$~

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

Date of decision: 31st July, 2013

\+ **W.P.(C) 7974/2012**

SELECT VACATIONS PVT LTD ..... Petitioner
Through Mr. Ajay Vohra and Ms. Kavita Jha, Advocates.

versus

INCOME TAX OFFICER AND ANR ..... Respondent
Through Mr. N.P. Sahni, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJIV KHANNA, J. (ORAL)

1. The petitioner has impugned the re-assessment notice dated 29th March, 2012 issued under Section 148 of the Income Tax Act, 1961 (Act, for short). The notice relates to the assessment year 2006-07.

2. The reasons recorded by the Assessing Officer for issue of notice as postulated and required by Section 147 read with Section 151 of the Act read as under:-

> "The assessment of M/s Select Vacations Pvt. Ltd. for the assessment year 2006-07 was completed after scrutiny in December 2008 determining a loss of Rs.44,28,400/-. Audit scrutiny revealed that the assessee has shown total income of Rs.52,36,040/- whereas as per TDS certificates assessee's total income is Rs.1,11,65,657/-. In view of above the mistake

resulted in underassessment of income of Rs. 59,29,617/- involving tax effect of Rs.19,95,909/-.

The escapement of income has been on account of failure on the part of the assessee to truly and fully disclose all the material facts necessary for assessment. Thus it is a fit case for initiation of proceedings u/s 148 of I.T. Act, 1961.

Therefore, I have reason to believe that the income of Rs.59,29,617/- has escaped assessment within the meaning of Section 147 of the I.T. Act, 1961. In view of the above, as per provisions of section 151, it is requested to kindly accord approval for issuance of notice u/s 148 for AY 2006-07."

3. The petitioner after receipt of the reasons to believe had filed written objections to the initiation of the re-assessment proceedings in terms of the decision of the Supreme Court in ***GKN Driveshafts India Ltd. vs. ITO,*** (2003) 259 ITR 19 (SC). The said objections have been disposed of by the impugned order dated 14th November, 2012 recording:-

> "The only objection to the reopening as narrated by you is that the assessment has been re-opened on the basis of mere change of opinion. In this regard it is stated that the assessment has been reopened on the basis of reasons to believe that the income as calculated as per the TDS certificates is much more than the returned income. It is therefore, not a change of opinion, but a strong ground to investigate as to why income as per TDS certificates has not been shown. As per the record this aspect was not checked at the time of assessment done in the case, therefore, on the basis of strong ground, the cases was reopened after taking prior approval of the concerned Commissioner of Income Tax as per the provisions of section 151.
> Reasons to believe can emanate from facts already

> on record. It the AO has issued notice u/s 154 & dropped it, still the proceedings u/s 147 can be initiated. This view has been upheld by the courts. WTO vs Aditya Narula (ITAT, Cal) 68 ITD 61 and Rama Boiled Modern Rice Mill Vs. ITO (ITAT, Hyd) 97 ITD 379."
>
> (emphasis supplied)

4. The contention of the petitioner before us is three-fold:-

(i) The reasons to believe do not show any nexus with escapement of income and ignores the method of accounting followed by the petitioner assessee year after year, which has been accepted and not adversely commented upon in the reasons to believe.

(ii) It is a case of change of opinion as the entire receipts or incomings on which TDS was deducted, was examined during the course of the assessment proceedings. Reliance is placed upon letter dated 24th October, 2008, by which the assessee had furnished details of TDS certificates, bills raised by the petitioner and other details including invoices, credit taken to different accounts, etc.

(iii) The assessee had made full and true disclosure of material facts. Explanation (1) is not applicable and nothing was to be inferred or deduced. Material facts as disclosed were clear and no decoding or decrypting was required. Nothing had to be inferred or gathered from the said facts.

5. Senior Standing Counsel appearing for the Revenue submits that the Assessing Officer had not examined the difference between the

TDS certificates and the income or receipts declared by the assesse TDS was deducted on amount of Rs. 1,11,65,657/-, whereas the receipt of income as declared was Rs. 52,36,040/-. No explanation was called from the assessee to ascertain and know the reason/cause for the difference. The assessee had failed to disclose income or receipt of Rs.59,29,617/-.

