* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 945/2007

REACH CABLE NETWORKS LTD. ..... Petitioner
Through
Mr. Soli J. Sorabjee, Sr. Adv.
with Mr. Ajay Bahl,
Mr. Sanjeev Puri &
Ms. Garima, Advs.

versus

DEPUTY DIRECTOR OF INCOME TAX ..... Respondent
Through
Mr. Sanjeev Sabharwal, Adv.

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE J.P. SINGH

ORDER

% **06.02.2007**

The Petitioner has challenged the Notice dated 3.3.2006 issued by the Revenue requiring the preparation of a true and correct Return of income of the Assessment Year 2000-01 to 2004-05. Subsequent thereto, Notice dated 4.9.2006 under Section 142(1) of the Income-Tax Act (IT Act) has also been issued. The prayer is that the entire action of the Revenue, being contrary to law, should be set-aside. The Petitioner had also approached this Court in WP(C) No.18110/2006 which was disposed of by Orders dated 12.12.2006 inter alia directing the Petitioner to fully participate in the assessment proceedings. At

that stage the Petitioner's grievance was that while dealing with its Objections, by Orders dated 13.10.2006, the Deputy Director of Income-Tax acting for the Revenue had observed that documents on which reliance was to be placed by the Department would, if found necessary, be disclosed to the Petitioner. This Court had relied on the following passage from *Dhakeswari Cotton Mills Ltd. -vs- Commissioner of Income Tax, West Bengal,* [1955] SCR 941:

> "In the result we allow this appeal, set aside the order of the Tribunal and remand the case to it with directions that in arriving at its estimate of gross profits and sales it should give full opportunity to the assessee to place any relevant material on the point that it has before the Tribunal, whether it is found in the books of account or elsewhere and it should also disclose to the assessee the material on which the Tribunal is going to found its estimate and then afford him full opportunity to meet the substance of any private inquiries made by the Income-tax Officer if it is intended to make the estimate on the foot of those enquiries. It will also be open to the department to place any evidence or material on the record to support the estimate made by the Income-Tax Officer or by the Tribunal in its judgment. The Tribunal if it thinks fit may remit the case to the Income-tax Officer for making a fresh assessment after taking such further evidence as is furnished by the assessee or by the department. The costs of these proceedings will

abide the result."

It is of significance that in the previous Writ Petition the Petitioner had not challenged the maintainability or legality of the proceedings under Sections 147/148 of the IT Act and the Department's resorting to Section 142(1) of the IT Act.

The Respondents had furnished a copy of the Ledger Account of Data Access(India) Ltd., Nehru Place, New Delhi which was the springboard for the issuance of the impugned Notices. In response to further communication addressed to it by the Petitioner the Respondents had recorded that they would not rely on any documents other than the said Ledger Account. This Ledger Account pertains to "Reach(ILD Creditor)". It also contains transactions pertaining to Reach Network Hongkong Ltd., Hutch Delhi(OSL-ILD Creditors), Reach (OSL-ILD Creditors), etc. In the course of arguments learned counsel for the Revenue has pointedly referred to the fact that contrary to the directions of this Court the Petitioner is not co-operating or participating in the assessment proceedings.

The main plank of the arguments addressed by Mr. Soli J. Sorabjee, learned Senior Counsel for the Petitioner, is that reliance on the said Ledger Account cannot possibly constitute 'reason to believe' as envisaged in Section 147 of the IT Act. Mr.

Sorabjee has extensively read the celebrated Judgment of the Hon'ble Supreme Court in ***Calcutta Discount*** *Co. Ltd. -vs- Income-Tax Officer, Companies District I, Calcutta,* AIR 1961 SC 372. The factual matrix before the Constitution Bench was the intended re-opening of assessment proceedings and the availability of sufficient material for doing so. Mr. Sorabjee emphasised that in order to confer jurisdiction under Sections 147/148 of the IT Act two conditions must be satisfied -"the first is that the Income-Tax Officer must have reasons to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such "under assessment" has occurred by reason of either (i)omission or failure on the part of an assessee to make a return of his income under S.22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year". Mr. Sorabjee thereafter drew our attention to the findings that Income-Tax Officer had not before him any non-disclosure of a material fact and so he could have no material before him for believing that there had been any material non-disclosure by reason of which an under-assessment had taken place. Our attention has also been drawn to the decision of the Division Bench of this Court in

