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

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\+ W.P.(C) 7515/2010

RITU INVESTMENTS PRIVATE LIMITED ..... Petitioner
Through Mr. C.S. Aggarwal, Sr. Adv. with
Mr. Prakash Kumar, Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through Mrs. P.L. Bansal, Adv.

% Date of Decision : 22nd November, 2010

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

DIPAK MISRA, CJ

Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the assessee-petitioner has prayed for issue of writ of certiorari for quashment of the notice dated 31st March, 2010 issued under Section 148 of the Income Tax Act, 1961 (for brevity 'the Act') by the assessing officer and the order dated 18th October, 2010 passed by the said authority dealing with the objections filed by the assessee.

2. The facts, in brief, are that the assessee-petitioner is a private limited company and has been assessed to income tax from 1976-77. It is engaged in the business of investment and trading in securities, investments in real estate. For the assessment year 2005-06, the assessee company filed its return of income on 31st October, 2005 declaring an income of Rs.1,60,35,700/- as set forth along with computation of income, audited accounts, etc. before the assessing officer. The income in entirety, as pleaded, was fully disclosed before the assessing officer and the said officer passed the order of assessment on 12th December, 2007 under Section 143(3) of the Act. After the said order of assessment came to be passed, a notice was issued under Section 148(1). As stated earlier, objections were filed and eventually the same were disposed of by order dated 18th October, 2010.

3. Mr. C.S. Aggarwal, learned senior counsel along with Mr. Prakash Kumar, learned counsel for the petitioner raised the following contentions:-

(a) The assessing officer has dealt with the objections as if there was escapement of turnover but if the order of assessment and the order rejecting the objections are scrutinized appropriately, it would be clear that there has been change of opinion and, hence, initiation of proceeding under Section 147 and issuance of notice under Section 148 are vulnerable in law.

(b) The assessing officer has treated the income as business income but while issuing notice the assessing officer has stated that it will be adventure in the nature of trade vis-à-vis short term capital gain;

however there will be no change as both will come within the compartment of business income.

(c) The error of judgment cannot clothe the assessing officer with the jurisdiction to reopen the completed assessment.

4. Be it noted, the learned counsel for the assessee has commended us to certain decisions which we shall refer to at the appropriate place.

5. Mrs. P.L. Bansal, learned counsel for the revenue, supported the order passed by the assessing officer.

6. To appreciate the first issue whether there has been change of opinion, it is apposite to refer to the reasons recorded for initiating the proceeding. In the said order, the assessing officer has stated thus:-

> "*2. In the judgment of Hon'ble Apex court in the case of G. Venkataswami & co. Vs CIT (Supra), the following facts have to be taken into account while concluding the nature of transactions.*
>
> *a. Whether the purchaser was a trader and the purchase of the commodity and its resale were allied to his usual trade or business or were incidental to it.*
>
> *b. The nature and quantity of the commodity purchased and re-sold if the commodity purchased is in very large quantity, it could tend to eliminate the possibility of investment for personal use, possession or enjoyment.*
>
> *c. The repetition of the transaction.*
>
> *The Supreme Court in this case has also discussed the test of intention, it was held that in cases where the purchase was made exclusively with the intention of resale at a profit and the purchaser had no intention to hold the asset for himself or otherwise enjoy it or use it, the presence of such intention is a*

relevant factor and unless it is offset by the presence of other factors, it would raise a strong presumption that a transaction is an adventure in the nature of trade.

In view of the above facts, it is clear that the trading activity carried out by the assessee company by diversion from stock-in-trade was definitely an adventure in the nature of trade and would construe to be a business activity. I have reasons to believe that income of Rs.2,01,81,691/- has escaped assessment by virtue of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for assessment in this year in this case and the same is to be brought to tax under section 147/148 of the I.Tax Act."

7. After the objections were filed, the same were dealt with by the order dated 18th October, 2010 whereby the assessing officer referred to certain decisions and eventually came to hold as follows-

"4.2 Further, as per the explanation 1 to section 147 of the IT Act, 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 proviso to section 147 of the IT Act.

4.3 Thus, to summarize, in the present case, the Assessing Officer had rightly initiated the reassessment proceedings u/s 147 of the IT Act, after recording in detail the reasons to believe that income has escaped taxation and there is no change of opinion as contended by the assessee."