6. The petitioner is engaged in the business of tours and travels. It specialises in arranging tours, hotel bookings for individuals and groups for travel within and outside India. It also handles incentives, meetings and conferences. In the objections filed, the petitioner had submitted that the income on tours was accounted after netting off directed expenses relating thereto. In other words, the income taken to the profit and loss account was not the gross receipts but gross receipts minus direct costs paid/transferred to third parties. The income declared consists of margin earned on services relating to tour arrangements i.e. after reducing from the billing, direct costs incurred like hotel, transport, guides etc. These costs were directly matched with the revenue earned and balance being the margin earned, was transferred to "income from tours accounts". This exercise was undertaken at the time of original assessment.

7. For the assessment year 2006-07, the petitioner had filed its return of income on 29th November, 2006 declaring loss of

Rs.44,50,039/-. The return was taken up for scrutiny and vi assessment order dated 5th February, 2008, the loss was computed at Rs. 44,28,400/-.

8. During the course of the assessment proceedings, queries were raised by the Assessing Officer on the method of accounting adopted by the petitioner. This is apparent from the reply given by the petitioner vide letter dated 24th October, 2008, wherein in response to query number 6, the petitioner had furnished the following details:-

> "The certificates include certificates for TDS deducted by clients while making payment of bills raised by assessee company and certificate for TDS deducted by ticketing agents (suppliers) from whom the assessee company purchased tickets for its clients taking tours from the assessee company. Since the ticketing agents parts with the commission he earns, he deducts TDS on the commission passed on to the assessee. He adds the amount of TDS on the bill that he raises on the assessee company.
> The assessee company is engaged in the business of providing tours for its clients. A separate tour account is opened for each tour and the scheme of accounting entries is as follows:
>
> 1. When invoice is raised on the client
> Debit: Client A/c (with the amount of invoice)
> Credit: Tour A/c (with the amount of invoice)
>
> 2. When client makes payment after deducting TDS
> Debit: Banck A/c (with amount received)
> Debit: TDS (TDS deducted by client)
> Credit: Client A/c (with the amount of invoice)
>
> 3. When bill are received from suppliers like Hotels, Ticketing agents from whom services are

taken for the client
Debit: Tour A/c (with the net cost of ticket)
Debit: TDS (With TDS deducted on commission part by the supplier and added to the bills)
Credit: Ticketing Agent (with the amount payable to the supplier i.e. net cost of the ticket plus TDS)

4. After completion of the tour and after bills from all suppliers are received and debited to the Tour A/c, the balance in the tour a/c represents the profit earned on the particular tour. The accounting entry for the recognizing the profit on tour is as under:
Debit: Tour A/c (with the balance remaining in the tour a/c after all expenses for the tour have been accounted for)
Credit: Income from Tour services.
Hence, it is not the amount of billing which is shown as income but the profit earned on the tours after deducting all direct costs. This is the standard accounting policy followed by all the tour companies."

(emphasis supplied)

Thus, the system and method of accounting was explained. Reference was made to the TDS certificates received and they were collated with the "income" disclosed.

9. A bare perusal of the said letter would indicate that the method of accounting adopted by the petitioner was that the direct costs were deducted from the billings and this was the standard method of accounting adopted by the petitioner and other tour operators. Thus, the Assessing Officer in the first or original round of assessment was fully conscious and aware of the method of accounting followed by the petitioner. This method of accounting has been accepted by Delhi

High Court in ***CIT Vs. International Travel House Ltd.*** (2010) 3 ITR 554 (Del).

10. The reasons to believe recorded above clearly do not reflect any application of mind on the accounting practice adopted by the petitioner being a tour operator. It is obvious that the assessing officer ignored and was oblivious to said factum. If he had noticed the said position, the reasons to believe would not have recorded that there was difference in the payment/receipt mentioned in the TDS certificates and the amount of income disclosed by the assessee. We notice that audit objection or query was raised and the Assessing Officer in response to the said audit objection had informed that he had fully examined the said aspect i.e. difference in the value on which TDS was deducted and the income declared during the course of assessment proceedings and had stated there was no loss of revenue. The said letter has been enclosed at page 25 of the rejoinder.

