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

Judgment reserved on: 19 March 2024
Judgment pronounced on: 30 May 2024

\+ ITA 1445/2018

PR. COMMISSIONER OF INCOME TAX DELHI - 8
..... Appellant
Through: Mr. Sanjay Kumar, Sr. SC.

Versus

M/S SAMSUNG INDIA ELECTRONICS PVT. LTD.
..... Respondent
Through: Mr. Sachit Jolly and Ms. Disha Jham, Advocates

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The present appeal has been preferred by the Revenue against the order dated 23.02.2018, passed by the Income Tax Appellate Tribunal [**"ITAT"**], whereby, the reassessment proceedings against the respondent-assessee have been invalidated on account of being initated in the absence of any fresh tangible material for the Assessment Year [**"AY"**] 2002-03.

2. Shorn of unnecessary details, the facts would manifest that the respondent-assessee filed its Income Tax Return [**"ITR"**] on 31.10.2002, declaring a loss of Rs.4,63,27,044/-. However, the book

profit as per Section 115JB of the Income Tax Act, 1961 [**"Act"**] was shown to be Rs.80,47,676/-. The ITR was processed as per Section 143(1) of the Act and the case of the respondent-assessee was selected for scrutiny assessment.

3. Subsequently, notices under Sections 143(2) and 142(1) of the Act were issued to the respondent-assessee alongwith a detailed questionnaire and an assessment order dated 21.03.2005 was passed under Section 143(3) of the Act. In the assessment order, the Assessing Officer [**"AO"**] made various additions under different heads and assessed the business income of the respondent-assessee at Rs.67,97,24,064/-.

4. Thereafter, a notice dated 25.03.2009 was issued under Section 148 of the Act for reopening assessment proceedings in accordance with the provisions enshrined in Section 147 of the Act. On 10.08.2009, the reasons recorded for reassessment were supplied to the respondent-assessee and the same were duly replied *vide* letter dated 16.12.2009. In the said reply, the respondent-assessee contended that there was no fresh material to reopen the assessment.

5. However, on 16.12.2009 itself, an assessment order under Section 147/143(3) of the Act was passed by the AO after making certain additions and the total taxable income was computed at Rs.73,71,78,670/-.

6. Aggrieved by the said order, the respondent-assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [**"CIT(A)"**], who *vide* order dated 27.06.2011, held that the reassessment proceedings were validly initiated by the Revenue.

However, the CIT(A) found that the additions made by the AO did not have any merit and the same were accordingly deleted.

7. Thereafter, the Revenue preferred an appeal before the ITAT against the order of the CIT(A) deleting additions made by the AO on account of prior period expenses, receivables etc. Subsequently, a cross objection was also filed by the respondent-assessee against the finding of the CIT(A) that the reassessment proceedings were sustainable as per law. *Vide* order dated 23.02.2018, the said cross objection was decided in favour of the respondent-assessee and the appeal of the Revenue came to be dismissed by the ITAT.

8. It is in the aforesaid backdrop that the Revenue has proposed the following substantial questions of law for our consideration: -

> "A. Whether, in the facts and circumstances of the case, the ITAT was justified in concluding that the reassessment proceedings were not validly initiated?
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> B. Whether, in the facts and circumstances of the case, the ITAT was justified in upholding the ClT(A)'s order in deleting additions made by the AO on account of 'prior expenses', 'receivables' and 'advertisement expenses' on the ground that no tangible material outside the record formed the basis of reassessment proceedings?"

9. Learned counsel for the Revenue, at the outset, submitted that the case at hand is squarely covered in favour of the Revenue by the decision of the Supreme Court in the case of **CIT v. P.V.S. Beedies (P) Ltd.** [(1998) 9 SCC 272] inasmuch as the ratio laid down in the said decision permits reopening of assessment on the basis of a factual error pointed out by the revenue audit party report. He contended that the moment the audit objection is accepted by the Revenue, it is implied that there is no true disclosure by the respondent-assessee. According to him, at the stage of issuance of notice under Section 148

of the Act, the AO is required to make only a *prima facie* opinion, which is duly discernible from the report of the revenue audit party. It was, therefore, submitted that the ITAT had erroneously held that the reassessment proceedings were bad in law.

