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

+ **W.P.(C) 12360/2018 & CM Appl. No. 47877/2018 (stay)**

BEST CYBERCITY (INDIA) PVT. LTD. Petitioner

Through: Mr. Salil Kapoor, Mr. Sumit Lal
Chandani, Ms. Ananya Kapoor &
Mr. Sidharth Kanwar, Advocates

versus

INCOME TAX OFFICER, WARD 4(3) & ANR. Respondents

Through: Mr. Zoheb Hossain, Sr. Standing
counsel with Mr. Piyush Goyal,
Advocates for Revenue

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE I.S.MEHTA

ORDER

% **21.05.2019**

Dr. S. Muralidhar, J.:

1. The Petitioner challenges a notice dated 29th March, 2018 issued by the Income Tax Officer, Ward 4(3) (hereafter Assessing Officer, AO) under Section 147 read with Section 148 of the Income Tax Act, 1961 seeking to re-open the assessment for the Assessment Year (AY) 2011-2012 as well as the order dated 26th October, 2018 rejecting the Petitioner's objections to the re-opening of the assessment.

Relevant facts

2. The Petitioner is a company engaged in real estate development and related services. It filed its return of income for the AY in question on 29th September, 2011 declaring a loss of Rs. 22,534/-. The return was picked up

for scrutiny and a questionnaire dated 23rd October, 2012 was issued by the AO to the Petitioner inquiring about various aspects. Along with its reply dated 30th October, 2012 the Petitioner submitted all the relevant bank statements. A further reply was submitted on 6th November, 2012 stating that copies of the Audit Report, Balance Sheet, Profit and Loss Account (P & L Account) along with Schedule had already been placed on record. Details of an unsecured loan of Rs.40 crores obtained by the Petitioner from PACL India Limited ('PACL') were also reflected in the accounts .

3. Another questionnaire was issued by the AO on 27th November, 2012 raising specific questions as regards PACL. The Petitioner submitted its reply on 25th January, 2013 furnishing details of the unsecured loan with confirmation of accounts. According to the Petitioner it informed the AO that it had a plan to undertake a joint venture with PACL for development of an IT park but the project did not materialize. Therefore, in the subsequent AY, the said amount was refunded to PACL. The statement of Petitioner's account with Axis bank for the AY in question was already on record. The bank statement for AY 2012-2013 along with the ledger account was also filed. By a further submission dated 2nd February, 2013 the Petitioner submitted details of the deployment of funds along with copies of the ledger accounts, showing loans and advances, along with ledger account of PACL. According to the Petitioner direct enquiries under Section 133(6) were made by the AO from PACL during the assessment proceedings.

Original assessment order

4. The AO passed an assessment order dated 28th March, 2013 for the AY in

question accepting the Petitioner's return as filed. The order was a short one and reads as under:

“A search and seizure operation u/s 132 of the IT Act was carried out at the business premises of M/s Best group at H-8, Best Plaza, Netaji Subhash Place, Pitampura, New Delhi as well as on residential premises of the directors and their family members on 28th March, 2011. The group is carrying out the activities of real estate development and related services. The group is managed by Sh. Harjeet Singh, Sh. Anu Aggarwal and others M/s Best Cyber City (India) Private Limited is one of the companies of this group. Case of the assessee company was centralized with Central Circle-11, New Delhi. A notice under section 142(1) was issued on 11-10-2012. Thereafter a questionnaire issued under section 142(1) on 23-10-2012 of the Income Tax Act, 1961. The assessee company filed its return of income declaring loss of Rs. (22,534)/- for the Assessment Year 2011-12 on 20-11-2012.

2. Sh. Rajesh Arora, Chartered Accountant, Authorized Representatives, attended the assessment proceedings in compliance to notices under section 142(1) & 143 (2) of the Income Tax Act, 1961 from time to time. The details/information produced/furnished during the course of assessment proceedings has been examined and placed on record. The case was discussed with the assessee on various related issues and submissions put forth.

After discussion income of assessee assessed at Nil

Assessed. Allow credit of prepaid taxes. Charge interest as per law. Issue demand notice and challan.

3. This order has been issued with the approval of Additional Commissioner of Income Tax, Central Range-III, New Delhi, as per approval accorded vide F.No. Addl.CIT (CR)-111/2011-12/726 dated 28-3-13.”

