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

\+ **W.P. (C) No. 10507/2016**

SKY VIEW COUNSULTANTS PVT. LTD. ..... Petitioner
Through: Dr. Rakesh Gupta, Mr.Somil Agarwal, Mr. Rohit Kumar Gupta, Ms.Monika Ghai, Ms. Syamalima, Advocates.

versus

INCOME TAX OFFICER, WARD 23 (4) & ANR. ..... Respondents
Through: Mr. Rahul Kaushik, Senior Standing Counsel for the Income Tax Department.

CORAM: JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 07.09.2017

Dr. S. Muralidhar, J.:

1. The challenge in this writ petition is to the notice dated 29th March 2016 issued by the Income Tax Officer Ward 23(4), New Delhi (hereafter Assessing Officer - 'AO') under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the Petitioner's assessment for the Assessment Year ('AY') 2009-10. A challenge is also laid to the letter dated 4th July 2016 rejecting the objections filed by the Petitioner to the reopening of the assessment.

2. The facts in brief are that the Petitioner, Sky View Consultants Private

Limited, is engaged in the consultancy business and looking after 'product promotion and sales services' of products being marketed by Seagram India Limited, presently known as Pernod Ricard India Limited (PRIL). The Petitioner filed its return for the AY 2009-10 on 24th October 2009 declaring an income of Rs. 13,59,848/-. The said return was processed under Section 143 (1) of the Act.

3. On 29th March 2016, the AO issued the impugned notice under Section 148 of the Act proposing to reopen the assessment for AY 2009-10. The reasons recorded by the AO on 10th March, 2016 for reopening of the assessment, as communicated to the Petitioner, were broadly as under:

(i) A Tax Evasion Petition ('TEP') had been received by the investigation wing of the Income Tax Department to the effect that the Petitioner had collected money from its Principal (PRIL) and thereafter issued account payee cheques in the name of various sub-contractors (allegedly bogus entities). Cash was withdrawn from the said accounts by self-cheques and distributed in the Defence canteens as bribes. On the basis of the said TEP, the assessment of the Petitioner for the AY 2007-08 was reopened by an order passed by the Commissioner of Income Tax (CIT) under Section 263 of the Act. It was further noted that for the AY 2008-09, proceedings under Section 147 of the Act were in progress. Even for the AY in question i.e. the AY 2009-10, a perusal of the Profit and Loss (P&L) Account for the year ending 31st March, 2009 showed that the Petitioner was claiming an expense of Rs.2,41,79,349/- on account of 'contractor's charges'. This was in fact the bribe amount distributed by it.

(ii) The second reason was that the Income Tax Officer (Investigation) [ITO (Inv)] OSD-I, Unit-3, New Delhi issued the summons under Section 131 (1A) of the Act on 4th March, 2015 calling upon the Petitioner to provide the necessary details so that independent enquiries could be conducted from the third parties. The ITO (Inv) in his report stated that the Petitioner has neither provided any justification with documentary evidence nor the details of the parties to whom the contract charges were paid. From both the above documents and the report of the ITO (Inv) it was inferred that 'the modus operandi of the Assessee in the AY 2009-10 is the same as was in AY 2007-08 and 2008-09'. It was further inferred that the aforementioned sum of Rs.2,41,79,349/- had been used by the Petitioner for 'non business purposes', thus concealing its true income.

(iii) The third reason was that the Director General of Income Tax (DGIT) (Vigilance) by letter dated 2nd November, 2011 had also suggested that the claim of expenses made by the Petitioner would have to be examined. This was after a detailed inquiry into a complaint against the then AO of Circle 8 (1), New Delhi, who happened to be the AO of the Petitioner.

4. The AO concluded that he had reason to believe that the contractor's charges shown in the Petitioner's P&L Account were bogus and the Petitioner had wilfully and knowingly concealed its particulars of income to avoid tax and that income of Rs.2,41,79,349/- chargeable to tax had escaped assessment for AY 2009-10.

