2023:DHC:4905-DB

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

Judgement reserved on: 21.02.2023

% *Judgement pronounced on: 18.07.2023*

\+ **ITA 546/2019**

PR. COMMISSIONER OF INCOME TAX, CENTRAL-11 ..... Appellant

Through: Mr Sanjay Kumar, Sr. Standing Counsel with Ms Hemlata Rawat, Advocate.

versus

DSC LTD. ..... Respondent

Through: Mr Salil Aggarwal, Sr. Adv. with Mr Mahir Aggarwal & Mr Uma Shankar, Advs.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

Prefatory Facts

1. This appeal concerns Assessment Year (AY) 2006-07.

2. The appellant/revenue seeks to assail the order dated 31.10.2018 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"].

2.1 The Tribunal, *via* the impugned order, has reversed the decision dated 10.11.2014 delivered by the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"].

3. The short issue which arose for consideration before the Tribunal, in

the backdrop of the facts and circumstances arising in the instant case, was: whether assessment could be reopened under Section 147 of the Income Tax Act, 1961 [in short, "Act"], in the absence of an allegation that the respondent/assessee had failed to disclose, fully and truly, all material facts necessary for carrying out the assessment, given the fact that the reassessment was triggered after the expiry of four (4) years from the end of relevant AY, i.e., AY 2006-07.

4. The factual backdrop in which the instant appeal has arisen, is as follows:

4.1 The respondent/assessee had electronically filed its Return of Income (ROI) on 02.02.2007. In the ROI, the respondent/assessee declared an income amounting to Rs.54,14,79,842/-. The respondent/assessee was subjected to scrutiny, and an assessment order under Section 143(3) of the Act was passed on 15.10.2008, pegging the income at Rs.54,16,13,061/-.

4.2 The record shows that on 28.08.2012, a search was carried out concerning the DSC Group of Companies by the Assistant Director of Income Tax (ADIT), i.e., the Investigation Wing. The search revealed that bogus purchases had been made by the respondent/assessee, *via* unexplained sources.

4.3 Consequently, on 28.03.2013, the Assessing Officer (AO) issued a notice under Section 148 of the Act, calling upon the respondent/assessee to file a return within a defined period.

4.4 In response, the respondent/assessee, *via* the communication dated 01.05.2013, informed the AO that its original return filed under Section 139

of the Act, should be treated as a return filed in response to the notice dated 28.03.2013, issued under Section 148 of the Act.

4.5 Furthermore, the respondent/assessee also called upon the AO to furnish a copy of the reasons recorded for triggering the reassessment proceeding.

5. It appears that thereafter, a notice dated 30.12.2013 was issued to the respondent/assessee under Section 143(2) of the Act, whereby, the respondent/assessee, *inter alia*, was called upon, to have its authorized representative [in short, "AR"] attend the reassessment proceeding scheduled to take place on 06.01.2014.

6. Evidently, it is on this date, i.e., 06.01.2014, that, upon the AR of the respondent/assessee seeking a copy of the reasons recorded by the AO for triggering the reassessment proceeding, the same was furnished.

7. Having received a copy of the reasons recorded by the AO, the respondent/assessee filed its objections dated 10.01.2014, at the hearing held by the AO on 20.01.2014.

8. The AO disposed of the objections filed by the respondent/assessee *via* an order dated 22.01.2014. The record shows that on 07.02.2014, the respondent/assessee was served with a notice under Section 142(1) of the Act.

9. The record also shows that the AR of the respondent/assessee furnished the requisite information/details and explanation called for by the AO. This aspect emerges upon a perusal of Paragraph 2 of the reassessment

order, passed on 30.03.2014 under Section 147/143(3) of the Act, which is extracted hereafter:

> *"The proceedings u/s 143(2) were discussed with Sh. Sahil Chanana along with Swati Gupta, CA & A/R of the assessee company from time to time, who furnished the required information/details and explanation as called for."*

10. *Via* the aforementioned reassessment order dated 30.03.2014, the AO made the following additions to the taxable income of the respondent/assessee, as determined by an earlier order dated 15.10.2008 passed under Section 143(3) of the Act:

(i) Rs.3,01,69,142/-: was added towards purchases said to have been made by the respondent/assessee, which, according to the AO, remained "unverified".

(ii) Rs.1,33,219/-: concerning expenditure related to dividend income earned which was exempt from tax was disallowed. The disallowance was added back, by taking recourse to Section 14A of the Act, read with Rule 8D of the Income Tax Rules, 1962 [in short, "the Rules"].

