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

Date of decision: 16.04.2014

\+ W.P.(C) 7550/2012

LE PASSAGE TO INDIA TOURS & TRAVELS PVT LTD

..... Petitioner

Through Mr Ajay Vohra and Ms Kavita Jha, Advs.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX

..... Respondent

Through Mr Sanjeev Sabharwal, sr. standing counsel with Mr Ruchir Bhatia, Adv.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

S. RAVINDRA BHAT, J.: (OPEN COURT)

CM 19191/2012

Exemption is allowed subject to all just exceptions.

The application is disposed of.

W.P.(C) 7550/2012 & CM 19190/2012

1. The petitioner, an income tax assessee challenges a notice dated 4.7.2011 issued by the respondent/revenue (hereinafter referred to as "revenue") in exercise of its powers under section 147 and 148 of the Income Tax Act seeking to reopen the assessment for the assessment year 2006-07.

2. The assessee is in the tourism and travel business. By the impugned reassessment notice, the AO was of the opinion that based upon the materials on the record, certain expenses incurred abroad were not disclosed. He therefore sought to use the reassessment proceedings to verify the expenses and thereafter frame a re-assessment. The material portion of the reassessment notice dated 4.7.2011 to the extent it is relevant is extracted below.

> "*1. Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of Rs.8,55,51,563/- as against the returned income of Rs.8,55,11,040/-. Further, the case was reopened u/s 147 and assessment u/s 147/143(3) was completed at Rs.1,22,84,55,005/-. Scrutiny of income tax assessment records revealed that as per the submissions of the assessee during the course of re-assessment proceedings the assessee had earnings of Rs.1,31,10,67,825/- and the assessee offered income from services in P& L A/c at Rs.21,03,01,532/-. Accordingly,*

being not satisfied with the submissions of the assessee the Assessing officer made a disallowance of Rs.114,29,03,442/- the assessee filed writ petition against the said order before the Hon'ble High Court and the Hon'ble High Court quest the assessment order passed by the Assessing Officer and also has held that the reasons for reopening have to stand on their legs and cannot be substantiate for reasons and grounds which are not mentioned therein. The Hon'ble Court further commented that we will only state that this order does not and will not operate as a bar or prohibition. It is opened to the Assessing Officer to record reasons and re-open assessment for the A.Y.2006-07 in accordance with law. In view of the above, the following reasons recorded to re-open the assessment for A.Y.2006-07. The assessee at the time of re-assessment proceedings only submitted that the income has been offered on the basis of netting. All the expenses booked outside India were excluded from the gross receipts. The assessee never offered details of the expenses where and to whom payments were made outside India. In the absence of any evidence on records, it is necessary to re-open the assessment for verification of expenses incurred outside India amounting to Rs.114,29,03,442/-. For the verification of genuineness of the expenses, it is extremely necessary to initiate proceedings u/s 148 in the instant case.

2. In view of the above, I have reasons to believe that the income of Rs.114,29,03,442/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income Tax Act, 1961."

The petitioner had approached this Court earlier by filing writ petition 8685/2010 in respect of the earlier reassessment notice for the same assessment year, dated 17.2.2010. In that instance, the AO after considering the notes to accounts filed during the original assessment proceedings, prima facie felt that the assessee had earned Rs.129 crores in foreign currency on approval basis from sale and service but disclosed only Rs.21.03 lakhs in the profit and loss account under the head "services". The Court in those writ proceedings was of the opinion that since all the materials were on the record, on an appropriate application of the Supreme Court's ruling in ***CIT V. Kelvinator of India Ltd.*** (2010) 2 SCC 723, the earlier reassessment notice was not justified. The court accordingly quashed the reassessment notice. At the same time the Court observed that the order would not operate as a bar or prohibition and fresh reasons for the reopening assessment for 2006-07 may be recorded in accordance with law.

3. It is submitted that the present impugned reassessment notice dated 4.7.2011 is on the same lines which led the Court to quash the previous one. It is urged that there is no fresh or tangible material to trigger a

legally justified reassessment proceedings in the circumstances of this case. In the previous instance the AO was of the opinion that income to the tune of Rs.121 crore had not been offered though what was shown in P & L account was Rs. 129 crores. In the present case similarly the AO has expressed the opinion that reassessment proceedings are called for on the assumption that all expenses booked outside India were excluded from the gross receipts. The revenue has filed its counter affidavit urging that the impugned notice in this case does not call for interference and that since liberty was given in the previous order, the reopening of assessment was justified.

4. In Kelvinator of India Ltd. (supra) the Supreme Court stated that the expression "reasons to believe" cannot comprehend a mere change of opinion which would only amount to an impermissible review. The Court held that-

> *".....Therefore, post-1-4-1989, power to re-open 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 re-open assessments on the basis of*

> *"mere change of opinion" which cannot be per se reason to re-open.*
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> *6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place."*

5. In the present case the "reasons to believe" – extracted above – nowhere reveal as to what tangible material which the AO came to obtain to justify the reassessment notice. In the previous instance, the reassessment notice was based on the assumption that a much larger income had accrued to the assessee whereas only a fraction of its was offered in the P & L account. In the present case, a somewhat similar, if not identical, ground has been made out i.e. that of expenses incurred abroad have not been revealed. This was an aspect which was known to the AO at the time of the original assessment; the explanations by the assessee appear to have been taken into account. At the time when the first reassessment notice was issued a facet of this was taken into

consideration and in fact cited in the "reasons to believe". A virtual assertion of the same reasons in different words does not clothe the reassessment notice, in the opinion of the Court, with any more sanctity, nor does it take away the vice of lack of jurisdiction noticed in the order in WP 8685/2010. Moreover, an assessment cannot be reopened merely to verify the genuineness of the expenses as that would amount to an impermissible fishing or rowing enquiry without any tangible material to show escapement of income.

For the above reasons it is held that the impugned notice is not justified and beyond the authority of law. It is accordingly quashed and the writ petition is allowed.

S. RAVINDRA BHAT, J

R.V.EASWAR, J

APRIL 16, 2014
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