's case that the assessee is to guide the AO about the possible enquiry or verification that may be carried out or the inference that may be drawn from the primary facts. Again, at the same time, the disclosure has to be true and full, i.e., conveying a clear and honest intent. This is also the purport of *Explanation 1* to section 147 of the Act, which makes it clear that the plea of want of due diligence by the AO is not open to the assessee, who is to therefore lead upfront all material facts necessary for his assessment. The matter before us, in view of the clear law laid down by the Hon'ble Apex Court, which is to be therefore applied, is primarily factual. That is, whether the assessee in the instant case, in possession of Form 3CL dated 30.11.2011, reporting the qualifying expenditure for deduction u/s. 35(2AB) of the Act at Rs. 1875.02 lakhs, eligible for deduction at Rs. 2812.53 lacs, was obliged by law to bring it to the notice of the AO assessing it's income in the original assessment proceedings, culminating in an assessment vide order u/s. 143(3) dated 31/12/2013 allowing deduction u/s. 35(2AB) at Rs. 4111.09 lacs, i.e., as

claimed by the assessee per it's returns, original and revised, based on the information available with it at the time of their filing on 29/9/2009 and 26/3/2011 respectively.

The respective cases

5.3 The Revenue contends non-submission of Form 3CL by the assessee to the AO in the original assessment proceedings as in violation of the obligation thereon to have disclosed, fully and truly, all material facts necessary for it's assessment. It is only this Form which quantifies the eligible research expenditure for deduction u/s.35(2AB) of the Act, both on revenue and capital account; Form 3CM being only an approval of the in-house R&D facility for the purpose of section 35(2AB) of the Act and, thus, *sans* any details *qua* the expenditure and, thus, of little consequence in-so-far as the quantum of deduction u/s.35(2AB) is concerned. Reliance is placed on the order by the Tribunal in the assessee's own case for AY 2012-13 (ITA No. 35/Coch/2017, dated 24/7/2017), wherein the claim for deduction u/s. 35(2AB), claimed, similarly, without reference to Form 3CL, was opined for being considered.

The assessee's case, on the other hand, and which found favour with the ld. CIT(A), is that an obligation to furnish Form 3CL by the assessee is not traceable to any requirement of law. Neither section 35(2AB) nor the relevant rule (r. 6), which together lay down the framework and the procedure prescribed in this regard requires so. The same is to be sent directly by the competent authority to *inter alia*, the DGIT, which authority is to communicate the same to the concerned AO. Sure, a copy thereof is marked to the assessee as well, but then how is the assessee to know that the same is not available with the AO for it to furnish copy thereto? This also explains the absence of any requirement in law for submission of Form 3CL by the assessee to, or otherwise inform the AO about it, which, being dated 30.11.2011, was not available with the assessee on the date of filing of the return for the year. Form 3CM, conveying the approval, being available, along with the CA certificate (i.e., toward the relevant expenditure figures), duly obtained, were duly furnished along with the

return of income. There has thus been true and full disclosure of all material facts by the assessee, i.e., as mandated by law, which cannot possibly cast an impossible burden. Reliance was placed on the order by the Tribunal in *Century Seeds Pvt. Ltd. vs. Dy. CIT* (in ITA No. 942/Hyd/2017 dated 20.07.2018, APB pgs. 11 to 15)

Discussion

6.1 We may at this stage reproduce the deduction provision along with the relevant rules in its relevant part as under: -

Expenditure on scientific research.

35. (1) In respect of expenditure on scientific research, the following deductions shall be allowed—

xxxxx

(2AB)(1) Where a company engaged in the business of bio-technology or in any business of manufacture or production of any drugs, pharmaceuticals, electronic items, computers, telecommunication equipments, chemicals or any other article or thing, notified by the Board incurs any expenditure on scientific research (not being expenditure in the nature of cost of any land or building) on in-house research and development facility as approved by the prescribed authority, then, there shall be allowed a deduction of a sum equal to one and one-half times of the expenditure so incurred:

Explanation.—For the purposes of this clause, "expenditure on scientific research", in relation to drugs and pharmaceuticals, shall include expenditure incurred on clinical drug trial, obtaining approval from any regulatory authority under any Central, State or Provincial Act and filing an application for a patent under the Patents Act, 1970 (39 of 1970).

(*2*) No deduction shall be allowed in respect of the expenditure mentioned in clause (*1*) under any other provision of this Act.