United Electrical Co. P. Ltd. -vs- Commissioner of Income-Tax, [2002] 258 ITR 317. Here also Notice under Section 147 of the IT Act had been issued after four years and, therefore, the pre-requisite of the existence of reason to believe that income has escaped assessment had come into sharp focus. As in ***Calcutta Discount*** the Division Bench took into consideration the material before the Assessing Officer (AO) and thereafter concluded that it was not sufficient for initiation of proceedings under Section 147 of the IT Act. On the other hand Mr. Sabharwal, learned counsel for the Revenue, has placed reliance on ***Raymond*** *Woollen Mills Ltd. -vs- Income-Tax Officer,* [1999] 236 ITR 34, the entire Judgment of which reads as follows:-

> The challenge in this case is to the re-opening of the assessment of Raymond Woollen Mills Ltd. We have been shown the recorded reasons for re-opening under section 147(a). The case of the Revenue was that the assessee was charging to its profit and loss account, fiscal duties paid during the year as well as labour charges, power, fuel, wages, chemicals, etc. However, while valuing its closing stock, the elements of fiscal duty and the other direct manufacturing costs were not included. This resulted in undervaluation of inventories and understatement of profits. This information was obtained by the Revenue in a subsequent year's assessment proceeding.

Mr. Vellapally, learned senior counsel appearing on behalf of the appellant, has argued that the Department has made a grievous error in coming to this conclusion.

In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could re-open the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the re-opening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.

In our view, there is clearly discernible watershed between assessment proceedings and re-assessment proceedings. The Courts have always been alive to the possibilities of harassment of an assessee by Revenue officials. Where an assessment had been completed, the law after a change of opinion did not permit

its re-opening because of a change in opinion; the statute, therefore, enjoins the formation of 'reason to believe' that income has escaped assessment before steps under Section 147 can be initiated; Explanation 2(a) thereof leaves no manner of doubt that where a Return of Income has not been furnished by the Assessee [as is the case in hand] it shall be deemed to be a case where income chargeable to tax has escaped assessment.

As we have already observed above there is a watershed between assessment and re-assessment, both of which are covered by Section 147 of the IT Act. Where re-assessment has taken place the entire exercise is looked upon with great stringency, as well it should. The position is altogether different where an assessment is to take place for the first time. We cannot accept the contention of Mr. Sorabjee that the two situations should be equated with each other.

As has been observed above in ***Raymond*** the sufficiency or adequacy of the material on which the action under Section 147 has been predicated in the case of an assessment cannot be sifted through by the Court under its extraordinary jurisdiction under Article 226 of the Constitution of India. This is for the simple reason that no assessment has taken place and, therefore, no opinion or decision has yet been articulated. It would be wholly

inappropriate for the Writ Court to look into the Ledger Account of Data Access(India) Ltd. to see whether it justifies action under Section 147 of the IT Act. The Revenue must be free to arrive at a conclusion based on the material before it. If it comes to a conclusion which is adverse to the assessee it will always be open to it to lay seize to it by way of filing an appeal before the Commissioner of Income-Tax(Appeal) and thereafter to the Income-Tax Appellate Tribunal (ITAT) which will have the final say so far as questions of fact are concerned. In rare cases a writ petition may also be entertained at that stage. Mr. Sabharwal has stated that even though Reach Network Hongkong Ltd. is a separate legal entity the Ledger Account, prima facie, shows group transactions which need to be sufficiently explained to dispel the prima view that the Petitioner has transactions in India which would render it liable for payment of Income-Tax under the statute.

Under Article 226 of the Constitution of India we would be loathe to pre-judge the issue. This does not mean that we are of the view that a Writ Petition will not lie. It could be that there is no material available with the AO and he nevertheless proceeds under Section 147 of the IT Act. This is not the case before us. We are also not declining to exercise jurisdiction because of the

availability of alternate relief. Therefore, reference to the arguments of Mr. Sastri in ***Calcutta Discount*** is of no avail to the Petitioner.

It is trite to state that assessment proceedings are in the nature of administrative action which should not be lightly and readily interfered with or impeded by taking recourse to Article 226 of the Constitution of India. In the previous foray under Article 226 the Petitioner's complaint was that the documents/material on which action under Section 147 was predicated had not been disclosed. This is not the position that obtains today.

We find no reason or justification to exercise the powers contained under Article 226 of the Constitution of India.

Dismissed.

VIKRAMAJIT SEN, J

J.P. SINGH, J

FEBRUARY 06, 2007
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