VERDICTUM.IN

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

% **Judgment reserved on: 08 April 2024**
Judgment pronounced on: 03 July 2024

\+ W.P.(C) 16700/2022

AARTI FABRICOTT PRIVATE LIMITED
.....Petitioner

Through: Mr.Amol Sinha and Mr.Kshitz Garg, Advs.

versus

INCOME TAX OFFICER, WARD 1(1), DELHI & ANR.
.... Respondents

Through: Mr.Sanjeev Menon, Jr.SC

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 instant petition has been filed by the petitioner assailing the notice dated 30 July 2022, issued under Section 148 of Income Tax Act, 1961 [**"Act"]** pursuant to a corrigendum of the even date issued to the order under Section 148A(d) of the Act by the respondents for the Assessment Year ["**AY**"] 2017-18.

2. The record would reflect that the petitioner is a company registered with the Registrar of Companies and has been regularly filing its Income Tax Return ["**ITR**"]. On 30 October 2017, the

VERDICTUM.IN

petitioner is stated to have filed its ITR, declaring a total income of Rs. 4,36,709/-.

3. On 28 June 2021, the respondents issued a notice under Section 148 of the Act, proposing to reassess the income based on a belief that certain income had escaped assessment for AY 2017-18.

4. Notably, this Court *vide* order dated 05 January 2022 passed in W.P. (C) No. 141 of 2022 titled as **Manmohan Kohli v. ACIT**, quashed the notice issued on 28.06.2021 under Section 148 of the Act. Subsequently, in light of the Supreme Court's judgment in **Union of India & Others v. Ashish Agarwal**[1], the proceedings were revived and a show cause notice was issued under Section 148A(b) of the Act on 24.05.2022 for the relevant AY.

5. In response to the said notice, the petitioner duly filed a reply on 07 June 2022, as required under Section 148A(c) of the Act, asserting that since it had not sold any immovable property during the concerned AY, therefore, no long-term capital gains could arise from such sale. The petitioner also clarified that it had purchased an immovable property worth Rs. 1,81,00,000/- from Mr. Vinod Popli *via* registration deed dated 18 May 2016 and denied any transaction involving an amount of Rs. 1,16,00,000/- with Mr. Sunil.

6. After duly considering the submissions, the respondents concluded that the petitioner's claim regarding the purchase of property worth Rs. 1,81,00,000/- from Mr. Vinod Popli *via* registration deed dated 18 May 2016 was correct.

7. With respect to the second allegation, the petitioner denied any transaction with Mr. Sunil, which was further examined and found to be true as the petitioner did not possess any immovable property during

[1] (2023) 1 SCC 617

VERDICTUM.IN

the said year. Therefore, taking into consideration all the submissions, the respondents passed an order dated 30 July 2022 under Section 148A(d) of the Act concluding that the reassessment proceedings could not continue under the given circumstances as it was not a suitable case for issuing a notice under Section 148 of the Act.

8. However, on the even date itself, the respondents issued a corrigendum against the original order passed under Section 148A(d) of the Act, allowing the continuation of reassessment proceedings by issuing a notice under Section 148 of the Act, which had originally been dropped.

9. Learned counsel appearing on behalf of the petitioner submitted that the respondents cannot be allowed to initiate proceedings of reassessment as per their opinion and convenience. According to him, the respondents have failed to provide any cogent reasoning in the corrigendum which was issued for opening reassessment. He, therefore, contended that the reasons to believe is imperative for initiation of reassessment which is missing in the case at hand.

10. He further contended that it is well settled that a mere change of opinion would not constitute a reason to reopen the assessment proceedings and the said position is even more fortified with the fact that the alleged information provided with the show cause notice is incorrect and does not relate to the petitioner. Learned counsel asserted that a perusal of the impugned corrigendum would indicate that the case of the petitioner is being reopened on a mere suspicion for conducting roving enquiries which is completely impermissible as per the Act.