11. Reassessment provisions are wide, but are not plenary. They are circumscribed and controlled by pre-conditions and must satisfy the prescribed statutory requirements. This is the reason why it is mandatory for the Assessing Officer to record "reasons to believe" in writing and state why and on what account or reason income chargeable to tax has escaped assessment. Sufficiency of reasons is not a matter which can be gone into by the court, but very

existence of belief is a subject matter which can be examined a scrutinized by the Court. Reassessment notice can be quashed if the "belief" is not bona fide or is based on vague, irrelevant and non-specific information. There should be a link and nexus between the reasons and the evidence/material available with the Assessing Officer for initiation of re-assessment proceedings. It should not be a mere pretence. The expression "reason to believe" means cause or justification of the Assessing Officer to believe that income has escaped assessment and does not mean that the Assessing Officer should have finally ascertained the said fact by legal evidence or reached a final conclusion, as this is determined and decided in the assessment order which is the final stage before the Assessing Officer. {see ***Signature Hotels P. Ltd. Vs. Income-Tax Officer and Another***, [2011] 338 ITR 51 (Delhi), which refers to ***ITO versus Lakhmani Mewal Das***, [1976] 103 ITR 437 (SC), ***Ganga Saran and Sons Private Limited versus Income-Tax Officer-I***, [1981] 130 ITR 1 (SC) and ***Phool Chand Bajrang Lal and Another versus Income-Tax Officer and Another***, [1993] (203) ITR 456 (SC) and ***Income-Tax Officer, New Delhi, and Another versus Dwarka Dass and Brothers***, [1981] 131 ITR 571 (Del)}.

12. Recently we had quashed reassessment notice issued in the case of ***Le Passage to India Tours & Travels (P) Ltd. Vs. ACIT***, W.P

(C) 8685/2010 decided on 9th March, 2011 recording as under:-

> "13. The ground and reasoning for reopening quoted above relate to the very basic nature and character of the accounting method adopted by the petitioner. The petitioner has adopted a system of netting as their billing was inclusive of "direct costs" incurred which were paid to third parties. It is impossible to perceive and accept the contention of the Standing Counsel for the Revenue that the Assessing Officer during the course of the original assessment proceedings would have not reflected and considered the method of accounting adopted by the petitioner. This is not possible as the Assessing Officer at the very first instance was required to examine the said aspect. The method of accounting adopted by the petitioner was set out in clear terms and explained by the petitioner in their letter dated 31st October, 2008, which has been quoted above. The petitioner has stated that they have always and continue to follow the said method of accounting. This is not a case where explanation 1 to Section 147 is applicable. The question relates to the WPC 8685/2010 Page 12 of 13 very method and manner of accounting, which will be apparent and clear to any person when scrutiny of the return and accounts is undertaken. The reopening is, therefore, bad for want of jurisdictional pre-condition under Section 147 of the Act. It is a case of change of opinion and the ratio in the case of Kelvinator (supra) is applicable."

13. Here it will be appropriate to reproduce the observations of the Supreme Court in ***Commissioner of Income Tax vs. Kelvinator of India Ltd.*** (2010) 2 SCC 723:-

> "5. 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 the 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 1-4-1989), 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-1-4-1989, 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.

6. 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.

7. 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 1-4-1989, the 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. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words

> "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer."

14. Looking at the aforesaid facts, the petitioner is entitled to succeed in the present case on all three counts. Firstly, there is failure on the part of the Assessing Officer to examine the original assessment record and ascertain the method of accounting adopted by the assessee and whether the quantum of receipts disclosed was correct as per the method of accounting and the amount reflected in the TDS certificates was examined by the Assessing Officer in the original assessment proceedings; secondly, it is a case of change of opinion because the method of accounting adopted by the assessee and the TDS certificates were examined by the first Assessing Officer; and thirdly the assessee had made full and true disclosure at the time of original proceedings about the method of accounting adopted by him and the quantum of receipts disclosed. The writ petition is accordingly allowed and the impugned notice dated 29th March, 2012 and the reassessment proceedings initiated thereby are quashed. If any assessment order has been passed, the same will be treated as null and void.

Dasti.

SANJIV KHANNA, J.

JULY 31, 2013/NA **SANJEEV SACHDEVA, J.**