10. Learned counsel further contended that the said report forms a tangible material, which is imperative for initiating reassessment under Section 147 of the Act. He submitted that the factum regarding the delivery of 75 vehicles to its dealers as commission for achieving sales targets and the incentives being provided thereto was not disclosed by the respondent-assessee and the same impedes the requirement of true and full disclosure at the time of original assessment. According to him, the said fact was only disclosed after the proceedings under Section 201/201(1A) of the Act were initiated against the respondent-assessee. He lastly contended that there is no elementary requirement to categorically mention the escapement of income on account of failure to truly and fully disclose the primary facts.

11. On the contrary, learned counsel appearing on behalf of the respondent-assessee vehemently opposed the submissions made by the learned counsel for the Revenue. He submitted that the initiation of reassessment proceedings is based upon the reasons recorded by the concerned authority, which cannot be subsequently allowed to improve or supplement the said reasons at the stage of appellate proceedings. According to him, the reasons recorded in the present case does not mention any failure upon the respondent-assessee to fully or truly disclose the material facts. He also asserted that the CIT(A) has traversed beyond its mandate to sustain the reassessment

proceedings on the ground which is not even mentioned in the reasons recorded for reopening.

12. While drawing our attention towards the reasons recorded for reopening the assessment, learned counsel submitted that the notice under Section 148 of the Act could not have been issued after a lapse of four years since there is no tangible material which could allow the Revenue to proceed with the reassessment. He contended that as per decision of *P.V.S. Beedies (supra)*, the report provided by the revenue audit party is only an information and the same does not lead to an unassailable inference that there was a failure on the part of the respondent-assessee to disclose the material facts truly and fully. It was, therefore, urged that the said case lacks applicability in the instant appeal and does not favour the Revenue.

13. He relied upon the decision of this Court in the case of **Willmar Schwabe India (P) Ltd. v. CIT** [2023 SCC OnLine Del 3757] to submit that it is necessary for the Revenue to highlight in the reasons recorded that there was no full and true disclosure on behalf of the assessee.

14. We have heard the learned counsel appearing for the parties and perused the record.

15. The short controversy which forms the subject matter of the present *lis* relates to whether there was any fresh tangible material which could have allowed the Revenue to proceed with the reopening of the assessment?

16. At the threshold, before we advert to the merits of the case, it is pertinent to determine whether the report provided by the revenue audit party could be considered to be a sole basis to infer that the

respondent-assessee had not adhered to the two-fold requirement of true and full disclosure at the time of original assessment proceedings. Paragraph no.3 of the decision in the case of *P.V.S. Beedies (supra)*, which has been heavily relied upon by the Revenue, reads as under: -

> **3.** We are of the view that both the Tribunal and the High Court were in error in holding that the information given by internal audit party could not be treated as information within the meaning of Section 147(*b*) of the Income Tax Act. The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law. In view of that we hold that reopening of the case under Section 147(*b*) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law. The judgment under appeal is set aside to this extent.

17. It is undoubtedly settled by the aforesaid decision that the revenue audit party is duly entitled to signify a factual error or omission in assessment and reopening of the case on the said grounds is permissible under law. However, the said decision is only concerned with sub-section (*b*) to Section 147 of the Act, as it then stood, which read as under: -

> "(b) Notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Income-tax 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 assess or reassess such income for the assessment year concerned."

18. However, in the instant case, it has been contended by the Revenue that the respondent-assessee had failed to fully and truly

disclose the material facts, which ostensibly relates to Section 147(a) of the Act, as it then stood. Thus, under the facts of the present case, the said decision cannot be construed to be an authority on the amended provision to reopen assessment.