5. More than four years thereafter, the impugned notice dated 29th March,

2018 under Section 148 of the Act seeking re-opening of the aforementioned assessment for AY 2011-2012 was issued by the AO. By a reply dated 23rd April, 2018 the Petitioner stated that its original return may be treated as the return filed pursuant to the above notice. The Petitioner also requested for copy of the reasons recorded. On 5th September, 2018 the AO supplied to the Petitioner a copy of the reasons recorded.

Reasons for re-opening

6. In Para 2.1 of the reasons, it was stated that during the course of assessment proceedings of a sister concern of the Petitioner i.e. Best International Projects Private Limited (BIPPL) for AY 2012-2013, it was noticed that a sum of Rs. 40 crores had been transferred from the account of PACL with Axis Bank to the account of the Assessee. It was observed that PACL “is well known for giving and taking accommodating entries”.

7. Para 3 of the reasons contained the analysis of the above information. According to the AO, the creditworthiness and genuineness of the above transaction remained unproved in the case of the Assessee in light of the financial position reflected in the returns and nature of the debit and credit entries reflected in the Bank account statements “in which transactions are squared up on daily basis or a day after day basis.” From statement of one Shri Annu Aggarwal, Director of Assessee it was clear that it had done no business activities ever since its incorporation and had no income for investment. It was further stated that the assessee had no business office premises either on rent basis or ownership basis. It had no fixed moveable assets and no staff to carry on day to day activities. It was then noted that

Shri Aggarwal admitted not knowing the names of the Directors and Top Management officers of PACL which was well known for giving and taking accommodating entries. The name of PACL had been mentioned by one Shri Praveen Aggarwal a well known entry operator of Kolkata who had made a statement to that effect on 12th November, 2012 during search and seizure operation conducted at his group of companies.

8. For the above reasons, the AO recorded that he had reason to believe that Rs. 40 crores received by the Assessee from PACL had escaped income for AY 2011-2012. In Para 4.1 the AO concluded that the Assessee had received “unexplained investment amounting Rs.40 crores” during the AY in question, which had escaped taxation. In para 4.2 it was stated that the above income had escaped assessment on account of “the failure on the part of the Assessee disclosed fully and truly all material facts”.

9. On 24th October, 2018 the Petitioner filed its objections to the re-opening of the assessment. These were rejected by the AO by an order dated 26th October, 2018.

10. While directing notice to issue in the present petition on 19th November, 2018 this Court directed that the AO would not pass the final orders during the pendency of the proceedings.

11. Pursuant to the notice issued in the petition, the Respondent AO has filed a counter affidavit reiterating, more or less, the reasons given for reopening of the proceedings. In particular, it is submitted that the assessment order

dated 28th March, 2013 under Section 143 (3) of the Act was cryptic. In other words, it is submitted that in the present case since the original assessment order did not contain any discussion on the issues raised in the notice for re-opening the assessment, it could not be said that the re-opening was based on mere a 'change of opinion' of the AO.

Submissions of the Assessee

12. Mr. Sanat Kapoor, learned counsel for the Assessee, submitted that there was total non-application of mind by the AO while re-opening the assessment. In the first place, the proforma filled up by the AO for seeking approval of the superior officer for the re-opening of the assessment indicated that the earlier assessment was under Section 143(1) of the Act whereas it was under Section 143(3) of the Act. According to Mr. Kapoor, this led to neither the AO nor the Superior Officer examining the file and noting that detailed questionnaires had already been issued by the AO for which replies have been given by the Assessee disclosing the complete particulars regarding the loan of Rs. 40 crores of the PACL. Mr. Kapoor emphasized that this was not a case of failure by the Assessee to disclose the complete relevant materials and information relevant to the assessment.

According to Mr. Kapoor the jurisdictional requirement in law for assumption of jurisdiction under Section 147 of the Act, keeping in view that the original assessment was under Section 143(3) of the Act, and the re-opening was sought to be done four years after the earlier assessment, were not fulfilled in the present case.

13. Mr. Kapoor placed reliance on the decisions of this Court and the

Supreme Court in *CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561*, *Haryana Acrylic Manufacturing Co. v. CIT (2009) 308 ITR 38 (Del)*, *Sabh Infrastructure Ltd. v. ACIT 398 ITR 198 (Del)* and *Yum! Restaurants Asia Private Ltd v. Deputy Director of Income Tax 397 ITR 665 (Del)*.

