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

Date of decision: 18.10.2012

\+ **ITA 1232/2009**

THE COMMISSIONER OF INCOME TAX-II

..... Appellant

Through : Sh. Sanjeev Sabharwal, Sr. Standing Counsel with Ms. Gayatri Verma, Advocate.

versus

MARUTI SUZUKI INDIA LTD. ..... Respondent

Through : Sh. Somnath Shukla, proxy for Sh. Ajay Verma, Advocate.

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%

1. In this appeal the revenue challenges the Income Tax Appellate Tribunal's (hereafter "Tribunal") order dated 12.12.2008 by which it allowed the assessee's appeal, quashing the re-assessment proceedings instituted against it under Section 147, Income Tax Act, 1963.

2. The relevant facts are that the assessee filed original return of income on 30.11.98 which was revised on 29.03.2000. Regular assessment was completed on 30.3.2001. The AO thereafter had reason to believe that some income had escaped assessment and recorded the following reasons for reopening the assessment:

"In the profit and loss account the Assesse has claimed

software expenditure of Rs. 129.70 lakhs as revenue expenses. By treating the software expenses of Rs. 129.70 lakh in this year the income had been under assessed by Rs. 129.70 lakhs. Therefore, I have reason to believe that income to the tune of Rs. 129.70 lakhs had been under assessed. This has now been confirmed by the order of Hon'ble ITAT vide their order in appeal no. ITA No. 1240/Del/2003 dated 11th October, 2004 page 58 para 73 in the assessee's own case for the Assessment Year 1999-2000 has treated the software expenses as capital expenses.

In this case 4 years have elapsed from the end of relevant year A.Y. i.e 31.03.1999 and 6 year will be lapsed on 31.03.2005. As the amount of under assessment income is more than one lakhs, I am placing these facts before your good-self along-with a Performa for obtaining section u/s 151 of the I.T. Act for issue of notice u/s 148.

I have reasons to believe that on failure on part of the Assessee to disclose truly and fully all legal facts the income chargeable to tax amounting to Rs. 129.70 lakhs has escaped assessment."

3. The notice under Section 148 was issued and served on the assessee on 15.3.2005. The AO framed the reassessment order on 21.3.2006 adding an amount of Rs. 1,25,81,994/- to the taxable income. The assessee went in appeal which was dismissed by CIT(A) on 23.8.2006. In second appeal, the Tribunal, by the impugned order, set aside the reassessment proceedings, allowing the assessee's appeal. The Tribunal's reasoning was as follows:

"14. We have heard both the sides and perused the material available on record. As the facts emerge, from the record, we could not gather that any material facts or particulars were not disclosed by the assessee. It has not

been disputed that the notice in question u/s 148 has been issued after the end of 4 years from the assessment year. In this scenario, justification of re-assessment falls in the realm of a situation where AO is satisfied that assessee has failed to disclose primary and material facts truly. Hon'ble Delhi High Court addressed this issue which we have respectfully to follow as AO has failed in objective term to make out a case that assessee in objectivity failed to disclose any material facts or particulars truly. The re-assessment seems to be inspired by subsequent ITAT judgment in assessee's own case which held that the software expenses were capital in nature. On this point, we have been impressed by the arguments of Ld. Counsel that software expenses cannot be of static nature as they vary from year to year and use to use. From the details failed, we find that the assessee had given reasonable details describing the nature which at the relevant time of assessment as accepted by the AO to be revenue in nature. Besides AO while writing the reasons has been sketchy and has indicated to wrong claim of depreciation by the assessee which, in our view, is not a correct reason as the expenditure was claimed as revenue in nature. In the entirety of facts and circumstances, respectfully following Hon'ble Delhi High Court Judgment, we have no hesitation to hold that there was no failure on the part of assessee of disclosing material facts and particulars so as to warrant reopening of assessment. Therefore, we quash the re-assessment proceedings. In this eventuality, there is no desirability to go into the merits of the case."

4. Before this Court, the Revenue's counsel argued that even when full disclosure has been made, income can still be held to have escaped assessment. In this regard, he relied on *Bawa Abhai Singh v. DCIT*, 253 ITR 83 and *Praful Chunilal Patel v. M.J. Makwana, Assistant Commissioner of Income Tax*, [1999] 236 ITR 832 (Guj).

Counsel further submitted that the Proforma for obtaining the approval of CIT under Section 151 for issuance of notice under Section 148 does not, at any place, use the word "depreciation", and therefore the Tribunal's observation that the AO had incorrectly used the "depreciation" was wrong. For this, counsel also placed reliance on Explanation 3 to Section 147 and a Madras High Court decision in *K.R. Venketesan v. Wealth Tax Officer* 146 CTR 268.

5. Counsel further contended that initiation of reassessment proceeding based on the decision of a High Court (and for that matter even the Tribunal) is valid. He took support from *ITO v. Saradbhai M. Lakhani* 243 ITR 1 (SC), *R.B. Bansilal Abirchand Firm v. Commissioner of Income Tax, Madhya Pradesh* 70 ITR 74 (SC), *Associated Stone Industries (Kotah) Ltd. v. Commissioner of Income Tax, Jaipur* 224 ITR 560.