19. In the case of **CIT v. Simbhaoli Sugar Mills Ltd.** [2011 SCC OnLine Del 1241], this Court, while relying upon various judicial pronouncements, has held that the reassessment proceedings cannot be solely based upon audit report objections. The relevant paragraphs of the said decision read as under: -

> **"11. There is also a catena of judgments to the effect that initiation of reassessment proceedings on the basis of audit report objections is bad in law.** A reference in this regard can be made to the judgment of our High Court titled Transworld International Inc. v. Joint CIT (2005) 273 ITR 242 (Delhi) and also the judgments of the Supreme Court in Indian and Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC) and CIT v. Lucas T.V.S. Ltd. (2001) 249 ITR 306 (SC).
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> **12. The sum and substance of the discussion is that reassessment proceedings under section 147 read with section 148 of the Act cannot be initiated merely based on the audit report. An audit is principally intended for the purpose of satisfying the auditor with regard to the sufficiency of rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue.** As per paragraph (3) of the circular issued by the Board on July 28, 1960, also an audit department should not in any way substitute itself for the Revenue authorities in the performance of their statutory duties."

20. Further, the Supreme Court in the case of **CIT v. Kelvinator of India Ltd.** [(2010) 2 SCC 723] has expressly held that the AO can exercise the power to reassess only if it can satisfactorily conclude on the basis of the 'tangible material' that the income has escaped assessment. The relevant paragraphs of the said decision are reproduced as under: -

> "6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.
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> 7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. **Reasons must have a live link with the formation of the belief.** Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer."

21. In the case of **Donaldson India Filters Systems v. Deputy CIT** [2015 SCC OnLine Del 6614], this Court took a view that the AO is saddled with a responsibility to disclose the 'tangible material' based upon which the action has been taken under Section 147 of the Act. The relevant paragraphs of the said decision read as under: -

> "24. It is clear from a bare reading of the aforementioned satisfaction note recorded by the assessing authority for reopening the assessment five years after the assessment had been completed under section 143(3) (on November 30, 2005) that the only indication set out as to the grounds which had triggered such action is through the words "after going through the records". **The assessing authority would not elaborate as to which records had been adverted to and what was the event which had occurred that had impelled such perusal of the records for a fresh view to be taken.** Noticeably, the Assessing Officer while recording his satisfaction by note dated March 19, 2010, that a case had been made out for the income to be reassessed would not attribute any act of commission or omission on the part of the assessee so as to constitute a failure to discuss fully and truly of the material facts. Indeed, the assessing authority expressed that reasons to believe

> existed that a part of the income had escaped assessment. But, it would not clarify even remotely as to how the said failure had occurred.
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> 28. The reopening of the assessment in the case at hand through a notice under section 148 of the Income-tax Act issued on March 22, 2010, fails to pass the muster on both the tests. **The satisfaction note does not disclose the foundation of "reasons to believe" as it vaguely refers to the perusal of "the records" without specifying the fresh "tangible material" that had come to light giving rise to a need for such action.** Since the assessment had earlier been concluded under section 143(3) by the order dated September 21, 2007, the restrictions on the exercise of the power of reassessment as contained in the first proviso to section 147 would inhibit further action in the absence of material showing default by the assessee to fully or truly disclose."

22. Recently, while dealing with a challenge laid to the initiation of reassessment proceedings, this Court *vide* order dated 18.03.2024 in the case of **S.B. Packagings Ltd. v. Asstt./Dy. Commissioner of Income Tax, Circle 22(2), New Delhi & Ors.** [W.P. (C) 13743/2018] has held that the authority to reassess income under Section 147 of the Act is circumscribed with a predominant condition that the AO must be in possession of reasons to believe that any income chargeable to tax has escaped assessment.

