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

DECIDED ON: 06.09.2012

+ WP (C) 8990/2011 & CM APPL.20252/2011

MARUTI SUZUKI INDIA LTD. & ANR. Petitioners

Through: Mr. Ajay Vohra with
Ms. Kavita Jha, Mr. Somnath Shukla
and Mr. Aashish Gupta, Advocates.

versus

THE ADDITIONAL COMMISSIONER OF INCOME
TAX AND ANR. Respondents

Through: Mr. N.P. Sahni, Sr. Standing
Counsel.

CORAM:

MR. JUSTICE S. RAVINDRA BHAT

MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

% Facts of the Case:

1. Petitioner No. 1 (herein referred to as 'Petitioner') is a company engaged, inter alia, in the business of manufacture, purchase and sale of automobiles. Petitioner No. 2 is the Director of the said company.



2. For the relevant assessment year (2005-06), return of income was filed on 31.10.2005 declaring a total income of Rs. 1346,51,71,140/-. During the relevant A.Y., the Petitioner company had debited an expenditure of Rs. 1986 million to its profit and loss account on account of royalty. In the course of original assessment proceedings under section 143(3) of the Income Tax Act, Respondent No. 1 conducted enquiries with respect to royalty payment and petitioner was called upon, by order dated 14.11.2008 to explain the claim of deduction of royalty paid as revenue expenditure. The Petitioner explained its claim justifying deduction of expenditure on account of royalty as revenue expenditure along with copy of the licence agreements, through replies dated 1.12.2008 and 11.12.2008. The AO, in the original assessment, made an addition of Rs. 99.30 crores out of the royalty payment of Rs. 198.58 crores in view of the findings of the Transfer Pricing Officer that the royalty payment was not at arm's length. This addition was not put into effect since this Court had made an order dated 19.09.2008, in W.P. (C) No. 6876/2008 (filed by the Petitioner), directing the Transfer Pricing Officer to determine the arm's length within 3 months. Aggrieved by that order, the Petitioner filed a Special Leave to Appeal being SLP (C) No. 8457/2010. The Supreme Court directed the Transfer Pricing Officer to proceed in the matter uninfluenced by the Order of the High Court.



3. Pursuant to the order of the Supreme Court, the first respondent revised the assessment order and recomputed the income amounting to Rs. 16,34,18,35,039 after making an addition of Rs. 942,580,296 on account of royalty paid to Suzuki Motors Corporation, Japan, for the brand name and Rs. 1,541,200,00 on account of AMP. Royalty payment was partly allowed by Respondent No.1 and an order was passed under section 143(3) and 144C of the Act. Thereafter, a notice under section 148 of the Act was received by the Petitioner requiring it to file return of income in the form prescribed for the cause that the Respondent had 'reason to believe' that income had escaped assessment within the meaning of section 147 of the Act. By letter dated 13.12.2010, the Petitioner submitted that the original returns of income filed on 31.10.2005 subject to variations in the taxable income on account of final outcome of appeals against the assessment order may be considered to be the return filed in response to the notice under section 148. The second respondent furnished a copy of the reasons recorded for initiating reassessment proceedings u/s 147. On receipt of the reasons recorded, the Petitioner filed objections to validity of jurisdiction assumed by the Respondent under section 147 read with section 148 of the Act. These objections were dismissed by the second respondent by order dated 30.11.2011.

