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

\+ W.P.(C) 8567/2011

ATSUSHI YOSHIDA ..... Petitioner
Through Mr. T. N. Chopra, Mr.Shivendra and Mr. Manish Kumar, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX.... Respondent
Through Mr. Sanjeev Rajpal, Adv.

\+ W.P.(C) 8568/2011

YASUNOBU FUKUDA ..... Petitioner
Through Mr. T. N. Chopra, Mr.Shivendra and Mr. Manish Kumar, Advs.

versus

ASSISTNAT COMMISSIONER OF INCOME TAX..... Respondent
Through Mr. Sanjeev Rajpal, Adv.

\+ W.P.(C) 8569/2011

SHUNZO NAGAHAMA ..... Petitioner
Through Mr. T. N. Chopra, Mr.Shivendra and Mr. Manish Kumar, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX..... Respondent
Through Mr. Sanjeev Rajpal, Adv.

\+ W.P.(C) 8570/2011

MAZAHIRO OGAWA ..... Petitioner
Through Mr. T. N. Chopra, Mr.Shivendra and Mr. Manish Kumar, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through Mr. Sanjeev Rajpal, Adv.

\+ W.P.(C) 8571/2011

TOSHIYUKI NAKAL ..... Petitioner
Through Mr. T. N. Chopra, Mr.Shivendra and Mr. Manish Kumar, Advs.

versus

ASSISTANT COMMISSIIONER OF INCOME TAX..... Respondent
Through Mr. Sanjeev Rajpal, Adv.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER

% 08.12.2011

The present five writ petitions raise identical issues and the facts are similar. These petitions are being disposed of by this common order.

2. The petitioners herein were/are employees of M/s Tokio Marine and Nichido Fire Inc. Limited. As per the terms of employment between the petitioners and the employer, they were paid tax free salary in India. The petitioners had filed returns of income for the Assessment Year 2008-09 enclosing therewith Form 16 issued by the employer. In the said original returns of income, the petitioners had, as per Form 16, grossed up and included the tax component as the

petitioners were drawing tax free salary in India, though the tax wa being paid by the employer. Subsequently, the petitioners filed revised returns enclosing therewith revised Form 16 issued by the employer, in which some part of grossing up towards non-monetary perquisites was deleted from the salary statement. Accordingly, the petitioners in the revised returns claimed refund of the tax, which had been deducted at source.

3. The Assessing Officer after receipt of the revised returns issued notice under Section 133(6) of the Act to the authorized signatory of the employer stating, inter alia, that their employees had claimed refund after filing revised returns for the assessment year 2008-09. The Assessing Officer called upon the employer to furnish the following information/details:-

> "1. Copy of agreement of employment with aforesaid employees.
> 2. Basis of tax computation including method of grossing up.
> 3. List of all employees on whose behalf tax was paid by employer with the respective assessment year.
> 4. Basis of issuing revised form 16 in the aforesaid cases."

4. The employer wrote a letter dated 25th October, 2010 and furnished some of the details, but copy of the agreement of employment, which was specifically asked for in the notice under Section 133(6) of the Act, was not furnished. Basis or ground for revision of Form No. 16 and exclusion of non-monetary perquisites

was not stated. After receiving the aforesaid reply, the Assessing Officer recorded reasons for issue of notice under Section 148 of the Act. The reasons recorded by the Assessing Officer in the W.P.(C) No. 8657/2011, ***Atushi Yoshida vs. Assistant Commissioner of Income Tax*** read as under:-

> "In the aforesaid case, the return of income was filed on 30/07/2008 declaring total income of Rs.14686283/-. The assessee filed a revised return on 25/3/2009, reducing the income and declaring the total income of Rs.11996028/- and asking for refund of Rs.914419/-. This revised return was filed on the basis of revised form-16 issued by the employer.
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> The assessee was an employee of M/s Tokio Marine & Nichido Fire Ins. Co. Ltd. As no proceedings were pending, after taking prior approval of CIT-XVI, New Delhi, a notice u/s 133(6) of Income Tax Act-1961 was issued to employer calling for information regarding the basis of issuing revised form-16 and filing revised return.
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> From the reply of the employer, it has been observed that the method of grossing up has been changed in the revised form-16, considering some amounts as non monetary perquisites. However no basis has been provided as to why these perquisites have been considered monetary in original form-16 and considered non monetary in revised form-16. No basis has also been provided for changing the nature of perquisites from monetary to non monetary.
>
> In view of the above, I have reasons to believe that the income of the assessee chargeable to tax for A.Y. 2008-09 has escaped assessment within the meaning of section 147 of the Income Tax Act 1961."

Similar reasons were recorded in other cases.

5. After notice under Section 148 of the Act was served upon the petitioners, a letter was written by the petitioners stating that the revised returns should be treated as returns filed pursuant to notice

issued under Section 148 of the Act. Copy of the reasons for issue c notice under Section 148 was supplied to the petitioners on 5th July, 2011. The petitioners, thereafter, objected to the legality of the notice under Section 148 by filing objections vide letter dated 8th July, 2011. By order dated 21st September, 2011, the Assessing Officer has rejected the objections filed by the petitioners to the issue of notice under Section 148.

