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

+ ITA 30/2001

M/s. TROPEX PROMOTION & TRADING LTD. ..... Appellant

Through: Mr. Inder Paul Bansal with Mr. Vivek Bansal, Advocates.

versus

THE COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. Ruchir Bhatia, Sr. Standing Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE I.S.MEHTA

O R D E R

% 01.04.2019

Dr. S. Muralidhar, J.:

1. This appeal under Section 260A of the Income Tax Act, 1961 is filed by the Assessee and is directed against an order dated 31st August 2000 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA 7484 of 1992 for the assessment year 1986-87. While admitting this appeal on 15th January 2002 the following questions were framed for consideration by this Court:

> "1. Whether on the facts of the case borne on record, the Appellate Tribunal was right in law in upholding the legal validity of the action of the Assessing Officer in initiating re-assessment proceedings against the assessee-appellant company for the assessment year 1986-87 u/s 147/148 of the Income Tax Act, 1961 for its alleged income of Rs. 76,61,408/- on the basis of the observations/ statements of the Assessing Officer in the note recorded by him under the provisions of sub-sec(2) of Section 148 of the Act, by way of the reasons for initiating the

re-assessment proceedings?

2. Whether on the facts of the case borne on the record, the Appellate Tribunal was right in law in upholding the assessment of the assessee-appellant company u/s 68 of the Income Tax Act, 1961, in its re-assessment to income tax u/s 147/148 of the Act for the assessment year 1986-87 on an amount of Rs. 75 lakhs, being the amount received by it from the subscribers to its additional share capital raised in its Rights issue during the relevant previous year, duly accounted for in its audit books and shown as such in the audited balance sheet of the said year, on the reasoning that the assessee company had failed to prove the identity of the share subscribers and their credit worthiness?"

2. The background facts in brief are that for the AY in question i.e. 1986-87 the return filed by the Assessee was picked up for scrutiny. An assessment order was passed on 16th February 1989 by the Assessing Officer under Section 143 (3) of the Act. During the course of that assessment, the question of the sale and purchase of shares was examined. It appears also that the Assessee by a letter of the same date i.e. 16th February 1989 answered some specific queries raised by the AO as regards the increasing share capital by Rs.75 lacs.

3. While finalising the assessment again under Section 143(3) of the Act for the subsequent AY 1987-88 the AO appears to have found that (i) share capital had been introduced in the name of "Sikkim based parties", (ii) that expenses had been claimed for maintaining an office at Bulandshahar and (iii) losses were claimed in the sale and purchase of shares. The AO decided to make a total addition of Rs.8348736 for the said three items for AY 1987-

88.

4. A perusal of the reasons for reopening of the assessment for 1986-87 as noted in the notice dated 29th March 1990 issued to the Assessee under Section 148 of the Act reveals that "on the same lines" as pointed out by the AO for AY 1987-88, the assessment for AY 1986-87 was examined and the three identical items reflected in the return filed for AY 1986-87 was picked up for disallowance viz., share capital introduced to the extent of Rs. 75 lacs; loss in sale and purchase of shares and expenses for maintenance of an office at Bulandshahar. According to the AO, he had reasons to believe that income chargeable to tax amounting to Rs.76,61,408 on account of the aforementioned three items "had escaped assessment for assessment year 1986-87."

5. On the basis of the above reopening, a re-assessment order dated 27th March 1992 was passed by the AO adding the aforementioned amount to the returned income of the Assessee for AY 1986-87. Aggrieved by the above reassessment order, the Assessee filed an appeal before the Commissioner of Income Tax (Appeals) ['CIT (A)]. By an order dated 5th August 1992 the CIT (A) dismissed the Assessee's appeal affirming the reassessment order. Thereafter, the Assessee filed ITA 7484 of 1992 before the ITAT. By the impugned order dated 31st August 2000, the ITAT dismissed the appeal.

6. Mr. Inder Paul Bansal, learned Counsel for the Assessee, first submitted that Section 147 as it stood prior to its amendment with effect from 1st April 1989 was applicable in the present case. The said provision as it stood then

reads as under:

> "S.147.Income escaping assessment.-If-
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> (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
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> (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,
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> 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).
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> *Explanation 1.* – For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-
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> (a) where income chargeable to tax has been under-assessed; or
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> (b) where such income has been assessed at too low a rate; or
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> (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (XI of 1922); or
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> (d) where excessive loss or depreciation allowance has been computed.
>
> *Explanation 2.*- Production before the (Assessing Officer) of

> account books or other evidence from which material evidence could with due diligence have been discovered by the (Assessing Officer) will not necessarily amount to disclosure within the meaning of this section."

7. It is pointed out by Mr. Bansal that as far as the AY 1986-87 is concerned it is not even the case of the Revenue that there was an absence of full and true disclosure by the Assessee of "all material facts necessary" for the assessment and, therefore, Section 147 (a) was not attracted in the present case. He further submitted that for the purposes of Section 147(b) the AO was required "in consequence of information in his possession" to form reasons to believe that income chargeable to tax had escaped assessment. Mr. Bansal submitted that there was no 'information' in possession of the AO specific to AY 1986-87 which could have formed the basis of the formation of his opinion that income had escaped assessment. He submitted that merely because those very three items were the subject matter of scrutiny for AY 1987-88, the AO decided to reopen the assessment for AY 1986-87. As far as AY 1987-88 is concerned, it is pointed out that after the AO made the additions on the above three items the matter was taken up in appeal to the CIT(A) and thereafter on one aspect to the ITAT. Ultimately, the additions made on all three items were deleted.