4. The primary contention of the Petitioner is that the second Respondent dismissed the objections filed by him regarding assumption of jurisdiction by the Respondent without giving an



opportunity to be heard. It was held by the Supreme Court in *G.K.N. Driveshafts (India) Ltd v. ITO & Ors.* 259 ITR 19, that the tax authorities should give, to the assessee, an opportunity to be heard in respect of notices under Section 148, and any order in contravention of the principle of natural justice is to be set aside. It was further held that the Assessing Officer is bound to dispose of the assessee's objection relating to the validity of the notice under section 148 of the Act, if filed, by passing a speaking order, before proceeding with the assessment. The assessee contends that the respondents did not even consider the objections filed in this regard, while disposing of the same. The Petitioner also relied on the judgment in *Kamlesh Sharma v. B.L. Meena*, ITO 287 ITR 337 in which a similar issue was involved. In that case, the reassessment was completed without a speaking order in respect of the objections. The Court held that:

"3. We are of the opinion that in view of the language of the Supreme Court in GKN Drvishafts, the AO should have rejected the objections, if he thought it appropriate to do so before passing the final order and not simultaneously

This position was reiterated by this Court in Sita World Travels (India)Ltd. v. CIT and Anr. (2005)193 CTR (Del) 84 : (2005) 274 ITR 186 (Del)"

The judgment of the Bombay High Court, to the same effect in *Allana Cold Storage Ltd. v. ITP* 287 ITR 1 was relied on, especially the following extract:

"We have noted the submissions of both counsel. The lae as laid down by the apex court is binding on this court as well



as on the authorities functioning under the statute. This being the position, we fail to understand as to why the first Respondent did not decide the objections separately which he is duty bound to decide. The whole idea in laying down the law in the aboveresferred judgment of the apex court is to give an opportunity to the assessee to know as to what is the decision on his objections, which decision has to be arrived at after giving an opportunity to the assessee. In the present case, the assessee has been denied this opportunity. Not only that but in the first three writ petitions what we find is the common order has been passed on the objections as well as the reassessment proceedings. In the fourth matter, the assessment order does not disclose any such decision.

Having noted this scenario, in our view the proper course will be to interfere with the assessment orders passed in all four matters by the concerned officer. We are aware that when an alternative remedy is resorted to, the writ jurisdiction is not to be exercised, but that is a rule of self limitation. The orders challenged in the present matter are clearly against the law laid down by the apex court and, being so, we allow these petitions and quash and set aside orders of assessment passed in the four petitions. In as much as the assessment orders are set aside, the appeals filed by the Petitioners no longer require to be prosecuted. The same will stand disposed of."

5. Thus, it has been argued by the Petitioner that the plea regarding jurisdiction made in the objections was dismissed without disposing of that objection and without according an opportunity to the Petitioner to be heard which is contrary to the principles of natural justice.

6. The second contention of the Petitioner is that the reassessment proceedings were initiated after the expiry of 4 years from the end of the relevant assessment year, and that there is no failure on the



part of the assessee, whatsoever, to disclose fully and truly all material facts necessary for assessment, the bar in proviso to Section 147 of the Act would apply. Section 147 reads as follows:

" 147. 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 that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]"

7. The Petitioner contended that there is no mention, leave aside any allegation, of the failure on its part to disclose income during the relevant Assessment year, in the reasons recorded for



reassessment. Reference is made in this regard to the decision of the Gujarat High Court in the case of *Kaira District Cooperative Milk Producers Union Ltd. v. ACIT* (1995): 216 ITR 317, where it was held that where the Assessing officer had failed to record his belief that the income chargeable to tax had escaped assessment on account of the assessee's failure to disclose truly and fully all material facts necessary for the assessment, a notice issued under section 148 beyond a period if issued after four years was wholly without jurisdiction and cannot be sustained. In this regard, reliance was placed on the decision in *Fenner India Ltd. v. DCIT* (Mad): 241 ITR 672, where the Madras High Court observed that:

"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclosed the material facts necessary for the assessment.

Whenever a notice is issued by the Assessing officer beyond a period of four years from the end of the relevant assessment year., such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the Assessing Officer to record that nay one or all the circumstances referred to in the proviso existed before the issue for notice under section 147.



After an assessment has been made, in the normal circumstances, there would be no reason for anyone to doubt that the assessment has been made on the basis of all relevant facts. If the assessing officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice."