23. In the instant case, the reasons recorded by the AO while issuing notice under Section 148 of the Act on 25.03.2009, which finds mention in the assessment order dated 16.12.2009 at *Annexure-A2*, are reproduced as under:-

> "On perusal of records it reveals that capital expenditure amounting to Rs. 1,40,22,335/- was not allowable u/s 37 of the IT Act, 1961. Further, Rs. 1,79,44,942/- was receivable from different sources which were included in the expense head, as per section 5 of the IT Act, 1961, the total income of a person for any previous year includes income from whatever sources derived which is received or which accrue or arise during such previous year unless it is specifically exempt from tax by the other provision of the Act, have

> been disallowed and added back. Further, adjustment pertaining to earlier year amounting to Rs. 29,91,085/- are also liable to be disallowed. Further, TDS on Payment of commission and brokerage on the amount of Rs. 1,11,30,250,/ is to be deducted but the same was escaped which resulted charging of interest u/s 201 (14) Interest u/s 234B is to be charge on the above anjounts accordingly. Further, Rs. 6,04,991/- was paid to Directors excess of amount payable under schedule XIII of the companies ACT."

24. A perusal of the reasons extracted above would evince that the AO had failed to make any specific reference to the circumstances which had triggered the Revenue to take a fresh view. The satisfaction note in the instant case finds a close resemblance with the factual matrix in *Donaldson India (supra)* as the reasons herein also vaguely refer to the expression "on perusal of records", rather than disclosing the foundation of "reasons to believe".

25. It is seen that the primary contention of the Revenue hinges on the premise that the revenue audit report was the fresh tangible material which had triggered the initiation of reassessment proceedings. However, the information provided by the said report finds mention for the first time in the order of the CIT(A), which reads as under: -

> "2.7. The second objection raised by the Ld. A.R. was that appellant's case is not covered even by explanation 1 to section 147 which reads as under;
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> > "S.147, Explanation 1. 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 the foregoing proviso."
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> It had been submitted by him that all materials facts relevant to the issues under re-assessment had been fully and truly disclosed in the original assessment proceedings. **This contention of the Ld. A.R. is not found to be correct as it has come to notice subsequently that the fact of giving away of 75 vehicles to its dealers as**

> **"commission" for achieving the sales targets, given in the guise of incentive reward was not disclosed before the A.O. in the original assessment proceedings. Only after the proceedings in this regard were initiated u/s 201/201/(1A) of the I.T. Act by ACIT, Circle 51 (1) that this fact has come to light and necessary TDS liability and interest thereon amounting to Rs. 45,89,513/- has been determined u/s 194H of the I.T. Act. It is observed that this primary fact of distribution of 75 vehicles as commission or brokerage to those dealers who achieve the set targets of the company had not been disclosed at the time of original assessment proceeding.** Therefore, the contention of the Ld. A.R. that all primary facts relevant to the assessment had been fully and truly disclosed, does not cut ice. Hence, re-opening beyond 4 years from the end of the assessment year is justified in this regard."

26. A plain reading of the aforesaid extract of the order of the CIT(A), which has sustained the reopening of assessment on the basis of revenue audit report, in juxtaposition with the reasons to believe would manifest that there is apparently no live link between the reasons recorded and the formation of belief to take action under Section 147 of the Act. Interestingly, while deleting the additions on merits, the CIT(A) has upheld the action of reassessment by the Revenue on the ground that the factum of giving away of 75 vehicles to dealers for achieving sale targets under the guise of incentives was not disclosed in the original assessment proceedings. However, according to the CIT(A), the said fact came to the light only after the proceedings in this regard were initiated under Section 201/201(1A) of the Act.

27. At this juncture, it is apposite to refer to the order dated 22.03.2011 passed under Section 201/201(1A) of the Act, which reads as under: -

> "2. Based on the information received by the Assessing Officer of the assessee company i.e. SIEL regarding the expenditure of Rs.2,11,00,000 on account of incentive reward to its dealers

> without deducting the tax thereon U/s 194H of the Act, proceedings U/s 201 of the Income Tax Act 1961 (hereinafter referred to as the Act) were initiated to verify the facts by way of issue of a letter dated 09-02-2011 and thereby asking the SIEL to show cause as to why it should not be treated as an assessee in default within the meaning of Section 201 of the Act."