(*3*) No company shall be entitled for deduction under clause (*1*) unless it enters into an agreement with the prescribed authority for co-operation in such research and development facility and for audit of accounts maintained for that facility.

(*4*) The prescribed authority shall submit its report in relation to the approval of the said facility to the Director General in such form and within such time as may be prescribed.

(5) ----------

(*6*) No deduction shall be allowed to a company approved under sub-clause (*C*) of clause (*iia*) of sub-section (1) in respect of the expenditure referred to in clause (*1*) which is incurred after the 31st day of March, 2008.

The relevant rule is r. 6, the relevant part of which reads as under: -

Prescribed authority for expenditure on scientific research.

6. (1) ……..

(1B) For the purposes of sub-section (2AB) of section 35, the prescribed authority shall be the Secretary, Department of Scientific and Industrial Research.

(4) The application required to be furnished by a company under sub-section (2AB) of section 35 shall be in Form No. 3CK.

(5A) The prescribed authority shall, if he is satisfied that the conditions provided in this rule and in sub-section (2AB) of section 35 of the Act are fulfilled, pass an order in writing in Form No. 3CM:

Provided that a reasonable opportunity of being heard shall be granted to the company before rejecting an application.

(7) Approval of a programme under sub-section (2AA) shall be subject to the following conditions:— (a) to (h)

(7A) Approval of expenditure incurred on in-house research and development facility by a company under sub-section (2AB) of section 35 shall be subject to the following conditions, namely :—

(e) The facility should not relate purely to market research, sales promotion, quality control, testing, commercial production, style changes, routine data collection or activities of a like nature;

(f) The prescribed authority shall submit its report in relation to the approval of in-house Research and Development facility in Form No.3CL to the Director General (Income–tax Exemptions) within sixty days of its granting approval;

(g) The company shall maintain a separate account for each approved facility; which shall be audited annually and a copy thereof shall be furnished to the Secretary, Department of Scientific and Industrial Research by 31st day of October of each succeeding year.

(h) Assets acquired in respect of development of scientific research and development facility shall not be disposed of without the approval of the Secretary, Department of Scientific and Industrial Research.

6.2 As apparent, the deduction u/s. 35(2AB) of the Act is to an approved (by the prescribed authority, being the Secretary, Department of Scientific and Industrial Research, GoI) research and development facility. This approval is conveyed in two stages. Form 3CM signifying approval to the in-house facility, i.e., of it being an eligible facility, and Form 3CL quantifying the eligible expenditure. While Form 3CM is issued to the approved facility, signifying its eligibility to claim deduction (u/s.35(2AB)), Form 3CL is to the Director General (Exemptions) within 60 days of

the former. Form 3CL follows Form 3CM followed by furnishing an audit report in Form 3CL(A) by the approved facility by 31st October of each year. Our purpose here is not dwell into these provisions, but ascertain, on the basis of the procedure laid down, the primacy of these documents *qua* claim for deduction u/s. 35(2AB) of the Act, and even as we observe no doubt or dispute in this regard; the same being the basis for the AO holding a belief as to escapement of income, the exercise confirms the same, besides providing an overview of the relevant provisions and the claim of the assessee in relation to a deduction u/s. 35, including section 35(2AB) of the Act.

6.3 Our first observation in the matter is that there has been an incorrect assumption of facts by the ld. CIT(A) for AY 2009-10 as well, and which, further, forms basis of his finding as to the assessee having not withheld any material fact necessary for being allowed deduction u/s.35(2AB), so that there is, thus, an invalid assumption of jurisdiction by the AO. *We say so in view of his finding that there is no dispute that Form 3CM contains details of expenditure incurred for R&D as submitted by the appellant before the AO*. Where indeed so; the relevant details as approved by the prescribed authority being in the possession of the AO, furnishing of the same by the assessee would not be of much consequence insofar as the allowance of deduction u/s.35(2AB) of the Act is concerned; no prejudice being caused to the Revenue. *Rather, in such a case it is difficult to say if the AO can be said to form a belief as to escapement of income*. However, as afore-noted, Form 3CM is *sans* any reference to any expenditure, which is the subject matter of Form 3CL, upon the assessee furnishing the audited statement of qualifying expenditure (in Form 3CL(A) for the approval by the prescribed authority, which is in Form 3CL. This itself is sufficient to dislodge the assessee's case, which found acceptance by the ld. CIT(A) on that basis, and the resultant acceptance of the Revenue's appeal before us. So, however, inasmuch as the said finding by the ld. CIT(A) is not based on any submission by the assessee before him, which would, where so, qualify to be