In the ultimate eventuate, the objections were rejected.

8. The first issue that emerges for consideration is whether there has been change of opinion or not. The assessing officer while passing the assessment order under Section 143(3) of the Act and while dealing with the income on account of transfer of equity shares of company from stock-in-trade to investments has held thus:-

"3. ***Income on account of transfer of equity shares of company from stock-in-trade to investments.***

As per point 8 of notes on accounts in schedule-12 of balance sheet and profit and loss account, the assessee has transferred 227400 equity shares, valued at Rs.24029595/-, of various companies from stock in trade into investments. It was also mentioned that the provisions of Sec.45(2) had been considered while calculating income tax provisions. In the course of assessment proceedings assessee was asked to furnish details of conversion of stock in trade to investments and to explain why income on accounts of above transfer be not taxed as business income, at the time of such transfer. Assessee has furnished a detail of stock converted into investment with its reply date 21.11.2007, which is ***annexed with this order as Annex-1.*** *As per the details submitted, the transfer made on 17.5.04/18.5.04 resulted in a profit, (being difference in the cost of shares transferred and its value at the market rate as on 17.05.04, of Rs.35,57,144/-. This amount is added to assessee's income for the following reasons:-*

i) The equity shares, which were held as stock-in-trade, have been transferred to investment and this has been recorded in the books of accounts in the shares sale ledger account as "To amount transferred from stock in trade to investment at the market value as on 17.5.2004". However, the actual transfer has been recorded at cost of shares and not at the market value. Since, the assessee has decided to transfer the equity shares, the sales should have been recorded at market price on the date of such transfer, as if the assessee has sold the shares as stock in trade and repurchased it as investment.

ii) Assessee has referred to Sec.45(2), in the notes to account. However, the said section refers to profits or gains arising from the transfer by way of conversion of a capital asset into stock-in-trade of a business. Here the case is vice-versa. As per the said section, the profits on such conversion, for the purpose of section 48 shall be chargeable to income tax, as the income of previous year in which such stock-in-trade is sold and the fair market value of the asset on the date of such conversion, shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset. This section is not applicable to a case of transfer by way of conversion from stock-in-trade to a capital asset.

Further, the assessee has transferred the stock-in-trade at cost and has not disclosed the profits even on sale of such equity shares made later during the year. For instance 20,000 shares of Avery India which were held as stock-in-trade as on 1.4.04 were converted into investments as on 17.5.04 at cost of Rs.696,000/-. The unit cost comes to Rs.34.8 and market rate on the date of conversion was Rs.35. On conversion, there was a profit of Rs.4000/-. Assessee has sold 5000 shares out of above, taking the unit cost at Rs.34.8/-, and has booked the entire profits as short term capital gain, attracting a lower rate of tax at the rate of 10%. The short term gain has been worked out as under:-

Date of purchase	*Name of script*	*No.*	*Cost*	*Date of Sale*	*Sale amount*	*Gain/loss*
18.5.04	*Avery India*	*5000*	*174000*	*12.2.05*	*247400*	*73400*

Similarly, in the case of 9 other equity shares, converted into investment from stock in trade on 17.5.04 and sold later during the year, the entire gain (i.e. gain on conversion and gains on appreciation) has been shown as capital gain. The gain arising on conversion/transfer from stock-in-trade to investment has not been shown during the year as business income. Thus, it is clear that assessee itself has not followed the provisions of Sec.45(2), as claimed, even though, such provision is not applicable to this case as mentioned above.

iii) In the absence of specific provision in the Act regarding taxing the gains from transfer of stock-in-trade to investment, the entire gains on the transfer/conversion is brought to tax in this year itself i.e. in A.Y. 2005-06. Accordingly, an addition of Rs.35,57,144/- is made to assessee's income from business. I am satisfied that assessee has filed inaccurate particulars of income and penalty proceedings u/s 271(1)(c) is initiated separately for the above said addition.

