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

\+ **W.P.(C) No.8631/2007**

Reserved on: 7th February, 2012

% *Date of Decision: 7th March, 2012*

NORTHERN EXIM (P) LTD. .....Petitioner

Through: Mr. N. K. Kaul, Sr. Adv. with Mr. Akshay Ringe, Adv.

Versus

THE DEPUTY COMMISSIONER OF INCOME TAX & ANR. ....Respondents

Through: Ms. Rashmi Chopra, Sr. Standing Counsel.

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

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

R.V. EASWAR, J.:

The short question raised in this writ petition filed by M/s. Northern Exim (P) Ltd. is whether the assessment for the assessment year 1997-98 has been validly reopened under Section 148 of the

Income Tax Act, 1961 ('Act', for short) despite the fact that the petitioner's disclosure of income for the said assessment year under the Voluntary Disclosure of Income Scheme, 1997 (hereinafter referred to as 'VDIS' or 'scheme') was accepted by the Revenue.

2. The petitioner is a private limited company. Pursuant to the VDIS announced by the Finance Act, 1997, it filed declaration of income under the said scheme disclosing its income for the assessment years 1989-90 to 1997-98. In respect of the assessment year 1997-98, with which we are concerned in the present writ petition, the taxable income was declared by the petitioner at Rs.7,23,490/-. In accordance with the provisions of the VDIS, the petitioner also paid the tax at the rates prescribed by the scheme on 31.12.1997. The Commissioner of Income Tax, Delhi-III issued a certificate under Section 68(2) of the VDIS on 13.01.1998 and in this certificate mentioned the fact, *inter alia*, that for the assessment year 1997-98 a sum of Rs.7,23,490/- has been declared as business income under the VDIS. The CIT further certified that the income declared under the VDIS for the assessment years 1989-90 to 1997-98 aggregated to Rs.12,29,320/- on which tax of Rs.4,30,264/- had been paid as per the provisions of VDIS.

3. On 14.12.2000 the Deputy Commissioner of Income Tax who is the respondent No.1, issued notice to the petitioner under Section 148 of the Act calling upon the petitioner to file its return of income for the assessment year 1997-98 on the ground that income chargeable to tax for that year has escaped assessment. In response to the said notice, the petitioner submitted a letter dated 27.12.2000 to the first respondent stating that it had availed of the VDIS and declared income for the assessment year 1997-98 under the same and that a certificate has also been issued by the CIT and under these circumstances, since it has already been assessed under the VDIS, there is no scope for further assessment. A copy of the certificate issued by the CIT was enclosed to the letter written to the first respondent. On 16.01.2001 the first respondent called upon the petitioner to submit its return of income and also informed the petitioner that if no return is filed, the re-assessment would be completed ex-parte. The petitioner responded by a letter dated 01.02.2001 in which it again reiterated the contents of its earlier letter dated 27.12.2000 and also submitted that since it had availed of the VDIS it was not required to file its income tax return again.

4. It would appear that the petitioner thereafter filed a writ petition in W. P. (C) No.240/2001 (Tax) before the Allahabad High Court seeking issue of a writ of certiorari to quash the notice dated

14.12.2000 issued by the respondent No.1 under Section 148 of the Act and also prayed for a direction to the respondent No.2 (respondent No.1 in the Writ Petition before us) not to proceed with the re-assessment proceedings. On 16.02.2001 a Division Bench of the Allahabad High Court passed an order staying all further proceedings pursuant to the notices dated 14.12.2000 and 16.01.2001. It appears that in the year 2005 the respondents filed their counter affidavit before the Allahabad High Court to the writ petition on the ground of lack of territorial jurisdiction and accepting the plea the Allahabad High Court dismissed the petitioner's writ petition by order dated 19.10.2007. Thereafter the petitioner filed the present writ petition before this Court. The prayer in the present writ petition is that the notice issued under Section 148 of the Act and the show-cause notice issued on 16.01.2001 be quashed as being without jurisdiction and that in the meantime directions be issued to the respondents not to proceed with the re-assessment proceedings pursuant to the notice/ show-cause notice.

5. The main contentions advanced on behalf of the petitioner are as follows: -

(a) The petitioner having availed of VDIS for a number of years including the assessment year 1997-98 and the

declarations under the VDIS having been accepted and a certificate under Section 68(2) of the VDIS also having been issued to the petitioner, there was a bar on re-opening the assessment for the assessment order 1997-98.