regarded as misleading, and who therefore ought not to be prejudiced on that count, as indeed the vehement arguments raised before us in the matter by the assessee, who is definitely entitled to defend the impugned order on any aspect decided against it, we proceed further to adjudicate in the matter *de hors* the said finding, which is unfortunate inasmuch as the same is grossly erroneous and shows a complete disregard of the basic facts of the case by the first appellate authority, who has in fact not referred to extant provisions, i.e., as applicable for the relevant year/period.

6.4 The controversy arising thus lies in a very narrow compass, i.e., whether non furnishing Form 3CL quantifying eligible expenditure u/s. 35(2AB) at Rs. 1875.02 lacs and, thus, deduction there-under at Rs. 2812.53 lacs, as against the claimed sum of Rs. 4111.09 lacs, could be regarded in law as non-disclosure within the meaning of *proviso* to section 147 r/w *Explanation 1* thereto. We pose the question arising thus as there is, even as we found it to be so, no quarrel on F/3CL being a relevant document and, thus, a material information in allowing deduction u/s. 35(2AB) of the Act.

It is thus abundantly clear that the answer to the controversy arising is the scope of the obligation cast on the assessee by section 147, and reference to section 35(2AB), i.e., the section under which deduction is being sought, as well as the relevant rule, is only toward the same. We may here pause to consider as to why the law in the first place postulates the condition of a true and full disclosure of all material facts necessary for his assessment by the assessee which, as afore-noted, only would, i.e., save non-filing of return, bar assumption of jurisdiction u/s. 147 of the Act beyond 4 years where the AO has a reason to believe income having escaped assessment. This reason, clearly, is that the primary burden to prove it's return of income, and the claims preferred thereby, is on the assessee, who only is in the intimate know of his affairs. (*CIT v. Calcutta Agency Ltd*. [1951] 19 ITR 191 (SC)*CIT v. R. Venkataswamy Naidu* [1956] 29 ITR 529 (SC)(also see: *Lakshmiratan Cotton Mills Co. v. CIT* [1969] 73 ITR 634 (SC).

There can again be no quarrel on the proposition that the assessee can furnish only what is available with it, as surely law cannot impose an impossible burden. Sure, the assessee was constrained for want of Form 3CL at the time of filing it's return of income. What, however, we wonder, prevented it from stating so in the computation of income (copy on record), i.e., *that the deduction under section .35(2AB) of the Act is, for want of Form 3CL, being claimed on the basis of Form 3CM and the Auditor's certificate*? Further, if it wanted to be heard, where Form 3CL certified a different figure of the qualifying expenditure, resulting in a lower deduction u/s. 35(2AB), it could state so as well, adding words to that effect. *Further, what, again, one may ask, prevented the assessee to, on receipt of Form 3CL, furnish a copy of the same in the assessment proceedings, reiterating it's stand – where so, of deduction u/s.35(2AB), as having been, nevertheless, rightly claimed, stating reasons for the same*?

These, and such-like actions would have, without doubt, qualified the assessee's disclosure as <u>full</u> and <u>true</u>, as required by law. This is particularly so in view of the huge variation (rs. 1298.56 lacs) between it's claim u/s. 35(2AB) and that quantified by the prescribed authority through Form 3CL. Our answer to the question posed, in view of the fore-going, is an emphatic 'No'. The assessee cannot, in our clear view, under the given facts and circumstances, be said to have met the requirement of a true and full disclosure of all the material facts necessary for assessment. Reference herein may also be made to *Explanation 1* to section 147 of the Act, which clarifies that even production of relevant documents cannot by itself be regarded as meeting the requirement of a proper disclosure. This is, as explained by the Hon'ble Courts, the document may well be embedded in the voluminous record and likely to be missed by the AO, who should therefore be clearly informed. Though not applicable on facts, is yet relevant inasmuch as even if Form 3CL had indeed been submitted by the assessee as part of it's return of income, which runs for a company of it's size into a voluminous record, it clearly stating in it's computation

