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

\+ **ITA 1444/2018**

PR. COMMISSIONER OF INCOME TAX DELHI-21..... Appellant

Through: Mr.Ajit Sharma, Sr. Standing Counsel with Ms.Adiba Mujahid and Ms.Priya Sarkar, Advocates.

versus

LALIT BAGAI ..... Respondent

Through: Mr.Gagan Kumar with Mr.Amit Kaushik, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE TALWANT SINGH

O R D E R

% 21.08.2019

Dr. S. Muralidhar, J.:

1. The Revenue is in appeal against an order dated 9th March 2018 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No.5833/Del/2015 for Assessment Year ('AY') 2006-07.

2. The issue sought to be urged by the Revenue is whether the ITAT was justified in quashing the reassessment proceedings under Section 147 of the Act on the ground of change of opinion on the applicability of Section 40 (a) (ia) of the Act even when the Assessing Officer ('AO') had not expressed any opinion on the applicability of such provision during the original

assessment proceedings under Section 143(3) of the Act?

3. The admitted factual position is that for the AY in question the return of income was filed by the Assessee on 31st October 2006 declaring an income of Rs.1,02,35,913/-. The return was picked up for scrutiny and notice to the Assessee was issued by the Assessing Officer ('AO') under Section 143(2) and 142(1) of the Act on 19th October 2007 along with a detailed questionnaire to the assessee.

4. Consequent thereto an assessment order was passed on 28th March 2008 assessing the business income of Assessee at Rs.71,66,970/- and taxable long term capital gains(LTCG) at Rs.37,85,502/-. In the course of the framing of the assessment the AO disallowed wage expenses to the extent of 1% of Rs.4,71,86,794/- which equals to Rs.4,71,867/- to cover up the leakage in the income. There was also disallowance of miscellaneous expenses.

5. Thereafter, on 28th March 2008 notice was issued to the Assessee under Section 147/148 of the Act. In the order of reassessment dated 28th March 2014 the AO disallowed Rs.4,89,15,024/- under Section 40 (a) (ia) on the ground that the Assessee had not deducted TDS on the payments made to the labour. The Assessee was also found to have made payment of job work charges amounting to Rs.84,03,444/- and rent charges of Rs.31,83,736/-. However, TDS had only been deducted on a sum of Rs.78,84,248/-.

6. Aggrieved by the above order of the AO the Assessee filed an appeal

before the Commissioner of Income Tax (Appeals) [CIT (A)]. By an order dated 7th August 2015 the CIT (A) allowed the appeal of the Assessee essentially on the ground that the reopening by the AO was based on change of opinion.

7. The Revenue's appeal against the aforementioned order of the CIT (A) was dismissed by the ITAT by the impugned order and that is how the Revenue is in appeal before this Court.

8. On 14th December 2018 while directing notice to issue in the present appeal the following order was passed by this Court:

> "2. By the impugned order dated 19.2.2018, Income Tax Appellate Tribunal (Tribunal for short) has affirmed the finding given by the Commissioner of Income Tax (Appeals) that this was a case of change of opinion; and, therefore, the reassessment proceedings initiated against the respondent — Lalit Bagai for the assessment year 2006-07 were contrary and bad in law.
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> 3. It is an accepted and admitted position that the original tax return of the respondent/assessee for the assessment year 2006-07 was taken up for scrutiny assessment. Vide assessment order under Section 143 (3) dated 28th March, 2008, additions were made including dis-allowance of one per cent of the wage expenses of Rs.4,71,86,794, i.e. Rs.4,71,867/- to cover up leakage or wrongful claims.
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> 4. At this stage itself, we may record, that the respondent/assessee had claimed that he had incurred wage expenses of Rs.4.71 crores based upon the muster roll which was relied upon before Assessing Officer.
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> 5. Subsequently, re-assessment proceedings under Section 147

read with Section 148 of the Income Tax Act were initiated by issuance of notice to the respondent/assessee after four years from the end of the relevant assessment year recording the following reasons:

"Reasons for reopening the case u/s 147.
The assessment in this case was completed u/s 143(3) on 28.3.2008 at an income of Rs. 1,09,52,472/-. On examination the assessee has not shown receipts in Profit and Loss account of Rs.2,61,84,628/- which appear inform 16 of the relevant previous year, thereby showing less income.

Further on perusal of records it is also seen that the assessee has not deducted any tax on payment of Rs.5,27,52,272/- payment. Therefore, the provisions of section u/s 40 (a) (ia) attract on the above mention amount.