28. Evidently, the proceedings under Section 201 of the Act, which have been the bedrock for reaching the conclusion that there was no full and true disclosure by the respondent-assessee, were initiated *vide* letter dated 09.02.2011. It is noteworthy that the notice under Section 148 of the Act, which recorded the reasons for reassessment, was issued way back on 25.03.2009. Thus, by no prudent stretch of imagination, the alleged non-disclosure could have formed a part of the satisfaction which was recorded to issue notice under Section 148 of the Act. Put otherwise, the finding of the CIT(A) which had sustained the action solely on the basis of the aforesaid fact, is blatantly perverse.

29. Undisputedly, the reassessment proceedings were initiated after passing of the period of four years from the relevant AY. An upshot of the above discussion would suggest that the Revenue did not have in its possession any fresh tangible material, which is otherwise *sine qua non* for initiating reassessment proceedings after a lapse of the said statutorily prescribed period. Notably, the findings of the ITAT in the cross-objection of the respondent-assessee in this regard are reproduced as under: -

> "4.1. Admittedly, the addition made by the Ld. AO in reassessment proceedings is on account of prior period expenses and claim of receivables. There was no tangible material outside the record which was the basis of reassessment proceedings. And further admittedly there is no reason to believe that income has escaped assessment, as assesse has not claimed the amount that has been the

addition in the reassessment proceedings. The observations of Ld. AO in the original assessment proceedings are very much pertinent at this juncture. Ld. AO therein has given categorical finding regarding the expenditure not been considered for the purposes of deduction in the P&L account.

The decisions relied upon by Ld. DR in the written submissions filed mostly relate to situations where there was tangible material available outside the record based on which Hon'ble Supreme Court and various High Courts have held reassessment proceedings to be valid.

4.2. In our considered opinion there was no tangible material in the possession of Ld. AO to initiate the reassessment proceedings and the additions made by Ld. AO was based on the materials already on record which has failed to stand the test of law as the same has been deleted by Ld. CIT (A) by observing categorically that they were never considered for the purposes of deduction in the original assessment proceedings itself.

4.3. On the basis of the above discussions we allow the legal ground raised by assessee in its cross objection and quash and set- aside the notice issued under section 147 of the act. Accordingly the reassessment proceedings also stands consequentially cancelled."

30. Additionally, this Court has recently held in *Willmar Schwabe (supra)* that the concerned officer is required to make a reference to the fact that the assessee had failed to disclose all the material facts necessary for carrying out assessment. It is discernible from the facts of the present case that the reaons recorded by the AO do not allude to any such non-disclosure. The relevant extract of the decision in *Willmar Schwabe (supra)* is culled out as under: -

"15. A perusal of the reasons furnished by the AO for triggering the reassessment proceeding would show that there is no reference to the fact that the petitioner had failed to disclose, fully and truly, all material facts necessary for carrying out the assessment.

16. Since the proceeding was triggered after the expiry of four (4) years from the end of the relevant AY, the concerned officer, i.e., the Additional Commissioner of Income Tax, was required to assert that income chargeable to tax has escaped assessment on account of

> the failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment *qua* the concerned AY, as stipulated in the first proviso appended to Section 147 of the Act.
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> 17. In our view, this is sufficient to set aside the impugned order."

31. In view of the aforesaid, we find that the initiation of reassessment proceedings after a lapse of four years herein, is *dehors* the settled position of law as no new tangible material can be said to have been discovered by the Revenue which would warrant reopening the assessment for the AY in question. Thus, we do not find any reason to intermeddle with the order of the ITAT.

32. Consequently, the present appeal does not raise any substantial question of law and stands dismissed. Pending application(s), if any, are also disposed of.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

MAY 30, 2024/MJ