of income that deduction u/s. 35(2AB) is being claimed not as per Form 3CL, stating the difference, as indeed, briefly, the reason/s for the same, only would suffice the requirement of law, i.e., the disclosure as envisaged by section 147 of the Act for barring initiation of assessment after 4 years. Now if the assessee, in view of the said difference, ought to have done so if Form 3CL was available at the time of filing the return of income, why shouldn't it be so during the course of the assessment proceedings on receipt of the said Form? *The requirement of true and full disclosure is, without doubt, not confined to the return of income, but is toward its assessment*. The argument of non-availability of Form 3CL at the time of filing the return, though true, is thus in law a false plea. The further plea that it could not possibly presume that the office of DGIT(E) would not have forwarded the copy of Form 3CL on its receipt to the AO, is, again, untenable, both on facts and in law. On facts, the very fact that the AO did not propose reduction of deduction u/s. 35(2AB) in assessment proceedings, makes it evident of he being unaware of Form 3CL approving a reduced amount of deduction there-under, of which the assessee was aware. *Could, one may ask, it be possible otherwise, i.e., that the AO proceeds to allow deduction u/s. 35(2AB) without regard to Form 3CL*? Even so, this presumption is not available to be drawn by the assessee, who has, by keeping silent in the matter, clearly taken advantage of the ignorance of the AO. The unavailability of this presumption is for two reasons. First, the obligation of full and true disclosure cast by law on the assessee. Two, there is nothing in the procedure u/r. 6 indicating DGIT(E) conveying Form 3CL to the respective AOs. Rather, as afore-noted, in view of *Explanation 1* to sec. 147, even the availability of Form 3CL with the AO would not absolve the assessee from, in view of the variation in the deduction claimed per the return and that later approved by the prescribed authority, to state reasons in support of it's claim as made, or otherwise, where in agreement with the revision, revise it's return, or otherwise bring this to the fore, so that deduction is allowed thereto in assessment on

a consideration of it's case. In fact, even if the AO still ignores the same, no fault, in terms of disclosure, can be attributed to the assessee.

6.5 Reference to the provision of s. 35(2AB) and r. 6 for the purpose, is again not apposite. The reason is not far to seek and, in fact, self-evident. The same, as afore-noted, provide the frame work for grant of deduction u/s. 35(2AB), i.e., the eligibility criterion; the approval, including the authority and manner in which the same is to be sought; *and the quantification of deduction thereby.* It is the last limb which is under consideration, and *qua* which the assessee's conduct is being examined with reference to the requirement of *true and full disclosure*, which pre-empts any reassessment where the same is sought to be initiated beyond 4 years of the relevant assessment year. It would be, to our mind, wholly incorrect to, in determining true and full disclosure, be guided by and, in any case, guided solely by the procedure prescribed by the relevant deduction provision, being s. 35(2AB) r/w r. 6 in the instant case. On the contrary, it is this requirement itself, keeping in view the fundamental/elementary position that the primary burden to prove it's claim for exemption of, or deduction from, income is on the assessee, which should guide one in determining if the same is met. The matter of proper disclosure, that being the undisputed position in law, becomes essentially factual, to be accordingly determined in the facts and circumstances of the case, with reference to the procedure prescribed by law. There is in fact a clear finding by the Tribunal in the assessee's own case for AY 2012-13, as we shall presently see, holding that each and every item of the expenditure claimed is to be examined by the AO during assessment, and which, unless contested by the assessee in this respect, further obliges it to do so.

The procedure of communication of Form 3CL direct by the prescribed authority to the Revenue giving rise to the presumption that the same would stand communicated to the AO, is, as afore-noted, not supported by the rule. The presumption, nevertheless, fails on facts, i.e., on the assessee receiving Form 3CL

approving a reduced deduction u/s. 35(2AB) (w.r.t. that claimed) on which the assessee is not questioned during assessment. And which ought to have impelled the assessee to, in discharge of it's primary obligation, furnishing Form 3CL, either revise it's claim downward, or state it's reasons for persisting with it's claim, or both, i.e., in case of partial scaling down of it's claim. Why, in a given case, the AO may himself question the assessee on it's higher claim, implying knowledge of Form 3CL with the AO, validating the presumption afore-said, which would entitle the assessee to proceed accordingly. The assessee's disclosure obligation undergoes a qualitative change in light of this fact. *Again, could the assessee's conduct be faulted where Form 3CL reports deduction in the same sum as claimed by the assessee*? We say so to emphasizes the need to calibrate the conduct toward true and full disclosure with the facts & circumstances of the case, which cannot be held as a constant or absolute.