6. Counsel for the assessee, on the other hand, defended the Tribunal's decision. It was argued that notice for reassessment was served after lapse of four years, and, therefore, the additional requirements stipulated in the First Proviso to Section 147 had to be met with; and that such requirements were not met. His contention was two-fold: firstly, that there was no clear and specific allegation the assessee had failed to disclose fully and truly all material facts, which made the proceedings under Section 147 invalid and without jurisdiction; and secondly, that,in law, there was no such failure as all the primary facts had been disclosed. He placed reliance on *Calcutta Discount Company Ltd. v. Income-tax Officer, Companies District, I and Anr.* 41 ITR 191. Furthermore, he contended that the notice under

Section 148 was issued due to a mere change in opinion, which is not sustainable. It was also urged that software expenses, as a matter of fact, cannot be said to be capital expenses in all times and circumstances.

Analysis

7. This Court has considered the arguments and the materials available on record. Since the notice under Section 148 was issued after the expiry of four years, the AO was required to demonstrate that the assessee had either failed "*to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year*". It is an admitted fact that the assessee filed its return of income; thus, for the initiation of reassessment proceedings to be valid, the last stated condition must be shown to have been met. In our opinion, this condition was not met. The AO, in the reasons recorded, after relying on the Tribunal's decision in the assessee's own case for a different assessment year, has merely made a bald statement that the assessee had failed "*to disclose truly and fully all legal facts*". It is borne out from the record that the assessee had provided in its P&L A/c software expenses as revenue in nature. The AO in the original assessment had, without any discussion in the assessment order, allowed these software expenses as revenue expenditure, and this was sought to be disturbed in the reassessment proceedings after expiry of four years. This is a clear case where the primary facts were available before the AO, and therefore, the assessee cannot be held to have failed to disclose "*fully*

and truly all material facts". In our opinion, it was for the AO to draw the appropriate inference. The assessee is/was under no obligation to draw the inference of fact or law based on the primary facts available on record. The following extracts from *Calcutta Discount* (supra) are pertinent here:

> *"11. Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts.*
>
> *12. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?"*

8. The same view is echoed in *Parashuram Pottery Works Co. Ltd v. Income Tax Officer*, (1977) 106 ITR 1 (SC) and several other cases and has become a settled principle. In the circumstances, Explanation 1 to Section 147 also cannot come to the rescue of the revenue. Therefore, by virtue of the applicability of the proviso, the additional

condition which was required to be met has remained unsatisfied. The reassessment proceeding is vitiated on this ground alone. The decisions in *Bawa Abhai Singh* (supra) and *Venketesan* (supra) do not deal with the First proviso to Section 147, and that in *Praful* (supra) even though makes observations in this regard, it does not assist the revenue's case.

9. Furthermore, the assessee also placed reliance on *Saradbhai* (supra) and other cases. In that regard, another question that arises is whether under the existing provision (Section 147), a decision having effect on the assessment which is subsequent to the assessment order under Section 143(3) of the Act or a decision which was not within the knowledge of the assessing officer can itself be a ground for issuing a notice under Section 148 of the Act for the purpose of reassessment. Since this case can be disposed of on the preliminary ground of non-satisfaction of condition (assessee's failure to fully and truly disclose all material facts) prescribed in the proviso, we consider it unnecessary to rule finally on the above question. We, however, add that the answer to this question as provided in *A.L.A. Firm v. CIT*, (1991) 189 ITR 285 (SC) and followed in *Saradbhai* (supra) and other decisions cited by the assessee are of little assistance in the facts of the present case.

10. The Supreme Court in *Commissioner of Income Tax, Delhi v. Kelvinator of India Limited* [2010] 320 ITR 561 (SC) held that there should be "tangible material" to arrive at the conclusion that there is escapement of income from assessment. Arguably, it cannot be held that a judicial decision (in this case the Tribunal's decision in

assessee's own case for a different assessment year) is tangible material. Section 147, as it existed prior to the Direct Tax Laws (Amendment) Act, 1987:

> *"147. Income escaping assessment.- If-- (a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or*
>
> *(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in- his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).*
>
> *XXXXXX XXXXXX XXXXXX*

The terminology employed in section 147, as it exists today w.e.f. 1st April, 1989, and existed in the relevant assessment year is "*has reason to believe that any income chargeable to tax has escaped assessment ... and which comes to his notice subsequently in the course of the proceedings under this section*".

11. In *Commissioner of Income Tax-VI v. Usha International Limited*, [2012] 348 ITR 485(Delhi), it was ruled that:

"14. Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.

XXXXXX XXXXXX XXXXXX

21… A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. Assessee is required to disclose full and true material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under Section 263 of the Act."

12. In light of the above discussion, the revenue's appeal must fail. It is hereby dismissed as no substantial question of law arises for consideration.

S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

OCTOBER 18, 2012