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

Reserved on: 12.05.2014
Pronounced on: 14.08.2014

\+ **W.P.(C) 1320/2014, C.M. NO.2744/2014 & 2745/2014**

MADHUKAR KHOSLA ..... Petitioner
Through : Sh. Salil Kapoor with Sh. Vikas Jain and Sh. Varun Gupta, Advocates.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through : Sh. Sanjeev Sabharwal, Sr. Standing Counsel with Sh. Ruchir Bhatia, Jr. Standing Counsel.

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

MR. JUSTICE S. RAVINDRA BHAT

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C.M. NO. 2745/2014 (for exemption)

Allowed, subject to all just exceptions.

W.P.(C) 1320/2014, C.M. NO.2744/2014

1. The petitioner challenges the notice dated 25.03.2013 under Section 148 of the Income Tax Act ("the Act") proposing to re-open the assessment for Assessment Year 2006-07 @ ₹1,12,760/- completed under Section 143 (3) by the Assessing Officer ("AO").

2. The brief facts are that the petitioner filed income tax returns on 30.10.2006 for AY 2006-07. The returns were selected for scrutiny; a notice was issued on 28.02.2008 along with a questionnaire. The required details were furnished by the petitioner on 07-03-2008. The AO, accepting the explanations, framed the assessment on 28-03-2008. In this background of circumstances, the respondent AO sought to re-open the assessment by the impugned notice, under Section 147 of the Act. Responding to this notice, the assessee, on 22-04-2013 stated that it stood by the returns filed originally (and accepted by the AO on 28-03-2008); it also requested that the reasons for re-opening the assessment be furnished.

3. The Revenue acceded to the petitioner's request; the reasons furnished are extracted below:

> *"In this case assessment was completed under section 143(3) vide order dated 28.3.2008 on an income of Rs.1, 12,760/-.*
>
> *2. On perusal of the records and the details filed by the assessee it came to the notice that the assessee has added an amount of Rs.25,31,003/- to its capital account of his proprietorship concern M/s Madhukar Khosla & Co. (Rs.14,31,000/- as gift and Rs.11 ,00,003/- addition). During the course of assessment proceedings the assessee offered no explanation to the above addition to the capital account.*
>
> *3. In the absence of the source of the addition with documentary evidence on records, the same is required to be brought on tax net as per provisions of section 68 of the Income tax Act, 1961 as the assessee had offered no*

explanation about the nature and source of the said additions

4. I have therefore, reasons to believe that omission/failure on the part of the assessee to disclose fully and truly all material/facts necessary for assessment, income to the extent of Rs.25,31,003/- has escaped assessment for the assessment year 2006-07 and hence issue notice under section 148."

4. On 28-11-2013 the assessee objected to re-opening of assessment, stating, *inter alia,* that:

"In this case, the assessee disclosed fully and truly all material facts relating to the said issue. In the Balance Sheet said amounts showing the nature thereof have been clearly shown. During assessment, the books of A/c were produced and were verified by the AO. The findings to this effect are available in Para - 3 of the Assessment Order. Hence, since, the conditions of first proviso to Section 147 are not fulfilled, Section 147 cannot be invoked."

and further that:

"there is no new information with your good self which was not available earlier. It is only on the basis of earlier existing Information and details that your good self has been forming an opinion that it is a case of escapement of income. Under the facts, it is a clear cut case of change of opinion. Section 147, cannot be resorted to in case of change of opinion..."

5. By the letter dated 20-12-2013, the assessee's objections to the reopening of assessment were rejected; the AO in his letter, stated as follows:

> *…you have raised the issue that section 147 has been resorted to due to a change of opinion. It may be reiterated that the issues on which the case has been reopened, had not been discussed earlier. Thus the issue of change of opinion does not arise. The onus was upon the assessee to provide full and complete details during the earlier proceedings which he failed to do so and therefore Section 147 is being resorted to. It is for the A.O to draw inferences from the facts and apply the law determining the liability of the assessee. If there are sufficient reasons to believe that income has escaped assessment, then it is the discretion of the A.O to reopen the case. Various case laws also substantiate the same….”*