6.6 We may next consider the case law relied upon by the parties, making the same as a part of their respective paper-books, and through which we were taken (in part) during hearing. We shall proceed in seriatim, i.e., in the same order in which the same were referred to during hearing. The first is by the Tribunal in *Century Seeds Pvt. Ltd.* (supra) wherein; the impugned order being u/s.263 of the Act, the Tribunal took the view that the AO in allowing deduction u/s. 35(2AB) of the Act, claimed in excess of that specified in Form 3CL, had taken a possible view. Inasmuch as revision may be on a full disclosure of facts; *the assessee relying on due consideration thereof by the AO in assessment, how we wonder does the same assist the assessee's case*? If anything, it supports the Revenue's case inasmuch as there had been due consideration of Form 3CL in assessment, not made disregarding or *de hors* the same, as in the instant case. It is again well-settled that the revisionary authority is not bound to make enquiry or record final conclusion in the matter. The Tribunal's opinion that once the research facility has been approved, the entire expenditure claim is to be allowed u/s. 35(2AB) of the Act is, therefore, unwarranted and, rather,

an excess of jurisdiction, discountenanced by the higher courts, who have, both in the context of 263, as in *CIT v. Mahavar Traders* [1996] 220 ITR 167 (MP)(where, in it's words, the Tribunal itself started making inquiries); or *CIT vs. Eastern Medikit Ltd.* [2011] 337 ITR 56 (Del)(where the Tribunal proceeded to decide the issue on merits, converting itself into a court of first instance), as well as generally, disapproved such a course being adopted, being no more than a usurpation of power. Reference in this context may also be made, *inter alia*, to *CIT vs. Toyota Motor Corp.* [2008] 306 ITR 49 (Del) [affirmed in [2008] 306 ITR 52 (SC)].

6.7 The next decision relied upon is by the Tribunal in the assessee's own case for AY 2012-13 (at APB pgs. 16-46/DPB pgs. 3-33). In the facts of the case Form 3CL (dated 28.10.2016) was filed by the assessee at the stage of the proceedings before the DRP and, in any case, on 17.5.2017, in rectification proceedings. That is, after the completion of assessment on 31.3.2017. The Tribunal restored the matter back to the file of the AO for consideration of 3CL inasmuch as there was a variance between the assessee's claim and that approved by the prescribed authority per the said Form. In its words:

"16. We have ---------- However, we are of the opinion that the amount which is eligible for such weighted deduction *have to be computed considering Form 3CL* and if the figures in Form 3CL is at variance with the claim, the Assessing Officer has to carefully check whether each of the item included in such claim is coming within the purview of section 35(2AB) of the Act. Issue is remitted back to the Assessing Officer for this purpose." (pg. 12)

The same, though again not on the point of disclosure *per se*, it yet, in ratio, again supports the Revenue's case inasmuch as it clarifies that in case of variance between the amount claimed and that approved under F/3CL, the latter assumes an added significance. Rather, the very fact of variance, *which is with reference to Form 3CL* (and not F/3CM, as presumed by CIT(A)), itself signifies its primacy, which in fact is not in dispute, being rather the basis on which the AO forms his 'reason to believe'.

6.8 The only other decision relied upon, which is by the assessee, and the only one which concerns true and full disclosure *per se,* is by the Hon'ble Apex Court in *New Delhi Television Ltd. vs. Dy. CIT* (CA No. 1008 of 2020, dated 03.04.2020). The same, in ratio, which alone is binding (*The Mavilayi Service Co-operative Bank Ltd. Ltd. & Ors. v. CIT* [2021] 431 ITR 1 (SC); *Sree Bhagavathi Textiles Ltd. v. CIT*[2000] 244 ITR 496 (Ker)), again validates the view taken by us. We shall, nevertheless, begin by reproducing the only part (of the decision) through which we were taken during hearing: -

"31. The revenue now has come up with the plea that certain documents were not supplied but according to us *all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment*. The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 03.08.2012 in the case of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the same date itself. Therefore, the entire material was available with the revenue."

