

New Delhi Television Ltd. v. DCIT**Civil Appeal no. 1008 of 2020 (SC), order dt. 3rd April, 2020**

Ratio : In a recent ruling, the Apex Court held that where the assessee has fully and truly disclosed primary facts before the Revenue, notice u/s. 148 of the Income Tax Act, 1961 for reopening of assessment cannot be issued beyond 4 years.

Facts of the case :

The assessee is an Indian company engaged in running television channels of various kinds. It has various foreign subsidiary. Here, the issue is related to subsidiary based in UK named NNPLC. The assessee filed its ROI for AY 2008-09 declaring loss. Subsequently, the return was produced and intimation u/s. 143(1) was issued. Thereafter, the return was selected for scrutiny by issuance of notice u/s. 143(2).

During this year, NNPLC issued step up coupon bonds against which the assessee agreed to provide corporate guarantee. The said transaction ought to have been at arm's length. The AO accepted the genuineness of the transaction but imposed guarantee fee by treating it as a business transaction and passed final assessment order.

In the subsequent AY 2009-10, the AO proposed substantial addition on account of monies raised by the assessee through its subsidiaries. The assessee had raised its objection before DRP. The DRP came to the conclusion that transactions with the subsidiary companies in Netherlands were sham and bogus transactions.

Accordingly, on the basis of said order of DRP, the AO recorded reasons that he has "reason to believe" that funds received by NNPLC were actually the funds of the assessee. Accordingly, AO issued notice u/s. 148 beyond the period of limitation of 4 years. On request by the assessee the above reasons were provided to the assessee.

Assessee's raised objection :

- (i) no failure on the part of the assessee to disclose fully and truly all material facts necessary during the course of original assessment ;
- (ii) thus, notice had been issued beyond the period of limitation of 4 years is invalid.

- (iii) proceedings had been initiated on a mere change of opinion.

AO's rejected the objections on the following grounds :

- (i) There was non-disclosure of material facts by the assessee.
- (ii) The income was being derived through foreign entity.
- (iii) Hence, the case of the assessee would fall within the 2nd proviso of Section 147 of the Act and the extended period of 16 years would be applicable.

The assessee filed writ petition before High Court which was dismissed. Against this the assessee has filed the present Appeal.

Question before Supreme Court :

- (i) Whether the revenue had a valid reason to believe that undisclosed income had escaped assessment?
- (ii) Whether the assessee disclose fully and truly all material facts during the course of original assessment which led to the finalisation of the assessment order?
- (iii) Whether notice u/s. 148 along with reasons communicated could be termed to be a notice invoking the provisions of the second proviso to Section 147 of the Act?

Supreme Court verdict :

Answer no. 1 : Information which comes to the notice of the AO, during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer under Section 147. While deciding this, the Court relied on the decision of *Claggett Brachi Co. Ltd. v. CIT (1989) 44 Taxman 186 (SC)* and *Ess Ess Kay Engineering Co.(P) Ltd. v. CIT (2002) 124 Taxman 491 (SC)*.

Answer no. 2 : The assessee had “fully and truly” disclosed all material facts necessary for its assessment and, therefore, the revenue cannot take benefit of the extended period of limitation of 6 years for the reason.

It is the duty of the assessee to disclose fully and truly all material primary facts. Nondisclosure of other facts which may be termed as secondary facts is not necessary [*Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191 (SC)*]. In the present case the AO on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee and 2 other companies who have subscribed for the said bonds. Thus, there was not mere disclosure of that transaction at the time of original assessment proceedings, but full and true disclosure [disapproved *M/s. Phool Chand Bajrang Lal v. ITO (1993) 203 ITR 456 (SC)*].

Answer no. 3 : Revenue cannot rely upon second proviso to section 147 i.e. the limitation period for issuance of notice u/s. 148 would be 16 years because the notice was silent on this regard [*Mohinder Singh Gill v. CEC (1978) 2 SCR 272*].

Notice issued u/s. 148 and reasons communicated to the assessee was silent on this regard. It is only while rejecting the objections reference was made to the said second proviso. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso. The assessee must be put to notice of all the provisions on which the revenue relies upon.

Supreme Court held :

- (i) Notice issued to the assessee shows sufficient reasons to believe on the part of the AO to reopen the assessment but since the revenue has failed to show non-disclosure of facts, the notice having been issued after a period of 4 years is required to be quashed.
- (ii) The Court has not given any opinion on whether the revenue could take benefit of the second proviso to section 147 or not since the said proviso is independent and does not require the condition of “full and true” disclosure to be satisfied before implementing. Accordingly, the Court has stated that the Revenue may issue fresh notice taking benefit of the second proviso, if permissible under law.

Acelegal Analysis :

1. Full and True disclosure :

For limiting the reopening to 4 years only, the assessee has to disclose the primary facts which are necessary for assessment “fully and truly”. A “full disclosure” would mean disclosure of all material facts which does not contain any hidden material or suppression of facts and “true disclosure” means disclosure which is truthful in all respects [*CIT v. Bhanji Lavji (1971) 79 ITR 582 (SC)*]. Where the assessee has made full and true disclosure, non disclosure ought to be shown by the Revenue. However, “full and true disclosure” will depend on case to case basis.

2. Reasons cannot be improvement upon during reassessment proceedings :

In the present case, the AO has tried to improve its reasons by invoking second proviso to section 147 i.e. extending the limitation period for reopening to 16 years. The Court has observed that the same cannot be done since that tantamount to improvement in reasons recorded. The Bombay High Court in the case of *Prashant Joshi v. ITO (2010) 324 ITR 154 (Bom.)* has held that the validity of reopening has to be decided on the basis of reasons recorded and, on those reasons, only. The reasons recorded cannot be allowed to grow with age and ingenuity, by devising new grounds on replies and affidavits not envisaged when the reasons for reopening an assessment were recorded.

3. Section 147 is a machinery provision :

While applying the said second proviso, the Revenue has to keep in mind the decision of Apex Court in the case of *CIT v. Sun Engineering Works (P.) Ltd. (1992) 198 ITR 297 (SC)* wherein it has been held that section 147 is merely a machinery provision. Though the provision of section 147 are for the benefit of the Revenue and aimed at gathering “escaped income” of the assessee, the same cannot be allowed to be converted as “revisional” or “review” proceedings thereby making the machinery unworkable.

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