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

% Decided on 09.01.2017

\+ W.P.(C) 3174/2015

BDR BUILDERS AND DEVELOPERS PVT. LTD. ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni, Advs.

Versus

THE ASSISTANT COMMISSIONER OF INCOME-TAX, & ANR. ..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT (ORAL)

1. The petitioner in these proceedings under Article 226 of the Constitution challenges a notice under Section 147/148 of the Income Tax Act , 1961 ('the Act' for short) issued on 31st March, 2014 for Assessment Year (AY) 2007-08.

2. The brief facts are that pursuant to search and seizure proceedings (which took place on 11.10.2006), a notice was issued under Section 153A/143(3) of the Act and the assessment was completed. This included inter alia assessment for pending AY 2007-08. Before the assessments could be completed, the petitioner approached the Income Tax Settlement Commission (ITSC); after considering the submissions of charges, the

application was admitted. Thereafter the ITSC called for a report under Rule 9A of the ITSC Rules, which was furnished to it by the respondent/ revenue. Based upon the submissions made and its appreciation, of other materials found during the cause of search (including the returns filed and its supporting documents), the ITSC made its final order on 8th February, 2013. In the meanwhile, original assessee i.e. M/s Rishi Promoters Pvt. Ltd. was amalgamated with M/s. BDR Builders and Developers Pvt. Ltd with effect from 01.04.2012 by order of this Court dated 20.02.2013. Consequently, for AY 2007-08, the total income assessed in the hands of BDR Builders and Developers Pvt. Ltd. was ₹3,76,90,206/- and to the account of M/s. Rishi Promoters, it was ₹7,17,237/-. The ITSC had in its order dealt with the question whether bogus share money had been introduced by the applicants and observed as follows:

> *"6. xxx xxxx*
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> *(i) The Investigation Wing in Appraisal report has pointed out about introduction of bogus share application money shown to have been received by the assessee company amounting to ₹ 3,00,00,000/- during the period 01.04.2006 to 11.10.2006 relevant to assessment year 2007-08 from various companies. In post search enquiry by the Investigation Wing, such bogus companies did not comply with the summons issued to them. He further submitted that the assessment is not completed in this case and therefore, this aspect also remained unverified. Details of date-wise receipt of bogus share application money received by the assessee group from various 80 companies as appearing on page 22 to 25 of the Appraisal Report are enclosed.*
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> *(ii) The learned CIT submitted that from the details*

given in the appraisal. Report (page No.22 & 23), it is clear that the applicant had received ₹ 3 crores in the period from 09.06.2006 to 21.08.2006 falling in F.Y. 2006-07 (A.Y. 2007-08). These amounts have been received from M/s. Thar Steels Pvt. Ltd. M/s. Bhawani Portfolio Pvt. Ltd., M/s. Mahanivesh India Ltd. And M/s. Taurus Iron & Steel Co. Pvt. Ltd. All these companies are fictitious companies providing accommodation entries. These companies were controlled by Shri Tarun Goyal who was searched by the Income Tax Department. Assessments in Tarun Goyal Group have been completed. In some cases appeals have also been decided. Copy of the appellate order in the case of Mahanivesh India Ltd. issued by the CIT(A)-XXXIII, New Delhi, is enclosed by CIT which according to him clearly indicated that these companies are bogus and fictitious and only providing accommodation entries. In view of these circumstances, the enhancement proposed under Rule 9 Report for the assessment year 2007-08 will increase by this sum of ₹ 3,00,00,000/-.

7. xxx xxx

8. xxx xxx

9. During the hearing, the matter was discussed with the learned CIT(DR) who did not raise any objection in respect of such telescoping. Therefore, we increase the additional income of the applicant for A.Y. 2007-08 by ₹ 3 crores in the hands of M/s. BDR Builders & Developers Pvt. Ltd., New Delhi, Applicant No. 1. In the cases of Applicants No. 2 and 3, the income is settled as declared by them in their SOF.

3. The notice impugned in this case proposing re-assessment of income tax of M/s Rishi Promoters Pvt. Ltd. reads as follows:

"A search & seizure operation was conducted on the BDR Group at the premises of the Directors. During the search several incriminating documents were found and seized. During the assessment proceedings the assessee filed application in the settlement commission for the assessment year under consideration, amongst others. The order in this case was passed on 07.02.2013 by the Hon'ble Commission where in the returned income of the assessee was accepted.

Now, a letter dt. 24.03.2014 from ITO, Ward 15(3), New Delhi has been received in this office on 26.03.2014 informing for initiating proceedings u/s 147 of the IT Act, 1961 in the case of the assessee for the A.Y. 2007-08. Vide the letter, a page containing entries in respect of the assessee, given by Taurus Iron & Steel Co. Pvt. Ltd. (₹ 30,00,000/-) & Tejasvi Investment Pvt. Ltd. (₹ 20,00,000/-) unearthed in the case of entry operator called as Tarun Goyal. This point has not been considered in the order of settlement commission.

From the above facts I have reason to believe that income to the tune of ₹ 50,00,000/- has escaped assessment in the case of the assessee M/s Rishi Promoters Pvt. Ltd for the A.Y. 2007-08, by reason of the failure on the part of the assessee to disclose fully and truly all material facts for his assessment and the same needs to be assessed/reassessed as per the provisions of sub-clause(i) of clause© to Explanation 2 to Section 147(b) of Income Tax Act, 1961in the assessment year 2007-08. Issue notice u/s 148 of the Income Tax Act, 1961 for the assessment year 2007-08.