NNPLC, Shri Markose would clarify, is a third party. Inasmuch as it had communicated the relevant details to the Dy. DIT (Inv.), the same were, thus, to be regarded as available with the AO. A parallel was sought to be thus drawn with the prescribed authority in the instant case having similarly conveyed Form 3CL to the DGIT (E). The parallel drawn, and the basis of the argument is, on the face of it, flawed. This is as the documents stated as not supplied were found by the Hon'ble Court as not primary documents, stating that, therefore, in it's view, the same were not required to be supplied. The latter part of the para, on which Sh. Markos would emphasize, the Hon'ble Court goes ahead to state that even these, or that stated in the main, i.e., details of subscribers, were available with the AO, is thus rendered of little consequence. We may here clarify that our stating that no presumption arises as to the

transmission of F/3CL to the AO by DGIT(E), is in view of the obligation cast on the assessee u/s. 147, *which is to the AO*, and, two, to meet the assessee's reliance on the said procedure for drawing a contrary presumption.

We may though, if only for the sake of clarity, state the background facts of the case to appreciate both the arguments as well as our opinion thereon, better. NNPLC is a UK-based subsidiary of the assessee, an India company. NNPLC issued step-up bonds for US$ 100M in July, 2007, i.e., during the previous year relevant to AY 2008-09, through Bank of New York, which were to be redeemed at a premium of 7.5% after 5 years. They were however redeemed in advance at a discounted amount of US$ 74.2M in November, 2009. *This information was available with the AO*. However, in assessment (for AY 2008-09), he was of the view that as NNPLC *had no financial worth*, it could not issue convertible bonds unless the assessee, it's parent company, had furnished corporate guarantee to secure the interest of the subscribers. He, accordingly, inferred issue of guarantee by the assessee, and imputed a fees of 4.68% in its respect, assessing the same as the assessee's income on 03.08.2012, the same date on which he passed orders in the case of other group companies, viz., NDTV Lab Ltd. and NDTV Lifestyle Ltd. In the assessment proceedings for AY 2009-10, DRP found that the monies raised by the assessee's subsidiaries, including NNPLC, by the issue of bonds, were not genuine transactions, and represented the assessee's own monies. Reassessment proceedings were initiated for AY 2008-09 vide notice dated 31.03.2015. NNPLC being a non-functional company, nobody would invest therein and, further, get back only 74% of the capital invested. The money invested in NNPLC, which went into liquidation on 28.3.2011, finally came back in a circuitous manner to the assessee. The funds raised during the year were inferred as the assessee's money, proposing to add the same, at Rs.405.09 crores, as the assessee's income. This was contested by the assessee, who remained unsuccessful up to the stage of Hon'ble High Court, on three grounds:

(a) absence of reasons to believe;

(b) proper disclosure of all material facts;

(c) proper invocation of second *proviso* to section 147 of the Act.

The assessee was unsuccessful on ground (a), but succeeded on other two, of which the second (b) concerns us. The Hon'ble Court found enough material brought on record by the Revenue subsequent to assessment for the AO to form a reason to believe escapement of income from assessment, which is to be a *prima facie* opinion. On full and true disclosure, it, relying on it's Constitutional Bench decision in *Calcutta Discount Co. Ltd.* (supra), which it observed as seminal, holding the field and providing guidance, reproducing there-from (at para 32), held as under: -

'33. *In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer*. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee *had disclosed all primary facts* before the assessing officer, and it was not required to give any further assistance to the assessing officer *by disclosure of other facts*. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case, the assessing officer on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee. This the assessing officer could have done even at that stage *on the basis of the facts which he already knew*. The other facts relied upon by revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion that there is non-disclosure of true and material facts by the assessee." (emphasis, ours)

It went on to analyse those facts, opining that all the necessary facts were in the knowledge of the AO who, on the basis of the facts he already knew, viz. the details of the subscribers; the redemption in advance and at a discounted price; etc., if he wanted to, could have set up a case now being sought to. The AO had in fact accepted the genuineness of the transaction, and on that basis made an addition for guarantee fee. Reference in this context be also made to paras 28 to 30 of the decision.