(b) There was no bar on the petitioner filing a declaration under the VDIS for the assessment year 1997-98 and this was permitted by the Circular No.753 dated 10.06.1997 issued by the Central Board of Direct Taxes (CBDT). In answer to question No.45 of the frequently asked questions (FAQ) the CBDT has replied that the benefit of VDIS can be availed of even in respect of the assessment year 1997-98, if no return had been filed within the time allowed under Section 139(1) of the Act.

(c) The income which is sought to be assessed pursuant to the notice issued under Section 148 of the Act for assessment year 1997-98 has already suffered tax under the VDIS. The relevant balance sheet as on 31.03.1997 has been filed to establish the aforesaid claim and a Division Bench of this Court on 03.08.2009 has directed the respondent No.1 to make a statement as to whether

he is satisfied with the explanation or still wants the proceedings to continue.

(d) The profit and loss account for the year ended 31.03.1997 disclosed a profit of Rs.42,79,340/-. The consultancy income derived by the petitioner for the said year was Rs.71,11,695/-. After claiming deduction permissible under Section 80-O the taxable profit came to Rs.7,23,490/- which has already been disclosed in the VDIS for the assessment year 1997-98. The action of the first respondent in issuing notice under Section 148 amounts to assessment of the same income again which is not permissible.

(e) According to Section 72 of the VDIS, all particulars contained in the declaration shall be treated as confidential and the notice issued by the first respondent under Section 148 of the Act is in blatant contravention of the secrecy provisions.

(f) According to Section 68 of the VDIS the amount of voluntarily disclosed income shall not be included in the total income of the declarent for any assessment year under the Act subject to fulfillment of the conditions and

there is no violation of any of these conditions stated in the Section. Therefore, the notice issued under Section 148 of the Act is without jurisdiction.

6. The contention of the learned Standing Counsel on behalf of the Income Tax Department is that in the rejoinder affidavit the petitioner itself has accepted that no details were filed in the declaration made under the VDIS and therefore the notice under Section 148 of the Act was well within jurisdiction. It was next contended that the reasons recorded for re-opening the assessment show that on a perusal of the return filed by the petitioner for the assessment year 1998-99 it was observed that in the previous year the petitioner had shown a taxable profit of Rs.42,79,340/-, but no return was found to have been filed by the petitioner for the assessment year 1997-98 and it was for this reason that notice under Section 148 of the Act was issued on the ground that income chargeable to tax for the assessment year 1997-98 had escaped assessment. It was contended that the reasons recorded *prima facie* established the nexus between the material before the Assessing Officer and the belief regarding escapement of income. It was thus contended that the notice for re-assessment was within jurisdiction.

7. The learned Standing Counsel filed copies of the reasons recorded on 13.12.2000 for re-opening the assessment and also copies of the proceedings sheet from 22.01.2001 to 05.02.2001 and drew our attention to the entry of 22.01.2001. On this date it has been recorded by the first respondent that the authorised representative of the petitioner has been asked to show cause why difference in the profit before tax and the amount declared in the VDIS should not be treated as income for the assessment year 1997-98 as no return has been filed.

8. The VDIS was formulated by the Finance Act, 1997. Sections 60 to 77 of the said Finance Act contained the relevant provisions of the scheme. The scheme was to remain in force till 31.12.1997. The object of the VDIS, as per the memorandum explaining its provisions, were *inter alia*, to mobilise resources and channelise funds into priority sector of the economy and to "offer an opportunity to persons who evaded tax in the past, to declare their undisclosed income, pay reasonable tax and in future adopt the path of rectitude and civic responsibility". The scheme covered all persons, corporate and non-corporate. The tax payable on the disclosed income was fixed at 30% in case of individuals, at 35% in the case of firms and corporates. A declarant under the VDIS had to pay the tax before making the declaration and attach proof of

payment thereof along with declaration. Provision was also made for payment of the tax within three months of filing of the declaration subject to payment of interest at 2% for each month. If no tax was paid on the basis of declaration within three months of filing the same, it will be deemed to be void. Once a valid declaration is filed, the CIT was empowered to grant a certificate to the declarant setting forth the particulars of the voluntarily disclosed income and the tax paid thereon. Section 68 of the Finance Act, 1997 permitted the declarant to credit the voluntarily disclosed income in his books of account maintained by him for any source of income or in any other record. The credit so made had to be intimated to the Assessing Officer. The voluntarily disclosed income was not to be included in the total income of the declarant for the purpose of assessment for any year under the Income Tax Act if the intimation of the crediting in the books of accounts is made to the Assessing Officer and the tax on the declaration is also paid in time. Section 72 protected the declarant by ensuring secrecy of the declaration except in very limited circumstances. It was further provided by Section 71 that the particulars contained in the declaration shall not be admissible in evidence against the declarant for the purpose of any proceedings relating to imposition of penalty or for the purposes of prosecution under various Acts, including Income Tax Act, 1961; Wealth Tax,