11. It was further canvassed before us that the respondents have failed to bring anything contrary on record against the submissions filed by the petitioner which could suggest that the present is a fit case for

VERDICTUM.IN

initiation of reassessment proceedings. It was his contention that the impugned proceedings by way of a corrigendum dated 30 July 2022 is only an afterthought and reflects a complete non-application of mind on the part of the respondents.

12. *Per contra,* learned counsel for the respondents vehemently opposed the submissions advanced by the learned counsel for the petitioner. He submitted that the impugned notice has been issued after the final objections were raised by the Comptroller and Auditor General of India to the effect that the assessment has not been made in accordance with the provisions of the Act. According to him, there is no infirmity in the notice issued under Section 148 of the Act since the same has been made in reference to the survey conducted under Section 133A of the Act.

13. He contended that though the proceedings were dropped on 30 July 2022, however, upon further examination of the accounts of the petitioner, it was found that mere denial of transaction was not sufficient to terminate the proceedings. It was his contention that the transaction ought to have been fully investigated from the source and therefore, the Assessing Officer [“**AO**”] had sufficient reasons to believe for the issuance of the impugned notice.

14. Learned counsel also contended that the expression ‘reason to believe’ cannot be read to mean that the AO had finally ascertained the fact of escapement of income, rather what is required as per law is the AO must have a *prima facie* opinion that a fresh tangible material is available to form a reason to believe that income had escaped assessment. He submitted that going by the settled position of law, this Court should not exercise its jurisdiction under Article 226 of the Constitution to look into the sufficiency and correctness of the reason to

VERDICTUM.IN

believe. He, therefore, contented that in the absence of a stringent requirement of an established fact of escapement of income, the impugned proceedings are sustainable in the eyes of law and does not warrant any interdiction by this Court.

15. We have heard the learned counsels appearing for the parties and perused the record.

16. The limited question which stands posited before us relates to whether the reason provided in the corrigendum can be considered as a new tangible material sufficient for initiating reassessment proceedings?

17. Since the reassessment proceedings before the issuance of corrigendum were initiated on the basis of a report furnished by the Audit Party, it is pertinent to examine the scope and extent of such information constituting fresh tangible material. In the case of **Indian & Eastern Newspaper Society v. CIT**[2], the Supreme Court has held that an audit by the Comptroller and Auditor General of India is principally intended for the purposes of satisfying itself with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue. The relevant Internal Audit Manuals and Circulars indicate that Audit Department should not in any way substitute itself for the Revenue authorities in the performance of their statutory duties. The relevant extract provides that:-

> "4. Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure .... It is however, to forming a general judgment rather than to the detection of individual errors of assessment, etc. that the audit enquiries should be directed. The

[2] (1979) 4 SCC 248

VERDICTUM.IN

> detection of individual errors is an incident rather that the object of audit."

18. Furthermore, other provisions stress that the primary function of audit in relation to assessments and refunds is the consideration whether the internal procedures are adequate and sufficient. It is not intended that the purpose of audit should go any further. In *Indian & Eastern Newspaper Society (supra)***,** it was further observed that:-

> "11---
> Whether it is the internal audit party of the Income Tax Department or an audit party of the Comptroller and Auditor-General, they perform essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of income tax authorities. The Income Tax Act does not contemplate such power in any internal audit organisation of the Income Tax Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions.
> ---
> Neither statute supports the conclusion that an audit party can pronounce on the law, and that such pronouncement amounts to "information" within the meaning of Section 147(b) of the Income Tax Act, 1961."

19. In **FIS Global Bus. Sol. India Pvt. Ltd. v. Asst. CIT**[3], this Court has held that the audit objection constitutes merely an information and no more. Moreover, in **CIT v. Simbhaoli Sugar Mills Ltd**[4], it was held that audit report objections cannot be a solitary basis to initiate reassessment proceedings. In the said case, the Revenue had issued a notice under Section 148 of the Act based on an internal audit report. Based on the audit report, a review was sought to be made by the AO on the pretext of reassessment alleging escapement of income in the assessment already concluded, ignoring the fact that the assessee therein had made complete disclosure of the particulars before the AO. The relevant extract of the decision in *Simbhaoli Sugar Mills (supra)*