10.1 Thus, the reassessed income was enhanced from Rs.54,16,13,061/- to Rs.57,19,15,422/-.

11. Against the assessment order dated 30.03.2014, the respondent/assessee preferred an appeal with the CIT(A). In the said appeal, one of the grounds that the respondent/assessee raised was that the AO had wrongly assumed jurisdiction in the matter, as there was no allegation made that the respondent/assessee had failed to disclose, fully and truly, all material facts necessary for assessing the income for the AY in issue.

12. The CIT(A), however, was not impressed with the contentions raised on behalf of the respondent/assessee and, accordingly, dismissed the appeal.

13. Resultantly, the respondent/assessee preferred an appeal with the Tribunal. As alluded to hereinabove, the Tribunal, *via* the impugned order dated 31.10.2018, allowed the appeal of the respondent/assessee.

14. It is in these circumstances that the appellant/revenue has preferred the instant appeal.

Submissions of Counsel

15. Arguments on behalf of the appellant/revenue were addressed by Mr Sanjay Kumar, learned senior standing counsel, while submissions on behalf of the respondent/assessee were advanced by Mr Salil Aggarwal, learned senior counsel.

16. Although *via* the order dated 02.12.2022, we had directed both sides to file their written submissions in the matter, we have received written submissions only on behalf of the respondent/assessee.

17. That being said, the arguments advanced by Mr Kumar, on behalf of the appellant/revenue, were broadly the following:

(i) Even though there is no allegation that the respondent/assessee had failed to disclose, fully and truly, all material facts necessary for carrying out the assessment proceeding, since in the reasons recorded by the AO for triggering the reassessment proceeding, there is a reference to the fact the reopening of assessment was triggered due to a search action, the escapement

of income was obvious and therefore, the necessary jurisdictional attributes for reopening stood embedded in the reassessment action taken by the AO.

(ii) The purchases *qua* which the addition was made by the AO were secured from a partnership concern, going by the name, JMD Building Material Suppliers [hereafter referred to as "JMD"], in which two partners were employees of the respondent/assessee.

(iii) Since the respondent/assessee could produce invoices and supporting documents only for purchases made worth Rs.92,34,545/- out of the total purchases amounting to Rs.3,94,03,687/-, the AO had rightly made an addition of the balance amount, i.e., Rs.3,01,69,142/-.

17.1 In sum, Mr Kumar relied upon the order passed by the AO and CIT(A), in support of the appeal.

18. On the other hand, Mr Aggarwal, emphasized the following facts:

(i) During the original scrutiny assessment carried out under Section 143(3) of the Act, the respondent/assessee had produced the relevant material about the purchases made from JMD. However, during the assessment, all documents/evidence could not be produced, as they had been seized by the Directorate General of Central Excise Intelligence [in short, "DGCEI"].

(ii) At the time of re-opening of the assessment, the AO did not have any material in his possession, which could have disclosed that income chargeable to tax had escaped assessment. The AO had triggered the reassessment proceeding for the AY in issue, only on the ground that a search action had been trigged against the DSC Group of Companies, although there was nothing found by way of material evidence, which would bring to the fore the fact that the respondent/assessee had failed to disclose, fully and truly, all material facts necessary for assessment.

(iii) Given the fact that more than four (4) years had passed since the end of the relevant AY, it was incumbent on the AO to allege that because the respondent/assessee had failed to disclose, fully and truly, all material facts necessary for assessment, income otherwise chargeable to tax had escaped assessment. In support of this argument, Mr Aggarwal relied on the following judgments of this Court:

a) ***JSRS Udyog Ltd. v. ITO***, 313 ITR 321 (Del)

b) ***Wel Intertrade Pvt. LTd. v. ITO***, 308 ITR 22 (Del)

c) ***Haryana Acrylic Manufacturing Company v. CIT***, 308 ITR 38 (Del)

d) ***Atma Ram Properties Pvt. Ltd. v. DCIT***, 343 ITR 141 (Del)

e) ***Shivalik Bimetal Controls Ltd. v. ITO***, 215 Taxman 441 (Del)

f) ***CIT v. Suren International Pvt. Ltd.***, 354 ITR 24 CIT (Del)

(iv) The reassessment for the AY in issue, i.e., AY 2006-07, has been triggered only because the said AY was beyond the block assessment carried out for the AYs spanning between AYs 2007-08 and 2012-13 on 28.08.2013. In sum, this was a *modus operandi* adopted by the appellant/revenue to prise upon a completed assessment for the AY in issue, i.e., AY 2006-07.

