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

Decided on 28.01.2014

\+ **W.P.(C) 7660/2012**

MOHAN GUPTA (HUF) ..... Petitioner
Through: Sh. Salil Kapoor, Sh. Vikas Jain, Sh. Sanat Kapoor and Sh. Ankit Gupta, Advocates.

versus

COMMISSIONER OF INCOME TAX-XI AND ANR.
..... Respondents
Through: Ms. Suruchii Aggarwal, Sr. Standing Counsel with Sh. Judy James, Jr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. This writ petition challenges orders dated 26.03.2012 and 09.08.2012 of the Income Tax authorities under Section 148 of the Income Tax Act, 1961 ("*the Act*") for reassessment for the A.Y. 2005-06.

2. The petitioner/assessee is a Hindu Undivided Family, represented by its *karta* Mohan Gupta. The assessee filed its return of income for the A.Y. 2005-06 declaring net income of ₹16,98,732/-.

This return was processed under Section 143(1) of the Act. Subsequently, on 26.03.2012, the Revenue issued a notice under Section 148 of the Act for reopening the assessment for A.Y. 2005-06. On 02.04.2012, the assessee filed a return of income pursuant to that notice dated 26.03.2012, requesting a copy of the reasons recorded by the Assessing Officer for reopening the assessment. These reasons were supplied on 18.04.2012, and the assessee preferred objections on 26.04.2012. These were rejected by the Revenue on 09.08.2012. A further exchange of objections and rejections followed by letters dated 24.08.2012 and 26.10.2012, thus leading to the present writ petition.

3. Briefly, the return filed and processed for the A.Y. 2005-06 indicated ₹6,55,016/- as Short Term Capital Gain (*"STCG"*). The reason for reopening the assessment of that year relates to the office note of the Assessing Officer for the subsequent A.Y. 2007-08, whereby the need to assess the income on purchase and sale of shares as business income, rather than STCG, was expressed. Specifically, the reasons provided to the assessee for reopening the assessment state as follows:

> "*The case of the assessee for the A.Y. 2007-08 was assessed u/s 143(3) at an Income of Rs.33,03,791/-, The STCG of Rs.33,00,053/- declared by the assessee was treated as Business income from purchase and sale of shares, As per the office note of the assessing officer for the A.Y. 2007-08, the issue of treating of STCG income on sale of share is needed to be assessed again. The total STCG for the A.Y. 2005-06 is Rs. 6,55,016/- taxed @ 10% The tax effect, if income is treated as business income, would be more than Rs. 1 lakh.*

> *I have therefore, reason to believe that by reason of omission or failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and by wrong treatment of income, income chargeable to tax amounting to Rs. 6,55,016/- taxed as STCG needed to be taxed as business income, has escaped assessment for which notice u/s 148 is required to be issued within the meaning of sec 147 ofthe ITAct, 1961.*"

4. The assessment order under Section 143(3) of the Act for the A.Y. 2007-08, from which the reassessment arose, after considering in detail the nature and frequency of the sale and purchase of shares by the assessee concluded that the activity was not for the purposes of investment but in the nature of a business activity, and thus, chargeable as such. The fact that such income was considered to be STGC in previous years was considered insufficient by the Assessing Officer as it is "*a settled law that intimation under Section 143(1) are summary processing wherein there is no application of mind.*" The assessee appealed this order (Appeal No. 114/09-10). The CIT (Appeals) reversed the finding of the Assessing Officer and held that the income was to be treated at STCG and not as business income.

5. Despite this, the Revenue proceeded with the reopening of the assessment for the year 2005-06, based on the reasoning that an order under Section 143(1) – which was the case for the A.Y. 2005-06 – is only an intimation which does not involve an application of mind of the Assessing Officer. As new information had now come to light, given the nature and frequency of the scrips traded by the assessee, the

Assessing Officer had reasons to believe that income had escaped assessment.

6. Section 147 permits the reopening of an assessment, and the issuance of notices etc., if the "*Assessing Officer 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 – has been 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 Court held as follows:

> *"27.....Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court of judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. 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....."*

7. Thus, while the Court will not judge the adequacy of the reasons provided by the Assessing Officer, the Court must assess whether the belief is based on relevant and specific information that could lead to such a belief. This well-accepted principle has found acceptance in *ITO, Calcutta and Ors. v. Lakhmani Mewal Das* 1976

(103) ITR 437 (SC); *Central Provinces Manganese Ore. Co. Ltd.* v. *Income Tax Officer, Nagpur*, [1991] 191 ITR 662 (SC), *Sri Krishna Pvt. Ltd. Etc.* v. *Income Tax Officer, Calcutta and Ors.*, (1996) 9 SCC 534.

8. In this case, the reasons provided under Section 148 are that "*by reason of omission or failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment and by wrong treatment of income*", certain income has escaped assessment. However, no details are provided as regards what such information is, which engaged the attention of the AO and was not disclosed by the assessee while filing returns. The reasons must indicate *specifically* what such objective material facts are, on the basis of which a reopening is initiated under Section 148. There is a vague reference in this case to 'material facts', which does not meet the standard under Section 148 as identified by the Supreme Court in *Phool Chand* (supra). In fact, the reasons provided also state that "*[a]s per the office note of the assessing officer for the A.Y. 2007-08, the issue of treating of STCG income on sale of share is needed to be assessed again.*" Therefore, this reassessment is not on the basis of new information or facts that have come to the fore now, but rather, a re-appreciation or review of the facts that were provided along with the original return filed by the assesse. As the Supreme Court noted in *CIT* v. *Kelvinator*, (2010) 2 SCC 723 = 320 ITR 561 (SC):

> "*6.....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..... "*

9. In this case, the record does not show any tangible material that created the reason to believe that income had escaped. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier A.Y. 2005-06, which amounts to an abuse of power and is impermissible. Equally, even the order of the Assessing Officer for the A.Y. 2007-08, converting the STCG into business income, has been reversed by the CIT (Appeals) in Appeal No. 114/09-10, which was confirmed by Income Tax Appellate Tribunal, Delhi, in ITA No. 1923 (Del) of 2010.

10. In response, it is argued that since the return was processed under Section 143(1) for the A.Y. 2005-06, which involves a mere intimation, rather than an application of mind or true assessment of the

return, a less stringent threshold must be taken in terms of 'reasons to believe' that income has escaped assessment or not. This precise argument, however, has been considered and rejected by this Court in *CIT* v. *Orient Craft*, [2013] 354 ITR 536 (Delhi), in the following terms, and thus is of no avail in the present case either:

> "*12.....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. For the above reasons, the writ petition is allowed and the impugned notices dated 26.03.2012 and 09.08.2012 are hereby set aside.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

JANUARY 28, 2014