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*IN THE HIGH COURT OF DELHI AT NEW DELHI

+ ITA 914/2010

THE COMMISSIONER OF INCOME TAX II..... Appellant
Through Mr. Kiran Babu, Sr. Standing Counsel.

versus

SOFTWARE CONSULTANTS ..... Respondent
Through Mr. Salil Aggarwal, Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

O R D E R

% **17.01.2012**

This appeal under Section 260A of the Income Tax Act, 1961 (Act, for short) impugns the order dated 26th September, 2008 passed by the Income Tax Appellate Tribunal (tribunal, for short) in ITA No. 2554/D/2004 in the case of Software Consultants (India) Private Limited. The appeal pertains to the assessment year 1993-94.

2. By order dated 17th October, 2011, the following substantial question of law was framed:

> "Whether the tribunal was right in law in holding that the Commissioner of Income

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> Tax had wrongly invoked jurisdiction under Section 263 of the Income Tax Act, 1961."

3. The assessee is a company and for the assessment year 1993-94 did not file their return of income. During the course of assessment proceedings for the assessment year 1997-98, it was noticed that Central Bureau of Investigation had conducted search in the premises in which FDRs worth Rs.20 lacs relating to assessment year 1993-94 were found in possession of Poonam Rani Singh, a director of the respondent company. However, Poonam Rani Singh claimed that the FDRs though in her name, actually belonged to the respondent assessee. This stand was accepted by the CIT (Appeals) in his order dated 16th February, 2001 in the appeal filed by Poonam Rani Singh.

4. Thereafter, the Assessing Officer in the case of the respondent assessee issued notice under Section 148 of the Act on 29th March, 2001. In response to this notice, the respondent assessee on 16th August, 2001filed a return showing loss of Rs.1,02,756/-. By assessment order dated 28th March, 2002 the Assessing Officer accepted that the respondent assessee had established and proved the source and their capacity to invest Rs.20 lacs and accordingly no addition was made on this account. The return filed by the assessee showing loss of

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Rs.1,02,756/- was accepted. No addition was made.

5. In this assessment order dated 28th March, 2002, the Assesssing Officer had also noted as under:-

> " Scrutiny of the P&L A/c also revealed that during the year share application money was increased by Rs.47,00,000/-. In order to verify the geniuses of share application money summons u/s 131 of the IT Act was issued to person on random basis and statement was recorded for confirming of these investments made by them towards the assessee company."

6. The Commissioner of Income Tax vide order dated 25th March, 2004 under Section 263 of the Act directed the Assessing Officer to conduct further enquiries in respect of share application money of Rs.47 lacs. He also held that the Assessing Officer had erred in determining loss after issue of notice under Section 148 of the Act.

7. With regard to the first aspect, the Commissioner of Income Tax observed that only seven parties were issued notices on random basis and their statements were recorded, but notices were not issued to other share applicants. The Commissioner of Income Tax in his order has mentioned lacunas and defects in the statements of the seven share applicants and the manner in which they were recorded.

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Accordingly, he held that the Assessing Officer had failed to make necessary verification and enquiries, which were required. Direction was given to the Assessing Officer to carry out investigation and enquiries regarding receipt of share application money.

8. The assessee preferred an appeal before the tribunal, which has been disposed of by the impugned order dated 26th September, 2008. The tribunal has quashed the order under Section 263 of the Act passed by the Commissioner of Income Tax.

9. One of the contentions, which has been accepted by the tribunal is that the order of the Assessing Officer cannot be regarded as erroneous even if the Assessing Officer had failed to carry out necessary verification and required enquiries in respect of the share application money, as no addition has been made on account of the reasons for reopening, which were recorded before issue of notice under Section 148 of the Act. It has been held that the Assessing Officer could not have made an addition on account of share application money as no addition has been made on account of FDRs of Rs.20 lacs. The tribunal has noticed and recorded that in the reasons for

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reopening it was mentioned that the assessee had made investment in form of FDRs of Rs.20 lacs but in the assessment order passed under Section 147/143(3) of the Act it has been held that the respondent assessee had been able to show and establish the genuineness of and capacity to make the said investment.