5. As noted earlier, the objections filed by the Assessee to the re-opening of the assessment were disposed of by the AO by the impugned letter dated 4th July 2016. One of the objections raised was that the entire exercise undertaken by the ITO (Inv) by invoking Section 131(1A) of the Act was without jurisdiction since that provision could not have been invoked without him being duly authorised. On this issue, in the impugned order dated 4th July 2016, the AO noted that the said information received from the ITO (Inv) was not the sole basis for reopening the assessment. It was stated that the AO had applied his mind, collected the bank statements, analysed the Financial Accounts and correlated the same with the TEP report. The case was reopened with the prior approval of the Principal CIT. Reliance was placed on the decision in ***AGR Investments Ltd. v. Additional CIT [2011] 333 ITR 146 (Del)*** in support of the proposition that 'information received from investigation wing can be used for re-opening of the case.' It was asserted that there was 'live and tangible nexus between the information and belief formed which has been arrived at after independent evaluation of the information by the AO.'

6. This Court has heard the submissions of Dr. Rakesh Gupta, learned counsel appearing for the Petitioner, and Mr. Rahul Kaushik, learned Senior Standing Counsel for the Revenue.

7. In the counter affidavit filed on behalf of the Revenue, reference, *inter alia*, is made to the fact that the proceedings under Section 147 of the Act for AY 2008-09 resulted in an assessment order under which it was held that none of the entities in whose names cheques were issued are shown to be

genuine entities. The said assessment order is dated 30th March 2016. In fact, Mr. Kaushik places considerable reliance on this assessment order to urge that the re-opening the assessment for the present AY, i.e. AY 2009-10 was more than vindicated by the said assessment order which, according to him, was not challenged by the Petitioner by way of a writ petition.

8. Dr. Gupta, on the other hand, pointed out that this Court has to necessarily examine the reasons recorded by the AO on 10th March, 2016 which make no reference, and obviously so, to an order that was passed subsequent to the date of recording of the reasons on 30th March, 2016. Secondly, he points out that the said assessment order for AY 2008-09 was in fact challenged by the Petitioner by filing an appeal before the CIT (A) and, therefore it was incorrect to say that the said order was not challenged.

9. On this issue, it requires to be noted that the settled legal position is that when a challenge is laid to the reopening of an assessment under Section 147 of the Act, the Court has to examine only the reasons recorded by the AO and nothing else. In ***Northern Exim Pvt. Ltd. v. Deputy Commissioner of Income Tax [2013] 357 ITR 586 (Del)***, this Court reiterated the well settled legal position that "we have to be guided only by the reasons recorded for the assessment and not by the reasons or explanations given by the AO at a later stage in respect of notices of the assessment". After referring to a large number of decisions, this Court explained:

> "The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under Section

147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law."

10. Recently, this Court in ***WP (C) 7828/2010 Oracle India Pvt Limited Vs. ACIT***, by the judgement dated 26th July, 2017 has further elaborated on the `reasons to believe' as under:

"....27. A second aspect of the matter is that the above jurisdictional requirement should be shown to have been fulfilled from the reasons for re-opening of the assessment. In other words, the reasons must speak for themselves. The mandatory jurisdictional requirement in W.P.(C) 7828/2010 Page 18 of 29 terms of the first proviso to Section 147 of the Act will not be fulfilled if the reasons do not themselves clearly indicate that there was in fact a failure by the Assessee to make a full and true disclosure of all material facts. The reasons have to explain what the material was that was not disclosed by the Assessee which the Assessee ought to have disclosed in the first instance. This should be apparent from a reading of the reasons themselves. The reasons have to go beyond merely repeating the language of the provision regarding the failure of the Assessee to make a full and true disclosure of material facts. They should indicate in what manner was there such a failure.

28. In many of the cases, where the re-opening of an assessment is challenged, the Revenue tries to make up for the obvious defect in the reasons themselves which do

> not spell out the reasons by providing a justification at the stage of disposal of the objections or later in the counter-affidavit when the re-opening is challenged by a writ petition. This, again, is impermissible in law. Since the reasons must speak for themselves, a subsequent attempt to supply the omission at the stage of an order disposing of the objections raised by the Assessee or providing them in the counter-affidavit in reply to the writ petition or even worse, making good that defect in the course of arguments before the Court, will simply not suffice...."