8. The Petitioner has also relied on the judgments in *CIT v Hindustan Lever Ltd.* 268 ITR 332 and *Dulichand Singhania v. ACIT* 269 ITR 182. In both the decisions, it was held that, when the Assessing officer has not stated anywhere in the reasons recorded that the escapement of income was due to the failure of the assessee to furnish truly and fully all material facts, he shall have no jurisdiction to conduct reassessment after the expiry of 4 years from the end of the relevant assessment year. The decision in *Wel Intertrade (P) Ltd. v. ITO* 308 ITR 22, of this Court, was relied on.

9. It was contended that the duty of the assessee is only to disclose the primary facts and nothing beyond that. It is the duty of the Assessing Officer to determine the facts provided by the assessee and reach a conclusion. This position has been time and again reiterated by the Supreme Court in catena of judgments including *Calcutta Discount Co. Ltd. v. ITO and Anr* (1961) 41 ITR 191(SC), *ITO v. Lakhmani Mewal Das* 1976 CTR (SC) 220, *GIT v. Bhanji Lavji* (1971) 79 ITR 582(SC), *Parashmam Pottery*



Works Ltd v. CIT 1977 CTR (SC) 32. It has been stated that once the assessee has disclosed all the primary facts that is the end of his duty. It is then for the assessing authority to draw the proper conclusions from these facts. If the conclusions drawn by the AO from the primary facts disclosed, by the assessee are erroneous, the assessing authority cannot reopen the assessment merely on the basis of the change of opinion.

10. The assessee's next contention is that the reassessment proceedings have been initiated merely on the basis of change of opinion. No new material has come before the Assessing Officer subsequent to the original assessment and thus, does not warrant reassessment under section 147 read with section 148 of the Act. In support reliance was placed on the judgment in *CIT v. Purolator India* in ITA No. 489/2011 where, dismissing the appeal of the Revenue this Court held that:

"10. In the present case, there is no indication that the assessee had failed or omitted to disclose the material or primary facts. These were available on record. The assessing officer, it is stated, had failed to draw correct legal inferences at the time of original assessment from the said primary facts. This is not an error or omission on the part of the Respondent-assessee. It is not alleged that the assessee has suppressed, misrepresented or falsified the record/facts. It is not alleged that there was any subsequent factual information on the basis of which it was found that the assessee had not fully disclosed the primary facts or had falsified or disclosed incorrect primary facts."

11. The Petitioner has stressed, relying on the judgment of *Oriental Carpet Mfrs. (India) Ltd. v. ITO*: (1978) 168 ITR 296 (P&H), that



"material facts" mentioned the proviso to Section 147 of the Act refer only to the primary facts disclosed by the assessee showing sale, purchase and profit supported by the account books. As such, in the absence of any case of suppression, misrepresentation or falsification of documents, it cannot be said that the provisions of section 147 of the Act are attracted. The Petitioner argued that due to the absence of specific charge in the reasons recorded for reassessment regarding failure of the assessee to disclose fully and truly all material facts necessary for assessment, the notice for reassessment issued under section 148 of the Act, after the expiry of 4 years from the end of relevant assessment year is barred by limitation and consequently the impugned order is beyond jurisdiction, bad in law and void *ab initio*.

12. The Respondents contended that they have followed due process while ordering for reassessment under Section 147 read with Section 148 of the Act. Relying on the judgment of *G.K.N. Driveshafts (India) Ltd.* (Supra), it was argued by the revenue that they have duly intimated the Petitioner about the reopening of assessment for the relevant year, to which, as per process of law, the Petitioner has filed objections. Furthermore, the Respondents have passed the reassessment order after due consideration of the objections filed by the Petitioner.