It would be apparent to the reader that it is a clear case of change of opinion by the AO who could, on the basis of the material before him, invoke the charge of round tripping, i.e., as by the DRP. There was, however, no whisper of the transaction

being not genuine, and the money raised being the assessee's money, which came about only in view of the findings by the DRP for the subsequent year. The AO, on the contrary, regarding the same as genuine, considered it proper to, treating it on an arm's length basis, apply the extant guarantee fee rate thereon. In fact, up to the Hon'ble High Court, case of the Revenue, as observed by the Hon'ble Apex Court in the succeeding paras (paras 34 & 35), was with reference to the second *proviso* to section 147 of the Act; it rather having filed an affidavit before the said Court averring that it was not relying on non-disclosure. The reference to the documents (in para 31), which the Revenue contends for the first time as not supplied, was thus a *volte face* by it, who had been successful before the Hon'ble High Court on the basis of the second *proviso* to section 147 of the Act. Though not relevant for our purpose, we may yet state that the charge of improper disclosure did not find favour with the Hon'ble Apex Court inasmuch as there was no reference thereto either in the reasons recorded u/s.148(2) or in the notice u/s. 148(1) of the Act, i.e., what had been opined by the Hon'ble High Court earlier, and which was in fact not specifically challenged before the Apex Court. In the facts of the instant case, admittedly, both Forms 3CM and 3CL are primary documents. It is only the unavailability of Form 3CL at the time of furnishing the return that the assessee did not either restrict it's claim for deduction u/s.35(2AB) on its basis, or otherwise, meeting the same, made out a case *qua* the deduction claimed, stating the facts upfront. This is precisely what the assessee ought to have done on receipt of Form 3CL, which reflected a much lower deduction; the primary burden to prove it's returns and its claim for exemption/deduction being on the assessee (*Govindarajulu Mudaliar (A.) v. CIT* [1958] 34 ITR 807 (810)(SC); *H.E. Nizam Religious Endowment Trust v. CIT* [1966] 59 ITR 582 (SC); *CIT v. Joseph John* [1968] 67 ITR 74 (SC)).This is a clear case of non-disclosure by the assessee, whose conduct in, though aware, maintaining silence, could in fact be regarded as dishonest.

There is as such no correspondence between the facts of the two cases, only in the context of which the observations relied upon become relevant and can be appreciated. As afore-stated, for our purpose, what is relevant is the law as explained by the Hon'ble Apex Court by placing total reliance on *Calcutta Discount Co. Ltd*. (supra), coupled with it's observations (at paras 28 & 29) stating no material information had been, as a matter of fact, withheld by the assessee. The said decision would thus be of no assistance to the assessee.

In Sum

7. The assessee's case (for AY 2009-10) fails to pass muster in view of the clear law in the matter, and the simple, undisputed facts: the prime relevance of Form 3CL, even as highlighted by the Tribunal in assessee's own case for AY 2012-13, being in fact undisputed, particularly considering that the claim for deduction made was much higher than that on the basis of expenditure approved thus by the prescribed authority. It is this variance, and not F/3CL per *se*, that is the undisclosed primary, material fact. The plea of presumption of the said Form being in the knowledge of the AO is not supported by the rule, i.e., not available legally and, besides, falls flat on facts, i.e., in view of a complete absence of any enquiry or reference thereto in the original assessment and, therefore, a false plea by the assessee, who is obliged by law to disclose, fully and truly, all material facts necessary for assessment to the AO. Why, the knowledge of Form 3CL being at a variance with the assessee's claim with the AO, i.e., at the time of original assessment, may, *where so*, eschew reassessment proceedings even for AY 2011-12, rendering the same as a change of opinion. The two aspects are inter-related, with there being decisions, as in *Ganga Saran & Sons P. Ltd. v. ITO* [1981] 130 ITR 1 (SC), wherein the Hon'ble Apex Court found no failure on the part of the assessee to disclose material facts, holding, on that basis, the AO could not have a reason to believe that any part of income had escaped assessment.

The matter is to be examined from the stand-point of the obligation on the assessee to disclose all material facts necessary for assessment, fully and truly, i.e. as mandated by law, and which, a positive requirement, we have, giving our reasons, found as not discharged. We are supported in our view by the decisions cited here-in-above, as well as that relied upon by the parties before us. The matter, as for AY 2011-12, shall travel to the file of the ld. CIT(A) for adjudicating the quantum adjustments in assessment under appeal before him after hearing the parties per a speaking order.

We decide accordingly.

8. In the result, the Revenue's appeals as well as the Assessee's COs, are allowed.

Order pronounced on November 30, 2023 under Rule 34 of The Income Tax(Appellate Tribunal) Rules, 1963.

Sd/-	Sd/-
(Manomohan Das)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: November 30, 2023

DG/n.p.

Copy to:

11. The Appellant
12. The Respondent
13. The Pr. CIT concerned
14. The Sr. DR, ITAT, Cochin
15. Guard File

By Order

Assistant Registrar
ITAT, Cochin