The assessee neither at time of Assessment proceedings nor at the time offling of returns of income disclosed the above mentioned facts.

In view of these facts and after due application of mind, I have reason to believe that income chargeable to tax has escaped assessment for the A.Y. 2006-07 for the reason of failure on the part of the assessee to disclose fully and truly all mentioned facts necessary for his assessment. Therefore, case is fit for reopening the assessment u/s 147/148 of IT Act. The prior sanction of CIT is required before issue of notice u/s 148 of IT Act as per provision of Section 151 (1) Income Tax Act. "

6. The second reason/ground recorded above refers to alleged failure on the part of the respondent/assessee to deduct tax at source on payment of Rs.5.27 crores and attracting provisions of Section 40(a)(ia) of the Act.

> 7. Contentions of the counsel for the appellant/Revenue is that this amount of Rs.5.27 crores includes labour charges of Rs.4.71 crores, job work charges of Rs.84 lakhs and rent of Rs.31.83 lakhs. He submits that while it is possible to argue that payment to labour i.e. wages was examined in the first round, the payments made for job work and rent were not examined and verified in the first round. He submits that this aspect has escaped notice of the Commissioner of Income Tax (Appeals) and the Tribunal.
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> 8. Issue notice, returnable on 18th March, 2019.
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> 9. The appellant would also produce the relevant assessment records including the records of the first assessment."

9. This Court has heard the submissions of learned counsel for the parties. It is seen that the entire exercise of reopening of the assessment was triggered by objections raised by the audit party. The first of these objections was contained in the letter dated 6th August 2009 addressed by the Deputy Commissioner of Income Tax CP-1 (Audit-1) to the Deputy Commissioner of Income Tax (DCIT) Circle 38(1), New Delhi calling for comments on the audit observations enclosed with the letter. The said audit observations referred to the payment of labour charges, job work and rent for hiring.

10. On 10th May 2010 the Assistant Commissioner of Income Tax Circle 38(1) i.e. the Assessing Officer ('AO') replied to the above audit objections. A perusal of the said reply reveals that the issue of non-deduction of TDS on labour charges, job work and rent were specifically addressed. The facts and figures were set out by the AO and it was concluded that 'the Assessee had correctly accounted for its turnover also by the Income Tax Laws.'

Accordingly, the AO requested the ACIT audit to treat the said issue as 'settled.'

11. For the second time on 28th November 2011 yet another letter was addressed by the CIT Audit to the AO calling for an explanation. On 7th December 2011 the AO sent again addressing in detail the above issue.

12. On 11th December 2012 for the third time the Income Tax Officer (Audit 1) wrote to the AO stating as under:

> "To
> The Asstt. Commissioner of Income Tax
> Cir-38(I),
> New Delhi.
>
> Sir/Madam,
> **Sub: -Audit Objection in the case of Sh. Lalit Bagai for Asst. Year 2006-07-reg.**
>
> Please refer to your letter F. No. ACIT/Cir-38(I) 1201 1-12 dated 07.12.2011 on the above mentioned subject.
>
> As the explanation/ reply in respect of the case above is not acceptable. I am directed to request you to take the necessary remedial action in this case as required earlier as per the audit objection raised.
>
> You are requested to please give your reply & complete report within a week of receipt of this letter."

13. On 28th March 2013 the AO wrote to the DCIT (Audit-1) and specific to the present Assessee for the AY 2006-07 it was stated as under:

> "1. Lalit Bagai **(PAN AAAPB2885L) A. Y - 2006-07**
> After receiving the audit objection, the case has been considered for reopening the assessment u/s 147/148 of IT Act. After approval of Ld. Commissioner of Income Tax, Delhi-XIII New Delhi, notice u/s 148 has already been issued.
> As the necessary remedial action has been taken, the audit objection may be treated as settled."

14. It is further seen that on 17th February 2014 the Joint Commissioner of Income Tax (JCIT) (Audit-1) wrote to the AO asking that the outcome of the reassessment proceedings in respect of the issue for AY 2006-07 and the remedial action for AY 2007-08 'may be intimating to this office, in proper channel.' It is in the above context that the ACIT Circle 38(1) proposed to reopen the assessment by initiating the steps in that regard on 26th March 2013.

15. It is clear from the above correspondence that there was no independent decision arrived at by the AO to form 'reasons to believe' for reopening of the assessment after being satisfied that there was an escapement of income. The above correspondence also indicates that not once but on two separate occasions the AO clearly formed the opinion that this was not a case fit for reopening of the assessment and that the AO was constrained, notwithstanding that opinion, to reopen the assessment on the express instructions issued to him vide letter dated 11th December 2012 of the Addl. CIT Audit-1 referred to hereinbefore.