[Addition: Rs.35,57,144/-]"

9 On a perusal of the order for initiation of proceeding and the order passed at the stage of assessment, it is noticeable that the said issue was dealt with after due application of mind and a computation was made. Against the

aforesaid order, the assessee preferred an appeal before the CIT(A) and the CIT(A) vide order dated 27th August, 2008 decided the said issue in favour of the assessee. As is evident, an appeal was preferred by the revenue before the Income Tax Appellate Tribunal (for short 'the tribunal') which vide order dated 31st July, 2009 concurred with the view expressed by the first appellate authority and dismissed the appeal.

10. Though we have narrated these facts, yet the core issue that emanates for adjudication is whether there has been change of opinion while issuing notice under Section 148 (1) of the Act. On a perusal of the order of assessment, we find that the assessing officer initially dealt with the issue and expressed the view that the income on account of transfer of equity shares of company from stock-in-trade to investments is income but while reopening of the assessment, he has taken a view that it is an adventure in the nature of trade vis-à-vis short term capital gain.

11. In this context, we may refer with profit to the decision of the Full Bench of this Court in ***Commissioner of Income-Tax v. Kelvinator of India Ltd., [2002]* 256 *ITR 1 (Del) (FB)*** wherein the Full Bench has held thus:-

> *"The scope and effect of section 147 as substituted with effect from April 1, 1989, by the Direct Tax Laws (Amendment) Act, 1987, and subsequently amended by the Direct Tax Laws (Amendment) Act, 1989, with effect from April 1, 1989, as also of sections 148 to 152 have been elaborated in Circular No.549 dated October 31, 1989. A perusal of clause 7.2 of the said Circular makes it clear that the amendments had been carried out only with a view to allay fears that the omission of the expression "reason to believe" from section 147 would give*

arbitrary powers to the Assessing Officer to reopen past assessments on a mere change of opinion. It is, therefore, evident that even according to the Central Board of Direct Taxes a mere change of opinion cannot form the basis for reopening a completed assessment.

A statute conferring an arbitrary power may be held to be ultra vires Article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality should be favoured. In the event it is held that by reason of section 147 the Income-tax Officer may exercise his jurisdiction for initiating a proceeding for reassessment only upon a mere change of opinion, the same may be held to be unconstitutional.

An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act, 1872, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi judicial function to take benefit of its own wrong. Hence, it is clear that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion."

12. The said decision was challenged before the Apex Court in ***Commissioner of Income-Tax v. Kelvinator of India Ltd., [2010] 320 ITR 561 (SC)*** wherein their Lordships have ruled thus:-

"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under

above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief...."

13. From the aforesaid enunciation of law, it is quite vivid that change of opinion cannot clothe the assessing officer with the jurisdiction to initiate the proceeding under Section 147 of the Act.

14. It is also worth noting, an error of judgment also does not confer such a jurisdiction on the assessing officer. In this context, we may fruitfully refer to the decision in ***Gemini Leather Stores v. Income-Tax Officer, B-Ward, Agra and others, [1975] 100 ITR 1(SC)*** wherein it has been held that when

the Income-tax Officer had all the material facts before him when he had framed the original assessment, he could not take recourse to Section 147(a) to remedy the error resulting from his own oversight. Similar view was expressed in ***Indian and Eastern Newspaper Society v. Commissioner of Income-Tax, New Delhi*, *[1979] 119 ITR 996 (SC)***. In the said case, it has been held thus:-

> *"Now, in the case before us, the ITO had, when he made the original assessment, considered the provisions of ss. 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The revenue contends that it is open to him to do so, and on that basis to reopen the assessment under s. 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT [1976] 102 ITR 287 (SC), where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the ITO must fall within s.34(1)(b) of the Indian I.T. Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration on the same material (and no more) does not give him that power. That was the view taken by this court in Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC), CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) and Bankipur Club Ltd. v. CIT [1971] 82 ITR 831(SC) and we do not believe that the law has since taken a difference course. Any observations in Kalyanji Mavji & Co. v. CIT [1976] 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law."*

15. In view of the aforesaid analysis, the irresistible conclusion is that initiation of proceeding is in the realm of change of opinion and the same is not sustainable and, therefore, initiation of proceeding as well as reasons for

continuing with the said proceeding stands quashed.

16. Consequently, the writ petition is allowed without any order as to costs.

CHIEF JUSTICE

MANMOHAN, J

NOVEMBER 22, 2010
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