THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 30.07.2014

+ W.P.(C) 1349/2014 & CM APPL. 2821/2014

GREAT EASTERN ENERGY CORPORATION LTD. GURGAON ..... Petitioner

versus

DY. COMMISSIONER OF INCOME TAX, CIRCLE 12(1), AND ANR. ..... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Satyen Sethi with Mr Arta Trana Panda.
For the Respondents : Mr Balbir Singh, Sr Standing Counsel with Mr Arjun Harkauli, Jr Standing Counsel and Mr Abhishek Singh Baghel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This petition has been filed by the petitioner impugning a notice dated 28.03.2013, issued under Section 148 of the Income Tax Act, 1961 (hereinafter mentioned as the 'Act') for reopening the assessment for the Assessment Year 2006-2007. The petitioner also challenges an order dated 10.02.2014 passed by the Deputy Commissioner of Income Tax rejecting the objections filed by the petitioner questioning the validity of the notice dated 28.03.2013.

2. The principal controversy to be considered in the present petition is whether the income of the petitioner (also referred to as the "assessee")

for the Previous Year 2005-2006, relevant to the Assessment Year 2006-2007, had escaped assessment on account of failure on the part of the assessee to disclose, fully and truly, the material facts necessary for the assessment.

3. Briefly stated, the facts of the case are as under:

3.1 The petitioner company is engaged in the business of exploration and development of Coal Bed Methane Gas (CBM Gas) trapped in coal seams in Rani Ganj Coal Field in West Bengal. On 04.07.2005, Energy Ventures, L.L.C (hereinafter referred to as 'Energy Ventures'), a company incorporated under the laws of Delaware, USA, entered into a Memorandum of Understanding dated 04.07.2005 (MOU) with the petitioner company for acquiring upto 20% 'farm-in', i.e. participating interest, in the petitioner's contract area under the Production Sharing Contract with the Directorate General of Hydrocarbon, Ministry of Petroleum and Natural Gas, Government of India. As per the terms of the MOU, Energy Ventures had agreed to fund USD 25,000,000/- against approved work programme during the development phase. The petitioner company had received US$ 200,000/- (₹87,13,000/-) as non refundable advance from Energy Ventures, subject to the approval of Government of India. The said amount was forfeited by the petitioner on non-fulfillment of the terms and conditions of the MOU.

3.2 On 30.11.2006, the petitioner filed a return for the AY 2006-07, declaring a loss of ₹1,07,89,125/-. A non-refundable advance of ₹87,13,000/- received by the petitioner from Energy Ventures was

claimed as capital receipt towards extinguishment of a right in business and the same was not offered to tax under the Act. The case of the petitioner was selected for scrutiny and a notice under section 143(2) of the Act was sent on 18.10.2007. After scrutiny, the Assessing Officer (AO) passed an assessment order dated 23.12.2008 under Section 143(3) of the Act, whereby expenditure of ₹1,61,09,642/- pertaining to period prior to 14.01.2006 was disallowed. The AO also disallowed depreciation to the extent of ₹5,85,078/- and assessed the total income at ₹59,05,595/-. Aggrieved by the assessment order, the petitioner filed an appeal before the Commissioner of Income Tax (Appeals). By an order dated 02.05.2012, CIT(A) partly allowed the appeal and the disallowance of expenditure, to the extent of ₹1,51,11,880/- out of ₹1,61,09,642/-, and disallowance of depreciation was deleted.

3.3 Thereafter, a notice dated 28.03.2013 under Section 148 of the Act was issued to the petitioner for reopening the assessment for the AY 2006-2007 under Section 147 of the Act. The said notice is hereinafter referred to as the 'impugned notice'. The petitioner requested that the original return filed be treated as return pursuant to the impugned notice and further sought reasons as to why the AO believed that income of the petitioner had escaped assessment. On 02.12.2013, respondent no.1 furnished the reasons to believe that income chargeable to tax had escaped assessment.

3.4 Thereafter, on 24.01.2014, the petitioner objected to the assumption of jurisdiction to reassess the income for the AY 2006-07, by asserting

that there was no failure on the part of the petitioner to disclose, fully and truly, all material facts and that the reasons furnished by the AO indicated only a change of opinion, which did not justify reopening of the assessment. The objections of the petitioner were rejected by the Deputy Commissioner of Income Tax by an order dated 10.02.2014 (hereinafter referred to as the 'impugned order'), which is impugned in the present petition.