Submissions of the Revenue

14. Mr. Zoheb Hossain, learned Senior standing counsel for the Revenue on the other hand submitted that the assessment order did not reflect any discussion on the aspect of the unsecured loan obtained by the Assessee from PACL during the AY in question. It was a cryptic order and, therefore, couldn't be said to reflect any opinion of the AO on the issue. He placed reliance on the decision in *Income Tax Officer Ward No. 16(2) vs. M/s TechSpan India Private Ltd. (2018) 6 SCC 685* as well as *S.K.Enginnering Company Private Limited vs. Commissioner of Income Tax (Amritsar) 2001 10 SCC 189* to urge that where the original assessment order was a cryptic one it could not be said that the re-opening was based on a mere change of opinion.

15. Mr. Hossain further submitted that the fact of utilisation of the sum of Rs. 40 crores by the Assessee by giving Rs. 15.48 crores to BIPPL was not disclosed by the Assessee during the assessment proceedings. PACL was an accommodation entry provider and these facts emerged only during the assessment proceedings of BIPPL for AY 2012-13.

Analysis and reasons

16. The requirement of the law in a case where the original assessment is

under Section 143(3) of the Act and the re-opening of the assessment is beyond four years is well settled in a large number of cases, including *CIT v. Kelvinator of India Ltd.* (*supra*) and may be summarised thus:

(a) There must be tangible material that leads an AO to form reasons to believe that income chargeable to tax for the AY Year concerned has escaped assessment.

(b) The AO's reasons must not be based on a mere change of opinion. Sections 147/148 of the Act cannot be invoked to overcome an oversight, inadvertent error and/or mistake in the original assessment order.

(c) Where the original assessment is under Section 143(3) of the Act and is sought to be reopened beyond a period of four years from the end of the relevant AY, then in terms of the first proviso to Section 147 of the Act it must be additionally shown that the escapement of income was either on account of the Assessee's failure to file a return under Section 139, or in response to a notice under Sections 142(1) or 148 of the Act or failing to disclose fully and truly all material facts necessary for the assessment.

(d) The reasons for re-opening the assessment must themselves contain all of the above elements. In other words the factum of the existence of tangible material and the recording of the satisfaction of the AO about the failure by the Assessee to disclose fully and truly all material facts necessary for the assessment must find place in the reasons recorded for re-opening the assessment. The deficiency in this regard cannot be sought to be made up by

a counter affidavit filed in the Court in response to a petition questioning the reopening of the assessment.

17. In *Sabh Infrastructure v. ACIT (supra)* after referring to the decisions in *Oracle India Pvt. Ltd. v. ACIT 2017 SCC online Del 9360* and *BDR Builders and Developers Pvt. Ltd. v. ACIT 2017 SCC Online Del 9425* this Court held

“Thus, it is also now well settled that the reasons to believe have to be self explanatory. The reasons cannot be thereafter supported by any extraneous material. The order disposing of the objections cannot act as a substitute for the reasons to believe and neither can any counter affidavit filed before this court in writ proceedings.”

18. As far as the present case is concerned, it is seen that the detailed questionnaire was first issued on 23rd October, 2012 by the AO during the course of the original assessment proceedings under Section 143 (3) of the Act. The AO had called for copies of all the bank accounts, the details of the sources of funds credited to the bank accounts and the application of the funds debited in such accounts. A reference was made to the search and seizure operations undertaken on 28th March, 2012 in which cash was found from plot No. H-8, Netaji Subhash Palace, New Delhi. On 30th October, 2012 the Petitioner gave a point-wise reply including the Auditors report and the balance sheets, profit and loss account etc. By a separate letter dated 6th November, 2012 the Petitioner give further clarifications on certain other points placed by the AO.

19. A further notice was issued on 27th November, 2012 by the AO which

was specific to the amount received from PACL. Copy of the agreement entered into with PACL Limited for development of IT park under joint venture with the best group and “details of amount of Rs.40 crores received from the parties during the year, along with documentary evidence” was also called for. On 25th January, 2013 the Assessee provided the following explanation:

“The Assessee Company has received Rs. 40 crore from M/s PACL during the year under reference as the Assessee Company was planning to undertake a joint venture with the said party for development of IT Park. The said amount is reflected in the schedule 2 of Balance Sheet already placed on record. However, the deal couldn't be materialized. Therefore the Assessee refunded the said amount to the said party in the financial year 2011-12. It is pertinent to mention hereby that the amount was received and refunded through Account No.910020022934722, Axis Bank. The bank statement for the financial year 2011-12, confirming that the amount was refunded, is enclosed herewith as per Annexure 5. The confirmation of PACL has already been submitted in "Reply to Point No, 3" above.”

