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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
21.
\+ **ITA 415/2015**

PR. COMMISSIONER OF INCOME TAX-09 ..... Appellant
Through: Ms. Suruchi Aggarwal, Senior Standing counsel with Ms. Lakshmi Gurung, Advocate.

versus

TUPPERWARE INDIA PVT. LTD. ..... Respondent
Through: Dr. Rakesh Gupta with Ms. Poonam Ahuja and Mr. Rohit Kumar Gupta, Advocates.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

O R D E R
% 10.08.2015

Dr. S. Muralidhar, J.

1. This appeal under Section 260A of the Income Tax Act, 1961 ('Act') by the Revenue is directed against the order dated 29th August 2014 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 2140/Del/2011 for the Assessment Year ('AY') 2003-04.

2. The question of law that the Revenue seeks to urge is whether in the facts and circumstances of the case the ITAT was justified in holding that the reassessment proceedings under Section 147/148 of the Act were not legally initiated?

3. The Respondent Assessee filed a return of income on 2nd December 2003 showing a loss of Rs. 96,19,890. The return was processed under Section 143 (1) of the Act at the return amount. An order for refund of Rs.20,16,957 was issued. Subsequently, the Assessing Officer ('AO') passed an order recording 'reasons for belief that income has escaped assessment'. In this order the AO noted that in the Audit Report under Section 44AB in Form 3CD, the Statutory Auditor had reported that the management service fee to the extent of Rs.1,36,89,075 payable to Tupperware International Holdings EV Ltd. was paid without deducting tax at source. Since the said deduction was inadmissible under Section 40 (a) (i) of the Act, the AO held that he had reasons to believe that the aforementioned amount had escaped assessment and consequently issued notice to the Assessee under Section 148 of the Act on 21st October 2005.

4. In the resultant assessment order dated 28th December 2006, the AO recorded that "since the Assessee did not raise any objection to the proposed reassessment after having conveyed the reasons recorded under Section 148 of the Act, there is no need to dispose of the same prior to reassessment."

5. Apparently, the Assessee did raise an objection to the order of the AO reopening the assessment. In the order dated 28th January 2011 allowing the Assessee's appeal, the Commissioner of Income Tax (Appeals) ['CIT (A)'] noted that the Assessee had indeed filed objections to the reopening of the assessment by its letter dated 9th August 2006. In the remand report dated 20th December 2010, the AO quoted a paragraph from the order sheet which stated that the aforementioned letter dated 9th August 2006 had been handed

over to the AO and that the AO had sought some more information which the Assessee had not filed. The CIT (A) accordingly held that by stating that no objections had been filed, the AO had "very conveniently disregarded the guidelines" laid down by the Supreme Court in ***G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)***. The CIT (A), therefore, agreed with the Assessee that since the procedure laid down by the SC in the aforementioned decision was mandatory, the AO had in fact not disposed of the objections by a speaking order. Nevertheless, the CIT (A) held that the said defect "does not make the assessment order illegal and hence it cannot be quashed. It is a technical mistake which is curable."

6. The Court is of the considered view that after having correctly understood the decision of the Supreme Court in ***G.K.N. Driveshafts (India) Ltd.*** (*supra*) as mandatorily requiring the AO to comply with the procedure laid down therein and to dispose of the objections to the reopening order with a speaking order, the CIT (A) committed an error in not quashing the reopening order and the consequent assessment.

7. The CIT (A) in the order dated 28th January 2011 proceeded to examine on merits the challenge by the Assessee (in Ground No.4) to the order of the AO disallowing the management service fee. The CIT (A) agreed with the submissions of the Assessee and held that in view of the 'Nil' withholding certificate issued by the DDIT Circle 1 (2) of the International Tax Division in favour of the Assessee in terms of the Double Taxation Avoidance Agreement ('DTAA') between the India and the USA, there was no need for the Assessee to charge tax or withhold tax under Section 195 of the Act.

Therefore, on merits the CIT (A) deleted the disallowance of the above deduction. The CIT (A) also noted that the said expenses were not disallowed in AY 2004-05 "even when the assessment for the said order so completed with the disallowance of this order."

8. The above findings on merits in Ground 4 by the CIT (A) in favour of the Assessee, was not challenged by the Revenue before the ITAT in ITA No. 2140/Del/2011 for 2003-04. With the Revenue not having challenged the order of the CIT (A) deleting the disallowance made by the AO pursuant to the reopening of the assessment, the challenge by the Revenue only to that portion of the order of the ITAT holding that the reopening was not legally sustainable, renders the issue academic.

9. Consequently, for both the aforementioned reasons, viz., that there was a failure by the AO to comply with the mandatory requirement of disposing of the objections of the Assessee to the reopening in terms of the law explained by the Supreme Court in ***G.K.N. Driveshafts (India) Ltd.*** (*supra*) as well as on account of the failure of the Revenue to challenge before the ITAT the order of the CIT (A) deleting on merits the disallowance made by the AO of the management service fee consequent upon reopening of the assessment, there appears to be no need to examine the issue projected by the Revenue in this appeal viz., the justification for re-opening the assessment under Section 147/148 of the Act.

10. Nevertheless, the Court has examined the above issue as well. The ITAT relied essentially on the decision of this Court in ***Commissioner of Income***

Tax v. Orient Craft Ltd. (2013) 354 ITR 536 and the decision of the Rajasthan High Court in ***Commissioner of Income Tax v. Smt. Jyoti Devi (2008) 218 CTR 264*** to answer the issue in favour of the Assessee.