13. The revenue contends that *G.K.N. Driveshafts* nowhere states that the objections cannot be disposed simultaneously with the passing of the reassessment order. In the instant case, the Assessing



officer, by way of speaking order duly considered the objections filed by the Assessee and has disposed of the same at the time of framing the reassessment order. The Revenue argued that the present petition is not justified. A writ Petition can only be entertained, when there is no alternative remedy available. Reliance has been placed on the judgment of *Jagdish Preshad Gupta v. Jt. CIT* (2006) 283 ITR 583 (Delhi) where this Court has where an assessment order has been processed after considering the objections, it was held that a writ proceeding would not lie, since the assessee has alternative remedy of pursuing appeal before the Commissioner of Income Tax (Appeals).

14. The revenue further argues that the Assessing Officer for the detailed reasons mentioned in the reassessment order was of the view that the entire claim of royalty and cess paid on running royalty aggregating to Rs. 196.998 crores ought to be disallowed as the same is capital expenditure. The Petitioner has failed to appreciate that a bare perusal of the relevant provisions of the Income Tax Act clearly shows that the Assessing Officer has wide power to assess or reassess the income of the assessee, if it has reasons to believe that income has escaped assessment. In the instant case also, the Assessing Officer has given detailed reasons that allow him to open assessment proceedings as per section 147(c) of the Act. Reliance is placed on the judgment of the Supreme Court in *ITO v. Sarabhai M. Lakhani*, (2000) 243 ITR 1 that if any income that has escaped assessment can be reassessed



even after the expiry of 4 years if the escaped income is inferable with reference to any fresh information. Thus, the Respondent is of the view that even if the income has not escaped income due to the fault of the Assessee, any fresh information in this regard renders reassessment under section 147 read with section 148 of the Act, good in law. Further, reliance has been placed on the judgment of *Syal Leasing Ltd. v. Asst. CIT* (2004) 266 ITR 639 (P&H), wherein it was held that where the business loss was not acceptable at face value in a subsequent assessment, the information from such assessment may be treated as information for the purpose of issue of notice u/s 148 of the Act. The respondents argue that in this case, their move to re-open the assessment is justified, and the “reasons to believe” legally tenable, on account of the re-assessment notice being issued further to the audit objections issued. Reliance is placed on *ACIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.* (2007) 291 ITR 500 (SC) to sustain this argument.

15. In this case, the “reasons to believe” forming the basis of the notice under Section 148, to the extent it is relevant, read as follows:

“Section 37 of the Income Tax Act, 1961, provides that any expenditure not being expenditure of capital nature or personal expenses of the assessee laid out or expended wholly and exclusively for the purpose of business is allowable as deduction in computation of income chargeable to tax under the head ‘Profits and gains of business or profession.

The assessment of M/s. Maruti Suzuki India Ltd. for the assessment year 2005-06 was completed under Section 143(3) of the Income



Tax Act, in December 2008 determining Rs.154852.08 lacs as taxable income. **But from the verification of the case records, it was found that the assessee claimed running royalty of Rs.198.60 crores, which was paid to Suzuki Motor Corporation (SMC) on various vehicle models. In the assessment order of A.Y. 2006-07, the claim of entire royalty expense was disallowed after examining the issue from various factual as well as legal prospective.** In this year, this claim of royalty expenses of Rs.198,58,54,557/- has been claimed by the assessee as under:

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Apart from the same, the assessee had also incurred expenditure of Rs.745.83 lacs towards cess on running royalty. Though in the transfer pricing order, the TPO has advised to make an upward adjustment of Rs.99.30 crores (being half of the Rs.198.585 crores) and the matter is sub-judice (i.e. before High Court and Hon'ble Supreme Court and as per their directions before, TPO for fresh adjudication). However, in A.Y. 2006-07, the claim of entire royalty expense was disallowed after examining the issue from various factual as well as legal perspectives, which are different from transfer pricing adjustments. **In that year the Assessing Officer upheld that the royalty paid on percentage basis (royalty other than paid on lump sum basis which was already disallowed by the assessee) is of capital nature. Therefore, in this year also the entire claim of Rs.196.998 crores (189.54 crores + 7.458 crores) was required to be disallowed as the same is of capital nature and not of revenue nature as claimed by the assessee.** Therefore, the income to the extent of Rs.196.998 crores has escaped assessment.