20. The certificate issued by the PACL limited stating that there is a balance of Rs. 40 crores in the name of the Assessee and the subsequent certificate dated 4th January, 2013 that debit balance is zero as on 31st March, 2012 was also furnished. The complete statement of bank account of Axis bank reflecting the debits and credits in the account including money received from PACL and repaid to it were furnished. It is therefore plain that all details pertaining to the amount received from PACL was in fact furnished by the Assessee to the AO.

21. While, in the present case the assessment order does not itself discuss the

details furnished by the Assessee, the fact remains that all the relevant materials were indeed disclosed by the Assessee before the AO. Also, the details of how the sum of Rs. 40 crores was disbursed appears to have been disclosed by the Assessee in a letter dated 2nd February, 2013 written by it to the AO in response to the questionnaire issued to it on 27th November, 2012. Relevant portions of the said letter read as under:

“Sir,

With reference to the subject captioned above, the Assessee seeks to submit as follows in response to the questionnaires issued u/s 142(1):

Reply to Point No. 6

With regard to the query in relation to Rs. 40Cr received by the Assessee Company, it is stated that the Assessee Company has received Rs. 40 Cr in AY 2011-12 as an advance for development of IT park, from M/s PACL, as highlighted in the bank statement and bank book enclosed herewith for your ready reference.

Availing the deployment of funds, the amounts were temporarily advanced to following parties whose debit balance on 31.03.2011 was as under:

| Name of the Party | Amount (Rs.) |
|---------------------------------------|---------------------------|
| Best City Developers (I) Pvt. Ltd. | 7,20,00,000/- Dr. |
| Best International Projects Pvt. Ltd. | 15,48,00,000/- Dr. |
| Best Realtech (I) Pvt. Ltd. | 12,30,00,000/- Dr. |
| Harjeet Singh Arora | 90,00,000/- Dr. |
| Parasmani Buildwell Pvt. Ltd. | 4,00,00,000/- Dr. |
| Zile Singh | 12,00,000/- Dr. |
| Total (Rs.) | 40,00,00,000/- Dr. |

The copy of ledger accounts showing the loans and advances are enclosed herewith as per Annexure 1.

Since the deal couldn't materialize therefore the Assessee Company refunded the same amount to M/s PACL in F.Y. 2011-12 highlighted in the bank statements enclosed herewith for your ready reference and ledger account of M/s PACL as per Annexure 2.

The confirmation of the account of M/s PACL as on 31.03.2011 has already been placed on record vide our letter dated 25.01.2013.”

22. Therefore, in the present case all the material that was necessary for the AO to form an opinion regarding the transaction involving the Assessee and PACL was already available with the AO. There was no fresh tangible material on the basis of which the AO could have formed an opinion about any taxable having escaped assessment during the AY in question. Also, the reasons recorded by the AO for re-opening the assessment do not refer to the above facts. It merely repeats the language of Section 147 that there was a failure by the Assessee to disclose fully and truly all material facts necessary for the assessment. The Court is, therefore, satisfied that the jurisdictional requirement of the first proviso to Section 147 proviso has not been satisfied in the present case.

23. The learned counsel for the Assessee is right in his submission about the mistakes committed even in the proforma accompanying the reasons recorded which notes that the exercise was being undertaken in terms of clause (b) to Explanation 2 to Section 147 which would mean that the original assessment was under Section 143 (1) of the Act. The fact is that the original assessment was under Section 143 (3) of the Act. This perhaps

explains why the reasons recorded for re-opening the assessment does not advert to what transpired during the original assessment and in particular the questionnaires issued to the Assessee by the AO specifically on the issue of the loan from PACL. The learned counsel for the Assessee is justified in his submission that this also reflects non-application of mind by the AO, and the superior officer who approved the re-opening, to the relevant materials.

Conclusion

24. For the aforementioned reasons, this Court quashes the notice dated 29th March, 2018 issued to the Assessee under Section 147 read with Section 148 of the Act and also sets aside the order dated 26th October, 2018 passed by the AO rejecting the objections raised by the Petitioner to the re-opening of the assessment for the AY in question.

25. The writ petition is accordingly allowed but in the circumstances with no order as to costs. The application is also disposed of.

S. MURALIDHAR, J.

I.S. MEHTA, J.

MAY 21, 2019

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