4. The controversy that has to be addressed in the present petition is whether the impugned notice, reopening of assessment, was in accordance with law. It is noted that whilst the assessment year in question is 2006-07 and the assessment order under Section 143(3) of the Act was passed on 23.12.2008, the impugned notice was dated 28.03.2013, after the expiry of four years from the end of the assessment year. In terms of the proviso to Section 147, no action could be taken after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose, fully and truly, all material facts necessary for the assessment. The proviso to Section 147 reads as under:-

> *"**147. Income escaping assessment.—***
>
> *xxxx xxxx xxxx xxxx xxxx*
>
> *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:"

5. The principal question, whether in the given facts, the condition that the assessee had failed to fully and truly disclose all material facts was met, can be best answered by referring to the reasons furnished by the AO for reopening the assessment. AO's letter dated 02.12.2013 discloses the following reasons for reopening the assessment:-

"Reasons for the belief that the income has escaped assessment in the case of M/s. Great Eastern Energy Corporation Ltd.

The assessment of above company for the assessment year 2006-07 was completed after scrutiny in November 2008 at an income of Rs.77,72,709/-. It is gathered that the assessee classified Software of Rs.9,22,148 under Computer and claimed depreciation at the rate of 60%. These assets are classifiable as intangible assets, subject to depreciation at the rate of 25%. This mistake resulted in incorrect allowance of depreciation and consequent under assessment of income to the extent of Rs.3,22,752/- having a tax effect of Rs.1,44,489/-.

It is also revealed that the assess received Rs.87,13,000 as nonrefundable advance from another company LLC (EV) and the same amount was credited to the profit and loss account, but during the computation the amount was deduction. This amount should have been disallowed by the assessing officer. The mistake resulted in underassessment of income of Rs.87,13,000/- involving tax effect of Rs.39,00,617/-.

It is further revealed that the assessee company is involved in exploration, development and exploration of petroleum (CBM). The company has entered into an agreement with Govt

of India under which the company is eligible for specified allowance while calculating profit and gains under section 42 of the Income tax Act, 1961 and for benefits available under section 80IA. It is gathered that in the profit and loss account there is no income accruing from sale of CBM. Neither is any stock of goods produced from normal operation. In the notes to the financial statements it has been stated that 'the company is in the exploration phase of CBM Gas operations. Wells under exploration will be converted to producing properties, when the well is ready to commence commercial production. Capital expenditure incurred for these wells will be allocated to Producing Properties'. It is clear that the company has neither started commercial production nor is ready to commence. But the company has charged Rs.4,81,29,174/- to the profit and loss account under the head of Administrative and General expenses. Out of Rs.4,81,29,174/- only Rs.1,61,09,642/- was disallowed by the Assessing Officer. The mistake resulted in underassessment of income of Rs.3,20,19,532/- involving tax effect of Rs.1,43,34,436/-.

The assessee company has deducted the amount of Rs.47,72,982/- in the computation of income under the head of depreciation. Since the assessee has not commenced its business, the depreciation charged should have been disallowed by the assessing officer. The mistake resulted in underassessment of income of Rs.47,72,982/-involving tax effect of Rs.21,36,756/-."

6. Thus, according to the AO, income is stated to have escaped assessment on four counts. The first being on account of depreciation claimed on computer software. In this respect, it is noted that the returns furnished by the assessee had been duly scrutinized by the AO. Undeniably, the amount of depreciation claimed by the assessee was examined by the AO. This is also apparent from the fact that the AO had disallowed depreciation to the extent of ₹5,85,078/-, which was claimed by the

assessee in respect of the building and warehouse. The AO has now alleged that the depreciation on computer software was to be allowed only to the extent of 25% instead of 60% as admitted earlier. Apart from the fact that the depreciation as claimed by the assessee had been examined during the assessment proceedings. The contention that the rate of depreciation allowable on computer software is 25% is also apparently erroneous. The depreciation on computer software is either to be charged at 60% or in certain cases, expenditure on computer software is treated as revenue expenditure. Be that as it may, it is apparent that the dispute raised with regard to rate of depreciation by the AO merely indicates a change of opinion and there has been no failure on the part of the assessee to disclose any material fact in this regard.