11. In the present case, the fact that the assessment order passed after the re-opening of the assessment for AY 2008-09 may have found the entities to whom the Petitioner issued cheques to be fictitious cannot be looked into for the simple reason that it was an order passed 21 days after the reasons in the present case were recorded for re-opening of the assessment for AY 2009-10. In any event, this will not answer one of the principal grounds urged by Dr. Gupta that the tangible material that is required to be shown for justifying the re-opening of assessment has to be relevant to the AY in question, i.e. AY 2009-10.

12. In ***Commissioner of Income Tax v. Gupta Abhushan (P)Ltd. [2009] 312 ITR 166 (Del)***, it is emphasised that information relating to one AY will not automatically become relevant for re-opening the assessment for another AY. If that would be the position, then the re-opening would be only on the basis of suspicion and not 'belief'. This decision in fact reiterated what was earlier explained by the Bombay High Court in ***Ramkrishna Ramnath v. Income Tax Officer [1970] 77 ITR 995 (Bom)***.

13. There is no answer by the Revenue to the Petitioner's contention that the TEP pertained only to two FYs and therefore only corresponded to two AYs, i.e. AY 2007-08 and 2008-09. Further, it is not disputed that the original assessment order for AY 2007-08 was passed by the AO on 11th December, 2009. It was re-opened by the CIT (A) by the order dated 28th March 2012 under Section 263 of the Act. This resulted in a further assessment order dated 28th March 2013 by the AO under Section 143 (3) read with Section 263 of the Act. Only 7% of the 'contractor's expenses' was disallowed and added back. Therefore, even for AY 2007-08, the TEP did not result in adding back the entire amount. The decision in ***AGR Investments Ltd. v. Additional CIT*** (*supra*) only lays down a general proposition regarding assessments being reopened on the basis of reports of investigation. It does not obviate the need to show that there is tangible material relevant to the AY in question that warrants reopening of the assessment for that particular AY.

14. More importantly, it is not understood how despite being aware of the above orders pertaining to AY 2007-08, the AO in his reasons for reopening the assessment for AY 2009-10 did not refer to them while recording his reasons on 10th March 2016. Clearly this was an instance of non-application of mind by the AO to the relevant material. Since the AO failed to justify his reasons to believe that income has escaped assessment for AY 2009-10 on the basis of the TEP pertaining to AY 2007-08, it was all the more important for the AO to refer to all the subsequent developments in relation to reopening of the assessment for AY 2007-08.

15. As already pointed out hereinabove, the Revenue has no answer to the submission that the entire exercise undertaken by the ITO (Inv.) was without jurisdiction. Which is why in the counter affidavit filed in the present writ petition, the stand taken by the Revenue is that it is not the only reason for re-opening the assessment. The fact remains that it could not form tangible material for re-opening the assessment. The fact remains that the power under Section 131 (1A) can be exercised only by officers named therein and they are all officers in the Department superior to the ITO. If the ITO had to exercise the powers under that provision, he had to be duly authorized to do so. He clearly was not and, therefore, the reports submitted by him could not have formed the valid basis for re-opening the assessment.

16. The third material referred to in the reasons for reopening the assessment, is the investigation undertaken by the DGIT (Vigilance) into the conduct of the erstwhile AO of the Petitioner. A perusal of the letter dated 2nd November 2011 written by the Director (Vigilance) to the DGIT (Vigilance) does not throw any light on any material relevant to AY 2009-10. In fact, the concluding paragraph of the said letter a request is made for reopening of the assessment for the AY 2007-08 by invoking Section 263 of the Act. This explains why that route was resorted to for AY 2007-08.

17. This Court is therefore satisfied that the jurisdictional requirement for reopening of the assessment for AY 2009-10 has not been fulfilled in the present case. Consequently, the notice dated 29th March 2016 issued by the AO under Section 148 of the Act as well as the consequent order dated 4th July 2016 of the AO rejecting the Petitioner's objections, are hereby

quashed.

18. The writ petition is allowed in the above terms with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 07, 2017
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