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

+ **W.P. (C) 1353/2013**

YUM! RESTAURANTS ASIA PTE. LTD Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya Kapoor,
Mr. Sumit Lalchandani & Mr. Sanat
Kapoor, Advocates.

versus

DEPUTY DIRECTOR OF INCOME TAX AND ORS

..... Respondents

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE PRATHIBA M. SINGH

ORDER

31.08.2017

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Dr. S. Muralidhar, J:

1. This writ petition by Yum! Restaurants Asia PTE Ltd. under Articles 226 and 227 of the Constitution, seeks the quashing of a notice dated 28th March 2012 issued by the Deputy Director of Income Tax (hereinafter the Assessing Officer or 'AO') under Section 148 of the Income Tax Act, 1961 (hereinafter 'the Act') seeking to reopen the assessment for Assessment Year (AY) 2005-06. The writ petition also challenges an order dated 25th January, 2013 passed by the AO rejecting the objections raised by the Petitioner to the reopening of the assessment.

2. On 5th March 2013, while issuing notice in this petition, the Court



directed that the proceedings pursuant to the impugned order shall remain stayed.

3. One of the grounds urged in the present petition is that since the original assessment was processed under Section 143 (1) of the Act, and since the reopening was after the expiry of four years from the end of the relevant AY, the approval for the reopening of the assessment had to be granted, in terms of Section 151 (2) of the Act, by an officer of the rank of Joint Commissioner, which in this case was the Additional Director of Income Tax (Addl. DIT). However, in the present case the approval was granted under Section 151 (2) by the DIT who was an officer superior to the Addl. DIT. It is accordingly contended by the Petitioner that the impugned notice under Section 148 of the Act and all proceedings pursuant thereto are bad in law.

4. On the previous date, i.e. 30th August 2017, this court noted that the Petitioner was placing reliance on the decision of the court in *Commissioner of Income Tax v. SPL's Siddhartha Ltd. 2012 (345) ITR 223 (Del)* and urged that even if such approval had been granted, as in the present case, by the officer superior i.e. the DIT, it would not cure the defect. The learned counsel for the Department sought time to produce the relevant file.

5. The relevant file has been produced before the Court. There is a single note sheet in the file and it is dated 26th March 2012. The note prepared by Mr. Mazhar Akram, the AO, reads: "No records for AY 2005-06 are traceable. ITD is showing the ROI processed for AY 2005-06. In the light of the reasons recorded in Annexure A, approval for issue of notice u/s Section



148 of IT Act, 1961 is sought.” The said note was put up to the Addl. DIT who recorded “put up for approval” with his signature and put up the file to the DIT. The next signature on the file is that of the DIT who states in a single word “Approved”.

6. From the above noting on the file it is seen that the Addl. DIT merely “put up for approval” the file and did not himself accord approval of the AO’s proposal for reopening the assessment for AY 2005-06.

7. It is contended by Mr. Rahul Chaudhary, learned Senior Standing counsel for the Department, that when the Addl. DIT recorded the words “put up for approval” he, in fact, should be understood to have applied his mind, approved the note of the AO, and only thereafter put up the note for further approval to the DIT. He further sought to explain that it is only because the original records were not traceable that this course was adopted by the Addl. DIT.

8. The above submission cannot be accepted. Where the original assessment is processed under Section 143 (1) of the Act, and the reopening is sought to be done after the expiry of four years from the end of the relevant AY, the mandatory requirement under Section 151 (2) of the Act is that the approval for the reopening of the assessment should be by an officer of the rank of the Joint Commissioner (in this case, the Addl. DIT) and not other officer including a superior officer. Section 151 (2) of the Act as it stood at the relevant time read:

“(2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing



Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice."

9. The argument that the approval by an officer superior to the Joint Commissioner will satisfy the requirement of Section 151 (2) of the Act, was categorically negated by this court in the aforementioned decision in *SPL's Siddhartha Ltd. (supra)* which has been followed in *Commissioner of Income Tax-8 v. Soyuz Industrial Resources Ltd. (2015) 58 taxmann.com 336 (Del)*. In *SPL's Siddhartha Ltd. (supra)*, under similar circumstances after noting that the approval had been granted on the file by a superior officer whose approval had been sought, the court observed as under:

"4. The aforesaid noting in the file does not reflect what learned counsel for the Revenue argued. In the first instance, it would be seen that the AO had specifically sought the approval of the Commissioner only. Therefore, it cannot be said that the Joint Commissioner/Additional Commissioner had granted the approval. Further, no doubt, the file was routed through Additional Commissioner. However, he also, in turn forwarded the same to the Commissioner by giving the following endorsement:

"CIT may kindly accord sanction."

5. It is clear that the Additional CIT did not apply his mind or gave any sanction. Instead, he requested Commissioner to accord the approval. It, thus, cannot be said that it is an irregularity curable under Section 292B of the Act."



10. In *Commissioner of Income Tax-8 v. Soyuz Industrial Resources Ltd.* (*supra*), the Court explained:

“8. The Revenue's argument seems plausible and even logical because the Commissioner or a Chief Commissioner is unarguably ranked higher in authority than a Joint Commissioner. Yet at the same time, this Court has to give effect to plain words of the statute which unambiguously states that the competent authority in such cases is the Joint Commissioner (and not the Chief Commissioner or the Principal Commissioner). The Revenue's submissions that all such cases, are covered under proviso to Section 147(1), the competent authority for prior approval would be four superior officers, renders Section 151 (2) superfluous. If anything the Court is clear that it is not its job to render, in the process of interpretation, an entire provision academic or Certified True Copy inoperative. This court is of the opinion that accepting the Revenue's position would result in that consequence. The Court also invokes the principle enunciated by the Privy Council in *Nazir Ahmad v. Emperor AIR 1936 PC 253*: that if the statute mandates that something be done in a particular manner, should be in that manner or not at all. In this case, since the original assessment was completed "other than" the eventualities contemplated in Section 151(1), i.e. it was processed under Section 143(1). Thus, clearly Section 151(2) applied.”

11. In view of the clear position in law, the Court has no hesitation in concluding that in the present case, the mandatory requirement under Section 151 (2) of the Act, as it stood at the relevant time, has not been fulfilled and therefore, the reopening of the assessment for the AY 2005-06 by the impugned notice is bad in law.

12. For the aforementioned reasons, the notice dated 28th March 2012 issued by the AO to the petitioner under Section 148 of the Act and the order



dated 25th January 2013 passed by the AO rejecting the Petitioner's objections thereto are hereby quashed.

13. The petition is allowed in the above terms. No costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 31, 2017
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