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

\+ **ITA No.355 of 2010**

&

ITA No.412 of 2010

% DECISION DELIVERED ON: FEBRUARY 03, 2011.

1) ITA No.355 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

SAFETAG INTERNATIONAL INDIA PVT. LTD. . . .Respondent

through: Mr. S. Krishanan, Advocate.

2) ITA No.412 of 2010

COMMISSIONER OF INCOME TAX . . . Appellant

through : Mr. Sanjeev Sabharwal, Sr. Standing Counsel.

VERSUS

SAFETAG INTERNATIONAL INDIA PVT. LTD. . . .Respondent

through: Mr. S. Krishanan, Advocate.

CORAM :-
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J. (*ORAL*)

1. Admit on the following substantial question of law:

> "Whether on the facts of the present case the Tribunal was justified in law in setting aside the assessment framed by the AO under Section 148/143(3) of the Act with a direction to the AO to follow the procedure laid down by the Supreme Court in the case of ***GKN Driveshafts (India) Ltd. Vs. ITO***, **259 ITR 19**?"

2. This is the common question of law which arises in both these appeals. We have taken the matter for final hearing straightaway, as learned counsel for both the parties have made their submissions on the aforesaid question of law.

3. The fact of the matter is in a narrow compass and taking note of the facts in brief would suffice for our purpose. These Appeals pertain to the Assessment Years 1996-97 and 1997-98. The Assessing Officer (AO) had issued notice for reopening of the assessment under Section 148 read with 142(1) of the Income Tax Act (hereinafter referred to as 'the Act'), pursuant to the information which the AO had received from the Directorate of Revenue, Intelligence (DRI).

4. The assessee was engaged in exporting the readymade garments, etc. to Russia. The information was received by the AO from the DRI that the assessee in association with the handling and forwarding agents M/s. Sam Aviation (P) Ltd. was carrying out fraudulent exports. On the basis of this information, a search was conducted by the DRI at the office of M/s. Sam Aviation (Pvt.) Ltd. During the course of search proceeding, some incriminating material, according to the DRI, was found and seized which divulged that the assessee was involved in fraudulent export and money laundering and was availing undue export benefits during the period 1993 to 1996. After reopening the assessment, the show cause notice was issued as to why deduction received under Section 80HHC of the Act be not withdrawn, etc. Thereafter, the proceedings were held and the AO passed orders of reassessment which was framed under Section 144 of the Act. As per this, 20%

of the sale proceeds amounting to ₹69,84,926/- was held to be income of the assessee in addition to export incentive of ₹55,71,397/-. The deduction claimed under Section 80HHC of the Act amounting ₹47,07,317/- was held to be not allowable. In this manner, the assessment was framed at an income of ₹1,25,56,323/- for the assessment year 1996-97. On the same basis, reassessment order in respect of other years was also passed.

5. The assessee preferred appeal thereagainst. Before the CIT(A), the assessee also challenged the reopening of the assessment under Section 147 of the Act as without jurisdiction. Another ground of challenge was that the AO had wrongly rejected the books of accounts and also wrongly withdrew the deduction claimed by the assessee under Section 80HHC of the Act. The assessee was also aggrieved by the action of the AO taking note of the recourse to Section 144 of the Act.

6. The assessee carried the matter further by filing appeal before the Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal'). The Tribunal has adopted a short-cut method. It did not decide the appeal on merits. It has not even touched the issue as to whether the reassessment proceedings were valid or not. It, thus, chartered altogether a different course of action. Accepting the plea of the assessee that the assessee was not aware that the Revenue was bound to provide the copy of 'reasons to believe', he could not demand the same and raise objections thereto, the Tribunal has remitted the case back to the AO in both the years with direction to the AO to provide a copy of

'reasons to believe' to the assessee and give him opportunity to raise objections and thereafter pass speaking order on those objections and frame *de novo* assessment in both the assessment years, if objections are rejected. This course of action, to our mind, is totally unsustainable. In the first place, we may record that when notice under Section 148 of the Act was issued for reassessment proceedings, no doubt, the AO is required to record reasons which led him to believe that there was escaped income. Law does not mandate the AO to *suo moto* supply the copy of those 'reasons to believe' to the assessee. It is for the assessee and if assessee so chooses can file objections thereto. Only when such objections are filed, it becomes the duty of the AO to dispose of all those objections first by passing speaking order and if the objections are rejected it gives a cause to the assessee to challenge the said order of the AO by filing appropriate writ petition. This is the law declared by the Supreme Court in the case of ***GKN Drive Shafts (India) Ltd. Vs. Income Tax Officer*** **[259 ITR 19]**.

7. In the present case, the assessee did not ask for these 'reasons to believe'. The assessee rather participated in the reassessment proceedings. When the reassessment orders were passed and the assessee felt aggrieved thereagainst, the assessee filed appeal before the CIT (A). In this appeal, he challenged the validity of reassessment proceedings, which was the course of action available to the assessee. The CIT (A), thus, could examine the issue as to whether the assessment reopened was valid or not. Once the CIT (A) also dismissed the appeal of the assessee and against that the second appeal was also preferred before the

Tribunal, the Tribunal could not have restored the matter back to the file of the AO and give another opportunity to the assessee to raise objections to 'reasons to believe' recorded by the AO. Reassessment order passed by the AO in both the assessment years is even upheld by the CIT (A). It was the assessee's own creation that it did not ask for the reasons or raise objection thereto. Merely because the assessee was oblivious of such a right would not mean that the Tribunal should have granted this right to the assessee, that too, at the stage when the matter was before the Tribunal and travelled much beyond the AO's jurisdiction. It is trite that what cannot be done directly, it is not allowed indirectly as well. This novel and ingenuineness method adopted by the Tribunal in setting aside the reassessment orders on merits cannot be accepted. Even otherwise, we are of the view that the assessee had not supplied any purchase inasmuch as it was still open to the assessee to challenge the validity of reassessment notice before the CIT (A) and in fact, the assessee did so for availing that opportunity.

8. We, thus, answer the question in favour of the Revenue and against the assessee. As a result, the impugned order passed by the Tribunal is set aside.

9. At this stage, it would be necessary to deal with another submission of the learned counsel for the respondent/assessee. He has pointed out that the CIT (A) while repelling the challenge laid by the assessee to the reassessment proceedings, as more than that the AO has duly recorded the 'reasons to believe' as per which the reopening of the assessment is justified and on this

ground, challenge to the validity of the notice is turned down. Learned counsel for the respondent is justified in his submission that at least at this stage, the assessee could have been provided with the 'reasons to believe' recorded by the AO to accept the assessee to make his submission before the CIT (A) predicated on the said 'reasons to believe'. While setting aside the order of the Tribunal, we direct that the matter be remitted back to the CIT (A). The Revenue shall supply 'reasons to believe' recorded by the AO within four weeks from today. On the supply of these 'reasons to believe', it would be open to the assessee to make submissions before the CIT (A) based on those reasons, challenging the validity of reassessment proceedings and the CIT (A) shall decide this issue on merits after hearing both the parties.

(A.K. SIKRI)
JUDGE

(M.L. MEHTA)
JUDGE

February 03, 2011
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