1957; FERA, 1973 and Companies Act, 1956. However, immunity shall not extend to offences under laws such as Indian Penal Code, Prevention of Corruption Act, Narcotic Drugs and Psychotropic Substances Act, etc. The scheme also provided that a person in whose case search action has been taken under Section 132 of the Income Tax Act, 1961 or where his books of accounts or other assets have been requisitioned under Section 132A of the said Act will not be entitled to take advantage of the VDIS. This broadly is the gist of the scheme.

9. The contention put forth on behalf of the petitioner to the effect that once a declaration is made under the VDIS for a particular year, the provisions of Section 147/ 148 of the Act cannot be invoked is too far-fetched for acceptance. We do not find any provision in the VDIS excluding the above provisions of the Act where escapement of income is detected nor is there anything in Section 147 providing that it cannot be invoked in respect of an assessment year for which the assessee has availed of the benefits under the VDIS. It appears to us that the validity of the action taken under Section 147 in respect of an assessee for an assessment year for which a declaration under the VDIS had been made must be examined by reference to the provisions of the said section alone.

10. While examining the validity of the action taken under Section 147 by issue of notice under Section 148, we have to be guided only by the reasons recorded for re-opening the assessment under sub-section (2) of Section 148. These reasons are as under: -

"*OFFICE OF THE*
DPUTY COMMISSIONER OF INCOME TAX
CIRCULE 26(1), 4TH FLOOR, C. R. BUILDING,
I. P. ESTATE, NEW DELHI 110002

Name of The Assessee	*:*	*Northern Exim Pvt. Ltd.* *7A, Sagar Apartment* *6, Tilak Marg, New Delhi*
Assessment Year	*:*	*1997-98*

Reasons Recorded for Reopening the Case U/s 148

On perusal of return for A.Y. 1998-99, it was observed that the assessee, in the previous year figures, has shown a taxable profit of Rs.42,79,340 for the A.Y. 1997-98. However on examination of records, it was found that the assessee has not filed its return for A.Y. 1997-98.

Keeping the above facts in view, I have reason to believe that Income has escaped assessment. The assessment for A.Y. 1997-98 is thus hereby reopened U/s 148 of the I.T. Act.

(Vivek Batra)
Deputy Commissioner of Income Tax"

11. It is true that the petitioner has shown profit before tax Rs.42,79,340/- for the year ended 31.03.1997, relevant for the assessment year 1997-98, in its profit and loss account. It is also true that this figure was culled by the Assessing Officer while examining the return filed by the petitioner for the assessment year 1998-99. While pursuing the return for the assessment year 1998-99, the Assessing Officer had occasion to examine the profit and loss account of the petitioner for the year ended 31.03.1998. This profit and loss account also contained the corresponding figures of income and expenses for the year ended 31.03.1997. The Assessing Officer, therefore, noticed the figure of profit shown in the profit and loss account for the year ended 31.03.1997 and on seeing that the same was Rs.42,79,340/- and finding that the return of income for the assessment year 1997-98 had not been filed by the petitioner, proceeded to record reasons and issued notice under Section 148 of the Act on the ground that the income chargeable to tax had escaped assessment. The petitioner, having filed a declaration under VDIS for the assessment year 1997-98, was under no obligation to file the return of income in the normal course for that assessment year under Section 139(1) of the Act. It has been clarified by the circular No.753 dated 10.06.1997 issued by the CBDT as follows: -

"*In accordance with the provisions of section 64 of the Finance Act, 1997, a person may make a disclosure in respect of any income chargeable to tax under the Act, for any assessment year –*

(a) for which he has failed to furnish a return under section 139 of the 1961, Act;

(b) which he has failed to disclose in a return of income furnished by him before the date of commencement of the scheme, i.e., 1st July, 1997;

(c) which has escaped assessment.

A person may, therefore, make a disclosure of income for any assessment year including assessment year 1997-98, provided he has either not furnished his return of income or has failed to disclose the income for which the declaration is being made."

12. The said position was again confirmed by the CBDT in its meeting with ASSOCHAM on 23.07.1997 as per question No.4 and answer thereto as recorded in the minutes of the said meeting.

13. In the light of this position it cannot be said there was any escapement of income because of the fact that the assessee did not file any return of income for the assessment year 1997-98 in the regular course under Section 139(1) of the Act.

