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

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Date of decision: 18th March, 2014

+ ITA 112/2014

COMMISSIONER OF INCOME TAX-XVI Appellant
Through Ms Suruchi Aggarwal, sr. standing
counsel

versus

SHRI ATUL KUMAR SWAMI Respondent
Through Mr Salil Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V.EASWAR

S. RAVINDRA BHAT, J.: (OPEN COURT)

The revenue is in appeal aggrieved by the order dated 20.9.2013 of the Income Tax Appellate Tribunal (ITAT) whereby the assessee's appeal was allowed.

2. The assessee had in respect of assessment year 1999-2000 in the note filed together with the accounts and the returns disclosed that he received a sum of Rs.88 lakhs as one-time non-compete fee. He concededly paid advance tax of Rs.27,60,600/- on the same. He states that this was a one-time capital receipt; the return was processed under section 143(1). The revenue sought to reopen the assessment recording



reasons for doing so as follows by its notice dated 09.01.2002:

"The income tax return for asstt. year 1999-2000 was filed on 29th July, 1999 claiming a refund of Rs.2674420/-. The assessee was the promoter of overseas Cargo Service Private Limited and had entered into an Asset Transfer Agreement with M/s Bax Global India Pvt. Ltd. for transfer of assets of OCS to BAX. As agreed under the ATA the assessee had entered into a Non Competition Agreement with BAX. Under the terms of NCA, the assessee had undertaken not to engage directly or indirectly, either alone or in association with any person or persons in any activity, which will be in competition with the current business of BAX and for observing the restrictions specified in NCA, a consideration amounting to Rs.8 lacs was payable to the assessee by BAX. "

"The assessee had paid advance tax of Rs.27, 60,000/- on the above mentioned amount of Rs. 88 lacs and is now claiming refund of Rs.30, 74,254/- on the contention that as it is capital receipt, it should not be chargeable to tax. However, the income of the assessee of Rs. 88 lacs received by him should be chargeable to tax as it is not a capital receipt but is to be charged to income tax under the head "Profit & Gains of Business of Profession". In terms of section 28 of the IT Act, 1961, section 28 is reproduced hereunder to bring the assessee in net of this provision. "

'any compensation or other payment due to or received by;

a) any person by whatever name called managing the of an Indian company at or in connection with the termination of his management or the modification of the terms and conditions relating thereto. In the light of the above facts, income of Rs.88 lacs has escaped assessment and the very fact that the assessee has already paid advance refund on it on after thought, substantiates the contention of the revenue that the above mentioned amount is chargeable to income tax. Hence notice u/s 148 issued."

3. The assessee objected to the reopening of the assessment



contending that there was no fresh or tangible material discerned by the revenue for notice for reassessment. This objection was overruled and the AO added back the said amount as business income observing that the nature of the consideration receipt having regard to the terms of the agreement was such that it was income and not capital receipt. The assessee preferred an appeal but without success to the Commissioner (Appeals). The Commissioner (Appeals) had during the pendency of the appeal called for remand report and after discussing its contents rejected the appeal.

4. The Income Tax Appellate Tribunal after considering the decision of the Supreme Court in *CIT vs. Kelvinator (India) Ltd.* (2010) 320 ITR 561 as well as the later rulings of the Supreme Court and this Court held that there was no tangible material and that the mere circumstance that advance tax to the tune of Rs.27.6 lakhs was paid did not amount to admission by him. The learned counsel for the revenue contends that having regard to the Explanation 1 of section 147 read with section 143(1), the reopening of the assessment in this case was justified. She also argued that the agreement entered into by the assessee under which the amount was paid had not been filed during the assessment stage. This according to the revenue justified the reassessment proceedings.

5. As to what constitutes valid “reasons to believe” is no longer a



matter of debate. So long as the law declared in *Kelvinator (supra)* stands, a valid reopening of assessment has to be based only on tangible material to justify the conclusion that there is escapement of income. In the present case the note forming part of the return clearly mentioned and described the nature of the receipt under a non-compete agreement. The reasons for the notice under section 147 nowhere mentioned that the revenue came up with any other fresh material warranting reopening of assessment. In these circumstances, the Court is of the opinion that mere conclusion of the proceedings under section 143(1) *ipso facto* does not bring invocation of powers for reopening the assessment. We are satisfied that the Tribunal's reasons are justified and do not call for any interference.

The appeal is accordingly without merit and is dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

MARCH 18, 2014
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