[3] 2018 SCC OnLine Del 13466
[4] 2011 SCC OnLine Del 1241

VERDICTUM.IN

which sheds light on the established law with respect to whether opinion/objection of audit party constitutes 'tangible material' or not, is reproduced 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).
>
> 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. In **CIT v. Kelvinator of India Ltd**[5], the Supreme Court has held that for reopening an assessment under Section 147, there has to be certain 'tangible material' to show that income has escaped assessment and non-satisfaction of this condition is an arbitrary action. It took a view that the concept of 'change of opinion' is an in-built test to check abuse of power by the Revenue and the reasons recorded for opening reassessment must have a live link with the formation of the belief. The relevant paragraphs of the decision in *Kelvinator (supra)* 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

[5] (2010) 2 SCC 723

VERDICTUM.IN

Department, then, in the garb of reopening the assessment, review would take place.

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. It remains established that 'tangible material' or factual information can be received from various external sources and the objections raised by an Audit Party is not absolutely barred. In **Transworld International Inc. v. Joint Commissioner of Income-tax**[6], this Court has observed that factual information can come from various sources including an audit objection. But a blanket reliance should not be placed on such objection to initiate reassessment proceedings and the AO must apply its own mind. The relevant portion of the said judgment is provided below:

"20. Factual information can come from various sources including an audit objection. In the affidavit filed on behalf of the respondent it is nowhere stated that factual information was supplied by the audit party that plant and machinery was not used for more than 180 days. Reading the original report of the audit party, it is clear that it has proceeded on the assumption that the plant and machinery could have been used only after the Reserve Bank of India granted permission to open a branch office on January 18, 1996. The Revenue has overlooked the material aspect that the assessee had placed material on record to show that the approval for project office was granted for a period from April 17, 1996 to March 31, 1997 and that it had in fact used the plant and machinery for more than 180 days. Merely because subsequently permission for branch office was given, it cannot be said that the plant and machinery was not used for more

[6] 2004 SCC OnLine Del 729

VERDICTUM.IN

than 180 days. When sufficient material is placed on record and the Assessing Officer had arrived at a conclusion that the assessee is entitled to get depreciation then on the same material a different view cannot be taken. It amounts to change of opinion.

24. It is required to be noted, as pointed out by learned counsel for the assessee, that there was no fresh information supplied to the Assessing Officer by any one including the audit party. In a case like this, the duty of the Assessing Officer is that he himself should examine the material placed on record and should arrive at a prima facie belief in this behalf. He must record a conclusion that there is escapement on account of excessive depreciation allowance and is required to give reasons in this behalf. He has to justify the exercise of reassessment. In the instant case, the Assessing Officer while recording the reasons has not done any exercise. Where an assessment has been made and there is purported excessive depreciation, its allowance would require examination of facts and that must be reflected in a well reasoned document before issuance of notice for reassessment. In the instant case, that exercise has not been done. Section 148 of the Act specifically requires the Assessing Officer to record reasons. The validity of initiation of reassessment proceedings has to be judged with regard to the material available with the authority at the point of time of issuing the notice under section 148 of the Act. When the assessee has disclosed fully and truly all material facts necessary for the assessment and on the basis of which the assessment is made, then exercise of powers under section 148 of the Act contemplates that :

> (a) there must be material for the belief ;
>
> (b) circumstances must exist and cannot be deemed to exist for arriving at an opinion ;
>
> (c) reasons to believe must be honest and not based on suspicion, gossip, rumour or conjecture ;
>
> (d) reasons referred to must disclose the process of reasoning by which the Assessing Officer holds 'reasons to believe' and change of opinion does not confer jurisdiction to reassess ;
>
> (e) there must be nexus between material and belief ; and
>
> (f) reasons recorded must show application of mind by the Assessing Officer (see Sheth Brothers' case [2001] 251 ITR 270 (Guj)).

