



\$~21

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

+ **W.P. (C) 12324/2015**

UNITECH LIMITED

..... Petitioner

Through: Mr. Salil Aggarwal and Mr. Madhur Aggarwal, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-27(1), NEW DELHI

..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel.

**CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH**

ORDER

%

24.07.2017

Prathiba M. Singh, J.

1. This is yet another case in the ever increasing number of cases filed before this Court challenging the issuance of notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

Brief Facts

2. The Petitioner filed its return of income for the Assessment Year ('AY') 2008-09 declaring an income of Rs.1334,87,70,381/-. Its case was picked up for scrutiny and notice was issued to it under Section 143 (2) of the Act. As part of the scrutiny, a questionnaire dated 20th October, 2009 was issued to the Petitioner by the Assessing Officer ('AO') raising various queries. This was duly replied by the Petitioner on 29th October, 2009. Further



documents were also submitted on 17th November, 2009 by the Petitioner. An assessment order under Section 143 (3) of the Act was passed by the AO on 30th December, 2009.

3. Thereafter, two notices under Section 148 of the Act came to be issued on 31st May, 2012 and 28th March, 2013 for the AY 2008-09. Both these notices came to be challenged by the Petitioner in W.P.(C) Nos. 446/2014 and 4631/2014 which were disposed of by this Court by a common order on 3rd September, 2014. The said order reads as under:

“ These writ petitions are being disposed of together inasmuch as they pertain to the same very petitioner and relate to the same assessment year 2008-09. In these petitions, the notices issued under Section 148 on 31.05.2012 and 28.03.2013 are impugned. We have heard the parties at length. We need not set out all the arguments in detail. It would suffice to say that the said notices do not meet the requirements of law. Consequently, the notices under Section 148 dated 31.05.2012 and 28.03.2013 are set aside and all proceedings pursuant thereto are quashed.

Quashing of the notices dated 31.05.2012 and 28.03.2013, however, does not preclude the Assessing Officer from issuing a fresh notice under Section 148 of the Income Tax Act, 1961 in relation to the assessment year 2008-09, if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment, having regard to the first proviso to Section 147 and other applicable provisions of the said Act. We are also making it clear that we have not expressed any opinion on the merits of the matter which includes the question as to whether there was mere change of opinion and/or no fresh material has surfaced after the completion of the assessment under Section 143(3).



*The writ petitions are allowed to the aforesaid extent.
There shall be no order as to costs.”*

4. Pursuant to the said order, a fresh notice was issued to the Petitioner on 16th July, 2015 under Sections 147/148 of the Act for the same AY viz., 2008-09. The two reasons for reopening the assessment read as under:

“2.1 Disallowance u/s 14-A r.w. Rule 8-D of the IT Act, 1961;

.....

2.2 Complex web of subsidiaries & colourable device of transferring shares instead of substantial transfer of landed properties.

.....”

5. The Petitioner filed its objections to the reopening of the assessment on 28th July, 2015. The said objections were rejected on 9th November, 2015. The Petitioner thereafter filed the present writ petition seeking the quashing of the notice under Section 148 of the Act dated 4th March, 2015 and order dated 9th November, 2015 rejecting the Petitioner’s objections thereto.

Petitioner’s Submissions

6. Mr. Salil Aggarwal, learned counsel for the Petitioner, submitted that the reasons recorded by the AO do not satisfy the requirement of law in terms of Sections 147/148 of the Act. There is no failure by the Petitioner to disclose fully and truly all the material facts necessary for the assessment and neither is such a failure recorded in the reasons.



7. Mr. Aggarwal further submitted that the order dated 3rd September, 2014 passed by this Court in the earlier round gave a clear mandate to the Revenue that a fresh notice under Section 148 of the ITA could be issued if the AO has reason to believe that the income chargeable to tax has escaped assessment "*having regard to the first proviso to Section 147 of the ITA and other applicable provisions of the said Act*". Thus, the direction of the Court did not mean that a fresh notice could be issued if the same was impermissible in law. Mr. Aggarwal further submitted that the two reasons for the reopening of the assessment are unsustainable inasmuch as, all the information regarding the said two issues already stood submitted to the AO. This was duly brought to the AO's notice in the objections filed by the Petitioner.

8. Mr. Aggarwal further submitted that in view of the ratio of the decision of the Supreme Court in *Commissioner of Income Tax, Delhi v. Kelvinator of India Limited (2010) 2 SCC 723*, the same material cannot be looked into for opening the assessment. The reasons recorded by the AO do not satisfy the legal requirement under the first proviso to Section 147 of the Act. Mr. Aggarwal further submitted that the Petitioner has already gone through two rounds of enquiry, inasmuch as, it was also issued a notice under Section 263 of the Act on 30th December, 2011 for the very same AY. Mr. Aggarwal also relied upon the decision in *Agya Ram v. Commissioner of Income Tax, Delhi, (2016) 386 ITR 545 (Del)*. Mr. Aggarwal thus submitted that this is nothing but a case of change of opinion on the same material, which is impermissible in law.



Respondent's Submissions

9. Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue, submitted that the earlier two notices issued to the Petitioner were within the four year period and the present notice, having been issued pursuant to the order dated 3rd September 2014 of this Court, was nothing but a continuation of the said earlier notices. This was permitted by the Court in its order dated 3rd September, 2014. Mr. Hossain further submitted that the said order merely required the AO to issue a fresh notice if any income had escaped assessment. There is no need to satisfy the conditions for reopening an assessment beyond the four-year period. It is Mr. Hossain's submission that the impugned order has to be treated as a notice issued within the four year period. The mentioning of the first proviso to Section 147 in the order dated 3rd September, 2014 of this Court was, according to Mr. Hossain, only in the context of Section 143 (3) of the Act.