8. Mr. Bansal pointed out that for AY 1987-88, specific to the issue of increase in share capital, the CIT (A) had called for a remand report from the AO who in the remand report admitted to the genuineness of the deposits of share capital. He accordingly submitted that since the very basis for reopening the assessment for AY 1986-87 viz., the additions on the said

three items AY 1987-88, was rendered non-existent in view of the subsequent developments. Therefore, there could be no justification in persisting with the reopening of the assessment for AY 1986-87.

9. Mr. Bansal relied on the decisions of this Court in ***Oracle India Pvt.Ltd. v. Assistant Commissioner of Income Tax (2017) 83 Taxman.com 368(Del)***, ***HCL Technologies Ltd. v. Deputy Commissioner of Income Tax Central Circle-2*** (decision dated 20th July 2017 WP(C) 8164 of 2010) and ***Unitech Ltd. Deputy Commissioner of Income Tax, Circle-27(1), New Delhi*** (order dated 24th July 2017 in WP(C) 12324 of 2015). He also referred to the observations of the Supreme Court in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd. (2010) 187 Taxman 312 (SC)***.

10. Mr. Ruchir Bhatia, learned Senior Standing Counsel for the Revenue, on the other hand submitted that merely because in respect of the above three items no additions were made to the income of the Assessee for AY 1987-88, it would make no difference to the reopening of the assessment under Section 147 (b) of the Act as stood at the relevant time for AY 1986-87. He referred to the decisions in ***Phool Chand Bajrang Lal v. Income Tax Officer (1963) 203 ITR 456 (SC), Kalyanji Mavji & Co. v. Commissioner of Income Tax (1976) 102 ITR 287 (SC), Claggett Brachi Co. Ltd. v. Commissioner of Income Tax (1989) 177 ITR 409 (SC)*** and ***Max Ventures Investment Holdings P. Ltd. v. Income Tax Officer 2019-TIOL-686-HC-DEL-IT.***

11. In the last mentioned judgment in ***Max Ventures Investment Holdings P. Ltd.*** (*supra*), a Division Bench of this Court after discussing the decisions in ***Phool Chand Bajrang Lal v. Income Tax Officer*** (*supra*), ***Kalyanji Mavji & Co. v. Commissioner of Income Tax*** (*supra*) as well as ***Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd.*** (*supra*) observed in para 12 as under:

> "12. Clearly therefore, when the Revenue gets hold of information or material which tends to or has the potential of undermining its findings (previously made in the assessment proceedings) and have an important bearing, invocation of the power to reassessment is warranted. Now in the present case, the Revenue presses several such circumstances: one, that the SEBI application was made in 2014 after a questionnaire was issued by the AO; two there was nothing to justify the premium of 457 per cent over the face value of the shares - even the market value of the share according to the Revenue on the date of issue of the shares was only Rs.318/- per share. Three, the SEBI approval was given much later; four, when the authorized capital of company was Rs.20 lakhs (mostly paid) the necessity for issuing shares worth Rs.87 crores remained unanswered."

12. Thus in the above case, the basis for the re-opening the assessment for AY 2011-12 was not merely the assessment order for the subsequent AY (2012-13) but other material/information which could support the reasons for reopening the assessment.

13. The basic proposition that for the purposes of Section 147 (b) of the Act, there has to be some information available with the AO to justify the reopening of the assessment has not been departed from in any of the decisions cited by learned counsel for the Revenue. The proposition was

reiterated in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd.*** (*supra*) that a mere change of opinion cannot be *per se* a reason to reopen the assessment. The Supreme Court has consistently emphasised the "conceptual difference between power to review and power to reassess." It was observed that: "One must treat the concept of 'change of opinion' as an inbuilt test to check abuse of power by the Assessing Officer".

14. In the present case, the reasons for reopening the assessment do not make any reference whatsoever to any 'information' in possession of the AO that persuaded him to form the belief that for AY 1986-87 income had escaped assessment. The only so-called 'information' available with the AO was the assessment order for AY 1987-88.

15. It is not possible for this Court at a distance in time of three decades after the event, to be unmindful of the fact that for AY 1987-88, ultimately, there were no additions made to the income of the Assessee. If that was the only basis for reopening the assessment of AY 1986-87 it would be an entirely futile exercise for this Court to allow the reopening of the assessment for 1986-87 to remain.

16. In ***Income Tax Officer v. Lakhmani Mewal Das (1976) 103 ITR 437 (SC)***, the Supreme Court was interpreting Section 147 as it then stood, i.e. prior to its amendment with effect from 1st April 1989, and observed thus:

> "The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons

> for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law."

17. Consequently, this Court is satisfied that in the present case the jurisdictional requirement of Section 147(b) of the Act as stood at the relevant time is not fulfilled. There was no information available to the AO specific to AY 1986-87 on the basis of which he could have formed a belief that income has escaped assessment.

18. Consequently question (1) is answered in the negative i.e. in favour of the Assessee and against the Revenue. In that view of the matter, the Court need not go into the merits of the additions made by the AO which are accordingly hereby set aside. Question (2) is, therefore, also answered in the negative i.e. in favour of the Assessee and against the Revenue. The impugned order of the ITAT is set aside and the appeal is allowed but, in the circumstances, with no orders as to costs.

S.MURALIDHAR, J.

I.S.MEHTA, J.

APRIL 01, 2019
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