6. Before this Court the petitioners have impugned the notice under Section 148 of the Act dated 6th April, 2011 and the order of rejection of the objections dated 21st September, 2011.

7. Learned counsel for the petitioners has raised two objections to the issue of notice under Section 148 of the Act. Firstly, it is stated that the Assessing Officer had failed to intimate and send the order passed under Section 143(1) to the petitioners-assessees, therefore, proceedings under Section 147/148 of the Act are bad. The petitioners rely upon the decision of this Court in ***Commissioner of Income Tax Vs. Ved and Company*** (2008) *302 ITR 328* (Del.). Secondly, he submits that the reasons for reopening do not justify and are not "reasons to believe". It is submitted that a similar issue has already been decided by the tribunal against the Revenue vide decision in ***RBF Rig Corporation Vs. ACIT*** (2008) *297 ITR (AT) 228 (Delhi) SB.*

8. Decision in the case of ***Ved and Company*** (supra) is dated 20 February, 2007. The aforesaid aspect was considered by the Supreme Court in the case of ***CIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd.*** *(2007) 291 ITR 500 (SC)* decided on 23rd May, 2007. In the said case the Supreme Court had examined the effect of Sections 143(1) and 147 of the Act including effect of Explanation 2(b). The legislative changes, which were made to Section 143(1) with effect from 1st June, 1999 were noticed. It was pointed out that under the first proviso to Section 143(1)(a), the Assessing Officer had a limited jurisdiction and mandate under the statute. The other aspect noticed by the Supreme Court was that intimation under Section 143(1) was without prejudice to Section 143(2). It was held by the Supreme Court:-

> "**13**. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989, and March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the

first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998, and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word "intimation" as substituted for "assessment" that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994 and May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions "intimation" and "assessment order" have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes "the computation of income", sometimes "the determination of the amount of tax payable" and sometimes "the whole procedure laid down in the Act for imposing liability upon the tax payer". In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time.

Under section 143(1)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the Departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J.) in Apogee International Limited v. Union of India [1996] 220 ITR 248 (Delhi). It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them ? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

(emphasis supplied)

9. Thereafter, the Supreme Court examined the amendments made to the Sections 147 and 148 of the Act and it was observed:-

"16. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If

the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd.* v. *ITO* [1991] 191 ITR 62, for initiation of action under Section 147(*a*) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction [see *ITO* v. *Selected Dalurband Coal Co. (P) Ltd.* [1996] 217 ITR 597 (SC); *Raymond Woollen Mills Ltd.* v. *ITO* [1999] 236 ITR 34(SC)].

17. The scope and effect of Section 147 as substituted with effect from 1-4-1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (*a*) and (*b*) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(*a*) two conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts

necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under Section 148 read with Section 147(*a*) but under the substituted Section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso.

18. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued."

10. In view of the authoritative pronouncement of the Supreme Court in the case of ***Rajesh Jhaveri*** (supra), we are of the opinion that in the present case the Assessing Officer has jurisdiction to invoke Section 147/148 of the Act. It is not disputed and doubted by the petitioners that the period of service of notice under Section 143(2) of the Act after filing of the original/revised returns has expired. Regular assessment proceedings under Section 143(3) cannot be initiated and the question considered. The only option available to Assessing Officer is to issue notice under Section 148 of the Act. The Assessing Officer could not have taken recourse to any other provision.

11. As per the case of the petitioners, original returns filed by them

were processed under Section 143(1) of the Act, but the Assessin Officer had failed to communicate the said decision to the petitioners-assessees. Failure to communicate the said processing is something separate and cannot be equate with pendency of the assessment proceedings under Section 143(3) of the Act. Once the order under Section 143(1) of the Act was passed, and no notice under Section 143(2) has been issued, the Assessing Officer can issue notice under Section 147/148, if the pre-conditions are satisfied.

11. The contention of the petitioners is self contradictory. It has stated that intimation under section 143 (1)(d) has not been communicated and no order under section 143 (3) has been passed and therefore proceedings are pending. At the same time, it is submitted that no order under section 143 (3) can be passed, as limitation period for service of the notice under Section 143(2) has expired. Communication of information under section 143 (1) (d) and failure to do so, is one aspect, but it does not follow as a sequitor that assessment proceeding are pending. If assessment proceeding are pending there is no need to issue re-assessment notice, as it is open to the Assessing Officer to pass a regular assessment order without taking recourse under section 147/148 of the Act.

12. Regarding the second contention, it may be noticed that the issue

with regard to the grossing up and conversion of non-monetary int monetary perquisites and the decision of the tribunal in ***RBF Rig Corporation*** *(supra)* is pending consideration before the High Court as the Revenue has not accepted the said decision and an appeal has been preferred. This factum has been noticed by the Assessing Officer in the order dated 21st September, 2011.

13. At the stage of initiation only a prima facie or tentative opinion is to be formed. A firm conclusion is reached when the Assessing Officer passes the Assessment Order. As noted above, in the present case, the re-assessment will be the first regular assessment.

14. In view of the above, we do not find any merit in the present writ petitions and the same are accordingly dismissed without any order as to costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

DECEMBER 08, 2011
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