10. Similar issue had arisen before this Court in ***Ranbaxy Laboratories Limited versus CIT***, (2011) 336 ITR 136 (Delhi). In the said case, the Division Bench had also examined Explanation 3 to Section 147, which was inserted by Finance (No. 2) Act of 2009 with retrospective effect from 1st April, 1989. Reference was made to the decision of the Bombay High Court in ***CIT versus Jet Airways India Limited***, (2011) 331 ITR 236 (Bom.) in which it has been held as under:

> "The effect of section 147 as it now stands after the amendment of 2009 can, therefore, be summarised as follows : (i) the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year ; (ii) upon the formation of that belief and before he proceeds to make an assessment, reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148 ; (iii) the Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped

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> assessment and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section ; and (iv) though the notice under section 148(2) does not include a particular, issue with respect to which income has escaped assessment, he may none the less, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section."

11. Thereafter, the High Court referred to the decision of the Rajasthan High Court in the case of ***CIT versus Shri Ram Singh***, (2008) 306 ITR 343 (Raj.) in which it has been observed as under:

> "It is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax which has escaped assessment for any assessment year, with respect to which he had 'reason to believe' to be so, then only, in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.
>
> To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe', had escaped assessment for any

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> assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

12. The Division Bench in ***Ranbaxy Laboratories Limited*** (supra)considered the judgment of the Supreme Court in the case of ***V. Jagmohan Rao versus CIT and EPT***, (1970) 75 ITR 373(SC) and ***CIT versus Sun Engineering Works Private Limited***, (1992) 198 ITR 297 (SC) and has then elucidated:

> "18. We are in complete agreement with the reasoning of the Division Bench of the Bombay High Court in the case of CIT v. Jet Airways (I) Limited [2011] 331 ITR 236 (Bom). We may also note that the heading of section 147 is "income escaping assessment" and that of section 148 "issue of notice where income escaped assessment". Sections 148 is supplementary and complimentary to section 147. Sub-section (2) of section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (1) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute the escaped income. Section 147 mandates recording of reasons to believe by the Assessing Officer that the income chargeable to tax has escaped

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assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. As per Explanation 3 if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under section 148.

19. In the present case, as is noted above, the Assessing Officer was satisfied with the justifications given by the assessee regarding the items, viz., club fees, gifts and presents and provision for leave encashment, but, however, during the assessment proceedings, he found the deduction under sections 80HH and 80-I as claimed by the assessee to be not admissible. He consequently while not making additions on those items of club fees, gifts and presents, etc., proceeded to make deductions under sections 80HH and 80-I and accordingly reduced the claim on these accounts.

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> 20. The very basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under sections 80HH and 80-I which as per our discussion was not permissible. Had the Assessing Officer proceeded to make disallowance in respect of the items of club fees, gifts and presents, etc., then in view of our discussion as above, he would have been justified as per Explanation 3 to reduce the claim of deduction under sections 80HH and 80-I as well."

13. On the second aspect raised by the Commissioner of Income Tax with regard to the Assessing Officer accepting the loss return of Rs.1,02,756/-, we are of the view that the same did not require exercise of revisionary power under Section 263 of the Act. The observations of the Assessing Officer were only to the extent of stating that he had accepted the return. Benefit of carry forward of loss can be claimed in case a return is filed under Section 139(1). It is not the case of the Revenue that the assessee had tried to claim benefit of carry forward of loss on the basis of the order passed under Section 147/143(3) of the Act.

14. For exercise of power under Section 263 of the Act, it is

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mandatory that the order passed by the Assessing Officer should be erroneous and prejudicial to the interest of the Revenue. In the present case, the Assessing Officer did not make any addition for the reasons recorded at the time of issue of notice under Section 148 of the Act. This position is not disputed and disturbed by the Commissioner of Income Tax in his order under Section 263 of the Act. Sequitur is that the Assessing Officer could not have made an addition on account of share application money in the assessment proceedings under Section 147/148. Accordingly, the assessment order is not erroneous. Thus, the Commissioner of Income Tax could not have exercised jurisdiction under Section 263 of the Act.

15. The question of law is accordingly answered in affirmative against the Revenue and in favour of the assessee. There will be no order as to costs.

SANJIV KHANNA, J.

R.V. EASWAR, J.

JANUARY 17, 2012
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