14. The learned Standing Counsel for the Income Tax Department drew our attention to the entry made on 22.01.2001 in the

proceedings sheet recorded in the course of the re-assessment proceedings. We have already seen that the said entry records that the authorised representative of the petitioner was asked to show cause why the difference in the amount of profit before tax and the amount declared under the VDIS cannot be treated as its income for the assessment year 1997-98 as no return of income had been filed. The entry made in the proceeding sheet is perhaps more elaborate and informative than the reasons recorded under Section 148(2) in the sense that it also states one more reason for initiating re-assessment proceedings, namely, that there is a difference between the profit before tax (Rs.42,79,340/-) and the amount declared in the VDIS (Rs.7,23,490/-). The reasons recorded however are not so explicit and do not refer to this fact. We are to be guided only by the reasons recorded for re-assessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of re-assessment. [This legal position is well settled and if any authority is needed, reference may be made to the following judgments: -

(i) ***Jamna Lal Kobra v. ITO,*** (1968) 69 ITR 461 (Allahabad);

(ii) ***Commissioner of Income Tax v. Agarwalla Brothers***, (1991) 189 ITR 786 (Patna);

(iii) ***G. M. Rajgharia v. ITO***, (1975) 98 ITR 486;

(iv) **Asa *John Devinathan and Another v. Addl. Commissioner of Income-Tax,*** (1980) 126 ITR 270 (Mad.);

(v) ***East Coast Commercial Co. Ltd. v. ITO***, (1981) 128 ITR 326 (Cal.);

(vi) ***Equitable Investment Co. (P.) Ltd. v. Income-Tax Officer, G. Ward, and Ors.***, (1988) 174 ITR 714 (Cal.);

(vii) ***S. Sreeramachandra Murthy and Anr. V. Deputy Commissioner of Income-Tax and Anr.***, (2000) 243 ITR 427 (A.P.).

The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/ or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law.

15. In the affidavit the petitioner has averred in paragraph 5 that for the assessment year 1997-98 the entire taxable income shown and

declared under the VDIS was Rs.7,23,490/- "after permissible deductions under the Income Tax Act". In the schedule 10 to the financial accounts for the year ended 31.03.1997 which is titled "Notes of Accounts" the assessee appended Note No.4 which reads as follows: -

> "*4. The entire income from consultancy remitted in foreign currency have been received within 6 months in the following year entitling the Co. to avail of the tax benefit under 80-O under Chapter VI of Income Tax Act.*"

16. The implication of this Note is that the petitioner was entitled to the deduction under Section 80-O of the Act in respect of its consultancy income of Rs.71,11,695/- which has been declared in its profit and loss account for the year ended 31.03.1997. Section 80-O as it stood at the relevant time enabled an assessee who was in receipt of any income from a foreign enterprise in consideration for the use outside India of information concerning industrial, commercial or scientific knowledge, experience or skilled or as consideration for technical or professional services rendered outside India, to claim deduction of 50% of such income which was brought into India in convertible foreign exchange within a period of 6 months. Apparently the assessee deducted 50% of Rs.71,11,695/-

which comes to Rs.35,55,848/- as deduction under Section 80-O. If this figure is reduced from the profit figure of Rs.42,79,340/-, the balance comes to Rs.7,23,492/-. It was on this basis that the petitioner declared income of Rs.7,23,490/- for the assessment year 1997-98 under the VDIS. This explains the difference between the figure of Rs.42,79,340/- and Rs.7,23,490/-. Thus there has been no escapement of income. We have merely gone by the figures shown by the accounts and the Notes made in the schedule 10 and we have not examined the entitlement of the assessee to the deduction under Section 80-O.

17. From the record made available to us by the learned Standing Counsel for the Income Tax Department in the course of the hearing we found that the petitioner, in the return of income filed for the assessment year 1998-99 had stated that the return of income for the assessment year 1997-98 was filed under VDIS. For this reason also, the Assessing Officer could not have had reason to believe that income chargeable to tax had escaped assessment for the assessment year 1997-98, because of any failure to file the return.

18. For the above reasons we hold that no income chargeable to tax had escaped assessment for the assessment year 1997-98. The reasons recorded for issue of notice under Section 148 are factually

incorrect. They cannot, therefore, form the basis for the belief that there was escapement of income. The notice is accordingly quashed as also the proceedings taken consequent thereto. The writ petition is allowed with no order as to costs.

(R.V. EASWAR)
JUDGE

(SANJIV KHANNA)
JUDGE

MARCH 07, 2012
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