25. In the instant case, we find that the Assessing Officer himself has not examined the matter keeping in mind the above principles and merely relying on the audit objection has issued the notice. That is

VERDICTUM.IN

> contrary to the requirement of law. It is not the case of the Revenue that the income chargeable to tax has escaped assessment because of failure to furnish full and true particulars. It is the bounden duty of the Revenue to discharge the onus of showing that there was any failure on the part of the petitioner. In the instant case, the Assessing Officer was informed about the use of machinery, permission granted by the Reserve Bank of India to operate the project office and subsequently the branch office. When the assessee has placed on record sufficient material to show that machinery was used, then in that case there is no failure on the part of the petitioner."

22. Reverting to the facts of the present case, undisputedly, the proceedings dated 30 July 2022 were firstly closed by the respondents upon being satisfied after a perusal of the audited final accounts filed by the petitioner indicating that there was no immovable property held by the petitioner as on 01 April 2016 and therefore, there was no sale undertaken by it. The relevant portion of the said order is extracted hereunder as:-

> "6---
> The assessee has further submitted that there is no sale of property by it during the said financial year i.e. F.Y.2016-17 relevant to A.Y.2017-18. The assessee has submitted that as per reasons provided there is sale of two properties of Rs. Rs.1,16,00,000/- and Rs. 1,81,00,000/- to Shri Sunil Kumar Arora and Shri Vinod Popli respectively on 18.05.2016 by the assessee. The assessee company has denied to have any transaction with Sh. Sunil Arora. Regarding the sale of property to Sh. Vinod Popli, the assessee has submitted that it has purchased property of Rs.1,81,00,000/- from Sh. Vinod Popli vide registration deed dated 18.05.2016. On examination of the copy of sale deed it is observed that agreement to sell was executed on 20.06.2012 and the full payment of Rs.1,10,00,000/- was made at the time of execution of agreement to sale. Thereafter dispute was arisen between both the parties and the sale deed was executed vide order of Delhi High Court. On examination of the audited final accounts filed by the assessee company it is observed that there was no immovable property held by it as on 01.04.2016 therefore it is assumed that there is no sale of property by the assessee during the year under consideration.
>
> 7. In view of the above discussion and on the basis of material available on record, it is decided that this is not a fit case to issue a notice under section 148 of the I.T. Act, 1961."

VERDICTUM.IN

23. However, on 30 July 2022 itself i.e., hours after terminating the reassessment proceedings, the respondents again issued a corrigendum initiating the reassessment proceedings. The relevant recitals of the said corrigendum are reproduced as under:-

> "Regarding denial of the assessee to have sold any property to Sh. Sunil Arora amounting to Rs.1,16,00,000/-, the same is not acceptable. On examination of the audited final accounts filed by the assessee company it is observed that though there was no immovable property held by it as on 01.04.2016 but it may be possible that the property may have been purchased by the assessee later on. Mere denial of transaction is not enough unless the transaction is fully investigated from the source. Therefore, it is assumed that there is undisclosed sale of property of Rs.1,16,00,000/- by the assessee during the year under consideration."

24. It is palpably observed from the extract of the impugned corrigendum that no new material has been found by the Revenue which would warrant reopening the assessment. A reading of the aforesaid two notices would crystallize the fact that the corrigendum has been issued merely on the basis of a change of opinion as two different conclusions are being drawn on the basis of same material i.e., audited final accounts of the petitioner. Thus, the AO has apparently reviewed its own decision, which is not permissible as per the settled law.

25. It is trite that under the guise of power vested in the Revenue to reassess an income which had escaped assessment upon production of fresh tangible material, it cannot be allowed to exercise the power of review. It is apposite to refer to the decision of the Supreme Court **CIT v. Techspan India (P) Ltd.**[7], wherein, it was held as under:-

> "15. Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of

[7] 2018 SCC OnLine SC 435

VERDICTUM.IN

> assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review."

26. Considering the aforesaid facts and circumstances, we are of the opinion that the impugned proceedings are unsustainable and deserve to be quashed.

27. Consequently, we allow the writ petition and quash the notice issued *via* corrigendum dated 30 July 2022 alongwith all the consequential proceedings. The writ petition is disposed of alongwith the pending application(s), if any.

PURUSHAINDRA KUMAR KAURAV, J.

YASHWANT VARMA, J.

03 JULY, 2024/p