11. The case sought to be urged by the Revenue in this appeal is that in terms of the decision of the Supreme Court in ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500,*** an intimation under Section 143 (1) is not an assessment. The acceptance of the Assessee's return under Section 143 (1) does not lead to formation of any opinion on merits so as to require the receipt of any new information for taking recourse to the provisions of Sections 147/148 of the Act. It is also sought to be urged that the facts of the present case are different from that of ***CIT v. Orient Craft Ltd.*** (*supra*) since in that case the AO had no tangible material before to show that the income had escaped assessment.

12. At the outset it requires to be factually noticed that the reopening order of the AO only refers to the report of Statutory Auditor under Section 44AB of the Act which report was already enclosed with the return filed by the Assessee. Therefore, factually, there was no new material that the AO came across so as to have 'reasons to believe that the income had escaped assessment'.

13. As far as the legal requirement is concerned, the Court finds that the decision in ***CIT v. Orient Craft Ltd.*** (*supra*) answers the question squarely in favour of the Assessee in the facts of the present case. In ***Orient Craft Ltd.*** this Court considered the decisions of the Supreme Court in ***CIT v.***

Kelvinator India Ltd. (2010) 320 ITR 561 and ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*).

14. The question examined by the Court in ***CIT v. Orient Craft Ltd.*** (*supra*) is identical to the one sought to be projected by the Revenue in this appeal viz., whether the Tribunal was right in law in holding that in the absence of any tangible material available with the AO to form the requisite belief regarding escapement of income, the reopening (under Section 147/148) of the assessment made under Section 143 (1) was bad in law?

15. In ***CIT v. Orient Craft Ltd.*** (*supra*) the Revenue sought to argue, placing reliance on ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) that "intimation" could not be equated with "assessment". The Court observed that the decision in ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) "contrary to what the Revenue would have us believe, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under Section 143 (1) at his whims and caprice; he must have reason to believe within the meaning of the Section." The Court in ***Orient Craft Ltd***. recorded that the decision in ***Rajesh Jhaveri Stock Brokers P. Ltd.*** underscored that the intimation under Section 143 (1) of the Act could be disturbed by initiating reassessment proceedings only:

> "so long as the ingredients of Section 147 are fulfilled and with reference to Section 143(1) vis-a-vis Section 147, the only ingredient is that there should be reason to believe that income chargeable to tax has escaped assessment and it does not matter that there has been no failure or omission on the part of the assessee to disclose full and true particulars at the time of the original assessment. There is nothing in the

> language of Section 147 to unshackle the Assessing Officer from the need to show "reason to believe". The fact that the intimation issued under Section 143(1) cannot be equated to an "assessment", a position which has been elaborated by the Supreme Court in the judgment cited above, cannot in our opinion lead to the conclusion that the requirements of Section 147 can be dispensed with when the finality of an intimation under Section 143(1) is sought to be disturbed."

16. The Court in ***CIT v. Orient Craft Ltd.*** (*supra*) examined the meaning given of the words 'reasons to believe', quoted from the decision of the Supreme Court in ***CIT v. Kelvinator India Ltd.*** and held as under:

> "Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there

> was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

17. The Court in ***CIT v. Orient Craft Ltd.*** (*supra*) further comprehensively rejected the argument of the Revenue, which it seeks to urge in the present case as well, that an 'intimation' under Section 143 (1) cannot be equated to an assessment. The Court held:

> "The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in *Rajesh Jhaveri* (*supra*) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to Section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to Section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke Section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one

> applicable where the assessment was earlier made under Section 143(3) and another applicable where an intimation was earlier issued under Section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under Section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements."

18. It may be noticed at this stage that the decision in ***Orient Craft Ltd*** has been followed by this Court in ***Madhukar Khosla v. Assistant Commissioner of Income Tax (2013) 354 ITR 356***.

19. There is no ground urged in the present appeal by the Revenue that the decision in ***CIT v. Orient Craft Ltd.*** was erroneously decided and requires reconsideration. During the course of arguments it was submitted that having regard to the decision of the Full Bench in ***CIT-VI v. Usha International Ltd. (2012) 348 ITR 485***, the question should be re-examined by the Court.

20. In the first place, it requires to be noted that the decision in ***Orient Craft Ltd***. was delivered after the decision of the Full Bench in ***Usha International Ltd***. (*supra*). Secondly, the subsequent decision in ***Madhukar Khosla*** noted the decision in ***Usha International Ltd.*** and reiterated the dictum in ***Orient Craft Ltd***. Again in a decision dated 28th January 2015 in

Mohan Gupta (HUF) v. Commissioner of Income Tax-XI (2014) 366 ITR 115 (Del) the Court reiterated the decision in ***Orient Craft Ltd***. Thirdly, the Court finds that the questions framed for consideration by the Full Bench in ***Usha International Ltd.*** as set out in para 1 of the said judgment did not pertain to reopening of an assessment under Section 143 (1) of the Act. The four questions referred to the Full Bench were as under:

> "(i) What is meant by the term "change of opinion"?
>
> (ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?
>
> (iii) Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?
>
> (iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?"

21. Therefore, the central issue examined in the decision of the Full Bench in ***Usha International Ltd.*** was as to what constituted a 'change of opinion'. The Court, therefore, does not consider the decision in ***Orient Craft Ltd.*** as being contrary to the decision in ***Usha International Ltd.*** In other words, there is no occasion for the Court to refer to a larger bench the question of

the correctness of the decision in ***Orient Craft Ltd.*** which decision squarely applies to the facts of the present case.

22. For all of the aforementioned reasons, the Court holds that no substantial question of law arises from the impugned order of the ITAT. The appeal is accordingly dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

AUGUST 10, 2015/dn