In the light of above facts, I, therefore, have reason to believe that the income of Rs.196.998 crores has escaped assessment within the meaning of Section 147 of the IT Act, 1961 due to omission on the part of the assessee to include this sum into its income for the relevant previous year. (emphasis supplied)''

.....



16. It is evident from a facial reading of the notice itself, that the claim for deduction on account of royalty paid was the specific matter of investigation by the AO for the concerned assessment year. It was also the subject matter of the transfer pricing exercise undertaken by the TPO. In the assessment, which was made under Section 143 (3) the claim was granted. However the royalty amount was adjusted partially, and was loaded to the ALP determined by the TPO. The matter travelled to this court, and later, the Supreme Court directed a fresh transfer pricing exercise. In this background, for the succeeding assessment year (2006-07) the royalty claim was disallowed. On these facts, there appears to have been an adverse comment in the Audit report in relation to the royalty amount for the assessment year which is the subject matter of the present case. That triggered the notice under Section 148, the legality of which is questioned in this petition.

17. The jurisdictional precondition to invoke the power under proviso to Section 148 is that the AO must have reasons to believe, on the basis of materials, (implying thereby some material not existing on record) which point to illegality or withholding of information, or presentation of inaccurate particulars, by the assessee. In the present case, the “reasons to believe” are a mere recital of events, including the previous order of assessment, which permitted the deduction, the order of the TPO, the assessment order of the subsequent year which made disallowance for royalty. The notice does not anywhere indicate what was the new material



which came to light, that threw into focus the fact that the assessee's behavior in not disclosing material particulars, attracted the provision under Section 148. The order of the AO contains an insight into the fact that there was an inquiry into the royalty claim; in fact the assessee has placed on record a letter written to the AO, containing replies to the queries in respect of the royalty deduction claim, dated 1-12-2008. It was after considering these materials, that the AO granted the allowance in the first instance.

18. Long ago, in [Indian and Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi](#) reported in (1979) 119 ITR 996 the Supreme Court considered the if a Section 148 notice could be based on an audit report. The Court rejected the revenue's contention that the audit report could constitute material or information as to income escaping assessment, and held that:

“In every case, the Income Tax officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax officer. Now, in the case before us, the Income Tax officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion of material already considered by him.”



It is therefore, held that the impugned notice, to the extent it was based on the report and opinion of the audit report, is indefensible.

19. As far as the question whether in the present case, the notice can be sustained as a valid one is concerned, the decision of the Supreme Court in *CIT v. Kelvinator of India Ltd.*, reported in (2010) 2 SCC723 = (2010) 320 ITR 561 held that the Assessing Officer can re-open an assessment under Section 147 of the Act, only if there is 'tangible material' to show that income has escaped assessment. The Assessing Officer shall not be allowed to arbitrarily re-open assessment. In the facts of the present case, neither the notice recites, nor does the order of reassessment (which deals with the objections of the petitioner) indicate what were the materials, which led the AO to form the opinion that the assessee's suppression of income or facts, led to escape of income. The mere fact that a transfer pricing order had led to a partially adverse order, or that in the subsequent year, the amount claimed was disallowed, does not constitute a valid basis for issuance of the notice. On the contrary, the materials on record disclose a detailed inquiry into the nature and character of the royalty, which had been dealt with by the AO in the first instance.

20. In view of the above discussion, it is held that the writ petition has to succeed. Consequently, the impugned notice, and all consequent orders, (including the reassessment order), are held to be without jurisdiction. The impugned notice and the said orders



are hereby quashed. The writ petition is therefore, allowed.
However, there shall not be any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

SEPTEMBER 06, 2012