7. The second reason furnished by the AO is with respect to the sum of ₹87,13,000/- received as non-refundable advance from Energy Ventures. It has been pointed out by the assessee that a specific reference was made to this advance in schedule 11 to the audited accounts furnished by the assessee. The relevant extract from Schedule 11 reads as under:-

> *"The company had entered into a Memorandum of Understanding (MOU) with Energy Ventures, L.L.C (EV) on 4th Jul, 2005, a company incorporated under the laws of Delaware, USA for acquiring upto 20% 'farm-in' i.e. participating interest in the company's contract area under the Production Sharing Contract with Director General of Hydrocarbon Ministry of Petroleum and Natural Gas, Government of India. As per the terms of the MOU, EV had agreed to fund USD 25,000,000 against approved work programme for the development phase. The company had received USD 200,000 (INR 8,713,000) as non refundable*

advance from EV, subject to the approval of Government of India."

8. In addition, the assessee had also by its letter dated 16.05.2007 furnished clarifications with regard to the claim of deduction made by the assessee in respect of this sum received from Energy Ventures as non-refundable advance. Thus, indisputably, the petitioner had made full and complete disclosure with regard to the deduction claimed on account of the aforementioned sum.

9. The other two reasons given by the AO, justifying reopening of the assessment, pertain to allocation of expenses and depreciation relating to pre-production period. This issue was also, undeniably, considered by the AO as is evident from the fact that he disallowed a sum of ₹1,61,09,642/- on account of the expenses being relatable to a period prior to commencement of business activities.

10. As we see it, the AO has sought to reopen the assessment not on account of failure on the part of the assessee to disclose any material particulars, but on account of the change of opinion with regard to certain deductions claimed and allowed by the assessee. It is now well settled that assessment cannot be reopened on mere change of opinion. The Hon'ble Supreme Court in the case of ***CIT v. Kelvinator of India Limited*****: (2010) 320 ITR 561 (SC)** affirmed the decision of the full Bench of this Court that a mere change of opinion cannot form the basis for reopening of assessment.

11. Although the AO has recorded that he has reasons to believe that income chargeable to tax exceeding ₹ 1 lac. had escaped assessment, as the assessee had not disclosed, fully and truly, all material facts necessary for his assessment for the relevant assessment year, there is no allegation made in the reasons as furnished by the AO that there had been a failure on the part of the assessee to disclose, fully and truly, any particular fact that was necessary for the assessment. In view of the express language of the proviso to Section 147, reopening of the assessment after expiry of four years from the end of the assessment year is impermissible unless this pre-condition is met. This Court in the case of in the case of ***Wel Intertrade P. Ltd. & Anr. v. ITO***: **(2009) 308 ITR 22 (Del)** and ***Haryana Acrylic Manufacturing Company v. CIT & Anr.***: **(2009) 308 ITR 38 (Del)** had held that unless the income has escaped assessment on account of failure, on the part of the assessee, to disclose all necessary material facts, the assessment cannot be reopened beyond the period of four years. The relevant extract from the decision in ***Wel Intertrade P. Ltd.*** *(supra)* reads as under:-

> *"A plain reading of the said proviso makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, the question of making of a return is not in issue and the only*

question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this pre- condition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated February 5, 2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to section 147 of the said Act had not been satisfied.

In this connection, it may be relevant to note one decision, although there are several others. The said decision is that of the Punjab and Haryana High Court in the case of Duli Chand Singhania v. Asstt. CIT : (2004) 269 ITR 192. In the said decision, the High Court of Punjab and Haryana was faced with a similar situation. The court noted that there was not even a whisper of an allegation that the escapement in income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The court observed that absence of this finding, which is the sine qua non for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, makes the action taken by the Assessing Officer wholly without jurisdiction. We agree with these observations of the Punjab and Haryana High Court and are of the view that in the present case also, the Assessing Officer has acted wholly without jurisdiction. The invocation of section 147, the issuance of the notice under section 148 and the subsequent order on the objections are all without jurisdiction. The impugned notice as well as the proceedings pursuant thereto are quashed."

12. In view of the settled law, the proceeding initiated by the AO for reopening the assessment for the AY 2006-2007 is without authority of law. The petition is, accordingly, allowed and the impugned notice dated 20.03.2013 as well as the impugned order dated 10.02.2014 are set aside. The parties are left to bear their own costs.

VIBHU BAKHRU, J

S. RAVINDRA BHAT, J

JULY 30, 2014
RK/pkv