Dated : 29.03.2014 ACIT, Central Circle – 17, New Delhi."

4. It is urged by the petitioner that by virtue of provision of Section 245C, 245D(4) and 245-I of the Act, the re-assessment notice is

unsustainable and void. It also relied upon the judgment of this Court in *Omaxe Limited v. Assistant Commissioner of Income Tax* 254 CTR 370 (Delhi) to say that where a Settlement Commission passes its final order in respect of proceedings in any given order, the matters are conclusive and final and it cannot be reopened under section 147 of the Act. It is also urged in addition that re-assessment notice is unsustainable because it was issued to M/s. BDR Builders and Developers Pvt. Ltd. which was no longer in existence at that time i.e. on 31.03.2014. In support of this contention, reliance is placed upon *Spice Entertainment Ltd. v. Commissioner of Income Tax* 247 CTR 500 (Del) and *Commissioner of Income Tax v. Dimension Apparels (P) Limited :* 370 ITR 288 (Del) and on *Rustagi Engineering Udyog (P) Ltd. v. Deputy Commissioner of Income Tax* 382 ITR 443 (Delhi).

5. Learned counsel for the Revenue urges that the re-assessment notice ought not to be quashed in the circumstances of the case. It is highlighted that the discussion by the ITSC was vis-a-vis share capital infused only in respect of BDR Builders and Developers Pvt. Ltd. which meant that there was no preclusion of issuance of notice under section 147/148 of the Act in respect of returns of M/s. Rishi Promoters. He points out that ITSC's final order does not contain any discussion with respect to the declaration or disclosures made by M/s. Rishi Promoters which can be said to have become final. It was urged in the circumstances that the notice should not be interfered with. The observation in *Omaxe Limited* (supra) with regard to the finality that attaches itself in respect of that are discussed, is as follows:

> *"18. xxx xxx ..... We hold that since the exclusive jurisdiction to exercise the powers and*

perform the functions of an income tax authority in relation to the case vests with the ITSC after an order is passed under Section 245D(1) till the final settlement order is passed under Section 245D(4), it is not possible to countenance a situation where it can be said that the assessee's claim for deduction under Section 80IB(10) was not the subject matter of the order passed by the ITSC under Section 245D(4). It is further necessary to keep in mind that Section 245B(3) requires that the ITSC shall be manned by "persons of integrity and outstanding ability having special knowledge of, and, experience in, problems relating to direct taxes and business accounts". The provisions of Chapter XIX-A suggest that all matters in relation to the case of the assessee shall be dealt with by the ITSC just as an assessing authority would deal with them while completing an assessment under Section 143(3) of the Act. If this is the position, it would be difficult to sustain the argument of the revenue that the matter relating to the deduction under section 80IB(10) was not the subject matter of the final order of settlement. It follows that the Assessing Officer had no jurisdiction to reopen the assessment for the assessment year 2006-07 by issuing a notice under Section 148 of the Act on the ground that the deduction was wrongly allowed.

19. The issue can also be viewed from another angle. Barring the exception of the provisions relating to appeal and revision, the Act does not contemplate or provide for disturbing the finality of an order or proceeding passed or completed by an income-tax authority, by any order or proceeding passed or initiated by a different income-tax authority. An assessment order passed by an Assessing Officer can be rectified or amended under Section 154 or Section 155 or reopened under Section 148 only by him, and by no other income-tax authority. Similarly, an assessment by way of settlement of a case, which is

> *made by the ITSC, can be reopened only by the ITSC and that too only in certain circumstances. Applying this general principle that runs through the Act, an assessment by way of settlement order passed by the ITSC cannot be reopened by a different authority, viz. The Assessing Officer. The fact that the ITSC has not been designated as an "income-tax authority" under Section 116 of the Act makes the position 'a fortiori'. Section 147 of the Act does not employ language that permits him to do so, nor are the powers and orders of the ITSC made subject to the provisions of Section 147. Section 47 does not appear to fit into the general scheme of Chapter XIX-A, which has been held to be a self contained code by the Supreme Court in Brij Lal v. CIT [2010] 328 ITR 477/Taxman 566."*

6. In the present case, the Court notices that the impugned notice was issued against a non-existent entity i.e. M/s. Rishi Promoters which had ceased to exist by virtue of order of this Court dated 20.02.2013. The date of its amalgamation was in fact earlier. Apparently, the respondent-revenue was aware of this and despite that it proceeded to issue the impugned notice. The judgment in *Spice Entertainment* (supra) and *Dimension Apparels (P) Limited* (supra), though rendered after the final assessment was completed, are clear that such notice and proceedings emanating from it are unsustainable. *Rustagi Engineering Udyog (P) Ltd.* (supra) takes the logic further and holds that notice issued under section 147 of the Act in respect of an entity which ceases to exist by virtue of amalgamation order under section 394 of the Companies Act, would also be illegal and unsustainable.

7. For the afore-going reasons, the Court hereby holds that the impugned notice under section 147/148 of the Act and proceedings arising therefrom are void and unsustainable and are hereby quashed. The writ petition is

consequently allowed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

JANUARY 09, 2017/acm