6. The assessee argues that the expression “reasons to believe” under Section 147 refers to objective circumstances. In the present case, the assessment was completed under Section 143 (3) after notice was issued under Section 142 (1) was issued and explanation sought in respect of all relevant matters. The assessee could not be faulted for the omission to discuss the materials on record. Learned counsel stressed that “reasons” were to be on the basis of “tangible materials” which must be in possession of the revenue, which alone can result in a valid re-opening. There was no such tangible material; the AO, argued counsel, acted without any jurisdiction in merely seeking to revisit the matter, which in effect amounts to a review or an impermissible change of opinion. Learned counsel relied on *CIT, Delhi* v. *Kelvinator of India Ltd.*, (2010) 2 SCC 723 and *CIT-V* v. *Orient Craft Ltd.*, [2013] 354 ITR 536 (Delhi).

7. Learned counsel for the Revenue supports the re-opening of assessment in this case and urges that the Court should dismiss the

petition. It was submitted that there was no explanation how the assessee added the amount to the capital account. The original assessment shows that the AO did not direct his mind to the issue at all though a questionnaire might have been issued. He relied on the decision in *CIT-VI v Usha International Ltd.* (2012) 348 ITR 485 and contends that having regard to the following observations of the majority (in that case), the notice issued by the AO is valid:-

> *"23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined".*

8. Section 147 permits the Assessing Officer to reopen an assessment, and issue notices if he " *has reason to believe that any income chargeable to tax has escaped assessment for any assessment year …*" The scope of the phrase "*reasons to believe*" – introduced in 1989 – was considered by the Supreme Court in various decisions. In *M/s. Phool Chand Bajrang Lal and Anr.* v. *Income Tax Officer and Anr.* [1993] 203 ITR 456 (SC) The Supreme Court held that the scope of enquiry to decide whether there were "reasons to believe" was restricted, and *"To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for*

the formation of the requisite belief." This was based on the law declared in several previous decisions of the Court (*Central Provinces Manganese Ore. Co. Ltd.* v. *Income Tax Officer, Nagpur*, [1991] 191 ITR 662 (SC), *Sri Krishna Pvt. Ltd.* v. *Income Tax Officer, Calcutta*, (1996) 9 SCC 534).

9. In this case, the reasons provided under Section 148 are that in "*absence of the source of the addition with documentary evidence on records, the same is required to be brought on tax net as per provisions of section 68 of the Income tax Act, 1961 as the assessee had offered no explanation about the nature and source of the said additions…"* and thus, must be treated as income which escaped assessment. No details are provided as to what such information is which excited the AO's notice and attention. The reasons must indicate *specifically* what such objective and new material facts are, on the basis of which a reopening is initiated under Section 148. This reassessment is clearly not on the basis of new (or "tangible") information or facts that which the Revenue came by. It is in effect a re-appreciation or review of the facts that were provided along with the original return filed by the assesse. The Supreme Court in *Kelvinator* (supra) frowned against such exercise of power:

> *"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. 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. 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 1st April, 1989, Assessing Officer has power to re-open, 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. "

10. This Court recollects that even in case of an assessment completed under Section 143 (1), the requirement of recording "reasons to believe" are mandatory – as the text of Section 147 indicates. Rejecting an argument by the Revenue to the contrary, this Court in *Orient Craft (supra)* held that:

"The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed

under Section 143(1) *in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section* 143(3). *Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section* 143(1) *and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section* 143(3) *and cases where mere intimations were issued earlier under Section* 143(1)*may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed.*

13. Certain observations made in the decision of Rajesh Jhaveri (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under section 143(1) *there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section* 148, *the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section* 147 *are fulfilled" an intimation issued under section* 143(1) *can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that the assessing officer should have "reason to believe" that income*

chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri (supra) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements."

11. The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such

external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made. The impugned notice, the AO's order rejecting the objections, and the arguments of the Revenue nowhere indicate how the AO was impelled to seek re-opening of the assessee's case, as distinguished from the several other completed assessments.

12. For these reasons, this Court is of the opinion that the impugned reassessment notice cannot be sustained; it is hereby quashed. The writ petition and the pending application are allowed in the above terms without order as to costs.

S. RAVINDRA BHAT
(JUDGE)

VIBHU BAKHRU
(JUDGE)

AUGUST 14, 2014