Analysis and Reasoning

19. Having perused the record and considered the submissions made by the counsel for the parties, what has emerged from the record is that the trigger for reopening the assessment was the search operation carried out against the DSC Group of Companies.

20. The AO, in the reasons recorded by him, adverted to the fact that in the post-search proceedings, the respondent/assessee had failed to produce supporting documents, i.e., bills and vouchers as well as "*khaki*" [i.e., slips issued by local authorities for extracting boulders from mines] amounting to Rs.3,94,03,687/-.

21. Besides this, the AO was also not satisfied with the claim for purchases made from an entity going by the name, Aggarwal Iron & Steel Co. to the tune of Rs.8,79,55,368/-. These were also categorized by the AO

as bogus purchases.

22. In addition thereto, the AO was of the view that cash payments made through one H.S. Buildtech, a sub-contractor, to the tune of Rs.36,54,533/-, remained unexplained. According to the AO, the unexplained cash payments contravened the provisions of Section 40A(iii) of the Act.

23. Based on the aforesaid, the AO, in the reasons recorded by him, concluded that income amounting to Rs.13,10,13,588/- had escaped assessment. The record shows that ultimately, the only purchases *qua* which addition was made were those that the petitioner had made from JMD, and that too partly, since the respondent/assessee had, according to the AO, furnished evidence supporting purchases worth Rs.92,34,545/-. The addition *qua* purchase made from JMD was scaled down to Rs.3,01,69,142/-, while other additions were dropped. Thus, in the present appeal, we are concerned with only this aspect of the matter, i.e., the purchases made from JMD.

24. The CIT(A) confirmed this addition, which was reversed by the Tribunal. The Tribunal attributed the purported failure on the part of the respondent/assessee to produce evidence/material concerning the remaining purchases worth Rs.3,01,69,142/-, to the records of JMD being seized by the DGCEI. Significantly, the argument of prejudice raised by Mr Kumar, i.e., that two (2) employees of the respondent/assessee were partners of JMD, did not come in the way of AO accepting part of the purchase worth Rs.92,34,545/- as being genuine. This submission of Mr Kumar, thus, does not impress us.

25. The record shows that the CIT(A) has merely observed that because

some part of the record could be produced, the respondent/assessee should have been able to produce the entire record. There, perhaps, may have been some weight in this observation, if only a specific allegation had been made by the AO while triggering reassessment, that because the respondent/assessee failed to disclose, fully and truly, all material facts necessary for carrying out the assessment, income otherwise chargeable to tax had escaped assessment. Furthermore, in our opinion, the AO could have called the bluff of the respondent/assessee [if it was construed to be one] by addressing an appropriate communication to the DGCEI.

26. In other words, the reasons recorded by the AO should not only have made such an assertion but should have also indicated the material found in the search operation carried out on the DSC Group of Companies, which gave reasons to believe that income chargeable to tax had escaped assessment.

27. Therefore, the arguments advanced on behalf of the appellant/revenue, that notwithstanding the absence of a specific allegation that the respondent/assessee had failed to disclose, fully and truly, all material facts, the reopening of the assessment was sustainable because it was a result of search action, is flawed.

28. Thus, the argument that the search action spoke for itself fails to recognize that the AO had to apply his mind to the material available on record, which at the relevant point in time, would have impelled him to form a belief that because of the failure on the part of the respondent/assessee to disclose, fully and truly, all material facts necessary for assessment, income

otherwise chargeable to tax had escaped assessment.

29. It appears that no such exercise was carried out by the AO at the relevant point in time. It is only after reassessment had been triggered, that information was sought by the AO concerning the purchase made by the respondent/assessee from JMD.

30. We, thus, tend to agree with Mr Aggarwal's submission that the jurisdictional ingredients for reopening the assessment provided in the first proviso to Section 147[1] of the Act were absent, both in form and substance and therefore, the proceedings were bad in law. [See ***Haryana Acrylic Manufacturing Company v. ITO***[2]]

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[1] Section 147, as it stood before amendment made *via* the Finance Act, 2021.

> "147. *Income escaping assessment – If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income 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 this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
>
> *Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*"

[2] "*In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material*

31. Thus, for the foregoing reasons, we are of the opinion that no substantial question of law arises for our consideration.

32. The appeal is, accordingly, closed.

RAJIV SHAKDHER, J

TARA VITASTA GANJU, J

JULY 18, 2023/pmc

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facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade Private Ltd (supra) we had agreed with the view taken by the Punjab & Haryana High Court in the case of Duli Chand Singhania (supra) that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our view-point, we hold that the notice dated 29.03.2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 02.03.2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above".[Emphasis is ours]