16. In ***Larsen and Toubro v. State of Jharkhand* (2017) 103 VST 1 (SC)** the Supreme Court was dealing with the reopening of assessment under

Section 19 of Bihar Finance Act, 1981 in respect of the return of a registered dealer for the period 1991-92. Section 19 of the BFA is in *para materia* with Section 147 of the Act. There again the reopening required the forming of an independent opinion by the AO regarding escapement of turnover for the purpose of tax. On the facts of that case, having examined the note of the audit party and the correspondence between AO and the audit party the Supreme Court came to the following conclusion in para 29 of the order which reads as under:

> "29. From a perusal of the last paragraph of the aforementioned report of the audit party, it is clear that the Assessing Officer was of the opinion that as the goods had not been transferred to Appellant-Company but had been consumed, so it does not come under the purview of taxation. In other words, the Assessing Officer was not satisfied on the basis of information given by the audit party that any of the turnover of the Appellant-Company had escaped assessment so as to invoke Section 19 of the State Act. From the above, it also appears that the assessing officer had to issue notice on the ground of direction issued by the audit party and not on his personal satisfaction which is not permissible under law."

17. In ***Adani Infrastructure & Developers (P.) Ltd. v. ACIT (2019) 101 taxmann.com 256 (Gujarat)*** the Gujarat High Court was dealing with a similar case where the notice under Section 148 of the Act for reopening of the assessment was challenged on the ground that it was not based on any independent opinion arrived at by the AO but merely based on the objections of an audit party. The relevant portion of the said judgment reads as under:

> "8. The learned Senior Standing Counsel also produced for the perusal of the court the original file containing the audit query.

A perusal of the file reveals that the Assessing Officer has not accepted the objections raised by the audit party and has given his reasons for the same and has further stated that he had considered the applicability of provisions of section 14A of the Act and was satisfied in adopting 0.5% of average value of investment for disallowance under section 14A of the Act. He was, accordingly, of the view that the objection raised by the audit party could not be accepted and is required to be dropped.

9. A perusal of the reasons recorded shows that the assessment for the year under consideration is sought to be reopened on the ground that the disallowance of expenditure under section 14A of the Act read with rule 8D of the rules had not been correctly worked out. On the other hand, the Assessing Officer, after considering the audit objections, has not accepted the same has stated that after considering the applicability of section 14A of the Act, he was satisfied with the disallowance made, despite which the impugned notice has been issued seeking to reopen the assessment on the very ground to which he has objected, which is indicative of the fact that the reopening of assessment is not based on the satisfaction of the Assessing Officer but on the audit objections.

10. Thus, the record of the case clearly reveals that the Assessing Officer has not accepted the objections raised by the audit party and on the contrary, has objected to such objections by communicating internally as referred to hereinabove. Evidently therefore, the Assessing Officer has not formed any independent belief that the income chargeable to tax has escaped assessment and on the contrary has stated that he had considered the applicability of provisions of section 14A of the Act and was satisfied in adopting 0.5% of average value of investment for disallowance under section 14A of the Act. Evidently, therefore, the notice under section 148 of the Act has merely been issued on the basis of the audit objection without the Assessing Officer having formed the requisite

> belief regarding escapement of income as contemplated under section 147 of the Act. It is by now well settled that the assessment cannot be reopened merely on the basis of an audit report without the Assessing Officer independently forming the belief, may be on the basis of such report, that income chargeable to tax has escaped assessment. The above referred decision would, therefore, be squarely applicable to the facts of the present case. The impugned notice issued by the respondent under section 148 of the Act being based merely upon the audit objection and not because the Assessing Officer had reason to believe that any income chargeable to tax has escaped assessment, cannot be sustained."

18. In the present case also the Court finds that the AO had in fact applied his mind to the audit party objection and formed a clear opinion that there is no justification for reopening of the assessment and yet it is only on the insistence of the Addl. CIT Audit that the AO changed his opinion and decided to reopen the assessment. Consequently, the reopening of the assessment in the present case, which was based on a change of opinion was vitiated in law as it did not satisfy the legal requirement of Section 147 of the Act.

19. In the circumstances, the view taken by the ITAT calls for no interference. No substantial question of law arises, the appeal is dismissed.

S. MURALIDHAR, J.

TALWANT SINGH, J.

AUGUST 21, 2019
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