10. Without prejudice to the above submissions, Mr. Hossain further submitted that the Petitioner has failed to make a full and true disclosure of all the material facts, inasmuch as, the Petitioner has deliberately shown the income under an incorrect head. It is clear from the order rejecting the objection of the Petitioner and hence this is a fit case for dismissal of the writ petition.

11. Mr. Hossain relied upon the decision in ***Chennai Properties and Investments Limited, Chennai v. Commissioner of Income Tax Central III, Tamil Nadu, (2015) 14 SCC 793*** and urged that the AO at this stage had only to see whether there was some material to reopen the case. The



sufficiency or correctness of the material was not to be examined.

Analysis

12. There are a large number of cases that have been decided by this Court with respect to reopening of assessments under Sections 147/148 of the Act. After a period of four years under the first proviso to Section 147 of the Act, for re-assessment proceedings to be initiated, the following pre-conditions have to be satisfied:

- The original assessment had to be completed under Section 143 (3) of the Act
- More than four years have lapsed from the end of the relevant AY
- The income chargeable to tax has escaped assessment
- Due to failure of the Assessee to make a return under Section 139, or
- In response to a notice under sub-section 1 of Section 142, or
- Due to a failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment for the relevant assessment order.

13. The wording of this provision makes it clear that reopening of assessments after a period of four years, ought to be an exception and not the rule. The purpose of this provision is to ensure that there is some finality which is attached after the period of four years, for assessments which have been completed under Section 143 (3) of the Act. The AO has to necessarily record that there has been a failure on the part of the Assessee to disclose



fully and truly all material facts necessary for his assessment, failing which the reopening of the assessment cannot be triggered.

14. In the facts of the present case, the reasons stated by the AO do not satisfy the mandatory legal requirement for reopening the assessment since they failed to record the failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment.

15. For the AY 2008-09, the Assessee's return has been subjected to multiple scrutinies;

(i) under Section 143 (3) of the Act;

(ii) under Section 263 of the Act;

(iii) under Sections 147/148 of the Act which was challenged in the writ proceedings and was set aside.

16. The Revenue has had more than sufficient opportunity to carefully scrutinize the returns of the Petitioner. In the circumstances of the case a higher burden is placed on the Revenue to sustain the impugned notices. An interesting feature of the impugned notice dated 4th March, 2015, is that the reasons contained therein are a verbatim reproduction of the reasons which were recorded in the notice dated 28th March, 2013 which came to be set aside by this Court on 3rd September, 2014. The re-issuance of the quashed notice in identical terms could not have been the purpose of the order dated 3rd September, 2014 passed by this Court. The said impugned notice dated 28th March, 2013 was set aside and proceedings pursuant to the said notice stood quashed. The direction to issue fresh notice keeping in mind the first



proviso of Section 147 of the Act clearly meant that the Revenue had to satisfy the rigors of the said proviso.

17. Further, a perusal of the reply submitted by the Petitioner to the questionnaire, which was issued on 29th October, 2009 by the AO as part of the proceedings under Section 143 (3) of the Act, clearly reveals that the dividend income was fully disclosed in the reply dated 17th November, 2009. The questionnaire having been duly replied to and the assessment order having been passed under Section 143 (3) of the Act on 30th December 2009, it cannot be said that AO did not form an opinion on the issue. The questionnaire specifically sought details of several incomes, which were submitted by the Assessee.

18. Even the proceedings under Section 263 of the Act did not raise the issue of disallowance of expenditure incurred for earning exempt income under Section 14-A of the Act. Under Section 263 of the Act, the Revenue had an opportunity to revisit the assessment order insofar if it was incorrect and prejudicial to the interests of the Revenue. However, even in the Section 263 proceedings this issue was not raised.

19. In view of the fact, that there was a full disclosure by the Assessee of all the material facts relating to the exempt income it cannot be said that the condition for reopening of the assessment is satisfied on this count.

20. Even the second reason is a mere reproduction of the earlier notice dated 28th March, 2013. The nature of business of the Petitioner has always been



known to the Revenue year after year. Even in this reason there is not even a whisper of the failure by the Petitioner to make a full and true disclosure of all the material facts necessary for the assessment.

21. Thus, the impugned notice does not satisfy the rigors of Sections 147/148 of the Act as there has been no non-disclosure of the material facts by the Petitioner. In fact, even the reasons accompanying the impugned notice do not even say that there is any failure by the Petitioner to disclose fully and truly all the material facts.

22. The Supreme Court in *Kelvinator (supra)* held that:

“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. ...”

23. This Court in *HCL Technologies Ltd. v. Deputy Commissioner of Income Tax (W.P.(C.) 8164/2010 decided on 20/7/2017)* has held as follows:

“16. The AO has not made the effort of disclosing, in the reasons, what according to him constituted the failure by the Assessee to make a full and true disclosure. A mere reproduction of the language of the provision will not suffice. Also, although making such an averment either in the order rejecting the objections of the Assessee or subsequently in the counter-affidavit in the answer to a writ petition will not satisfy the requirement of the law. The reasons will have to speak for themselves. For complying with the jurisdictional requirement under the first proviso to Section 147 of the Act, the reasons would have to show in what manner the Assessee had failed to make a full and true disclosure of all the material facts necessary for the assessment. The failure to do so would not be a mere irregularity. It would render the reopening of the assessment after four years vulnerable to invalidation.” (emphasis supplied)

23. For the reasons stated above, the writ petition is allowed and the impugned notice dated 4th March, 2015 and order dated 9th November, 2015 are hereby quashed.

PRATHIBA M. SINGH, J

S.MURALIDHAR, J

JULY 24, 2017

dk

W.P.(C) No. 12324/2015

Page 10 of 10