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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
% **Judgment reserved on: 29 August 2024**
Judgment pronounced on: 26 September 2024

+ W.P.(C) 359/2023
CHANDRA GLOBAL FINANCE LTD ..... Petitioner
Through: Mr. Ruchesh Sinha and Ms. Monalisa Maity, Advocates

versus

ITO WARD 6(1) NEW DELHI & ANR . ..... Respondents
Through: Mr. Debesh Panda, Sr. Standing Counsel with Ms. Zehra Khan, Junior Standing Counsel, Mr. Vikramaditya Singh, Junior Standing Counsel, Mr. Ojaswa Pathak, Ms. Anauntta Sarkar and Mr. Vineet Gupta, Advocates.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

RAVINDER DUDEJA, J.

1. This Writ Petition has been filed for seeking directions for quashing the impugned notice dated 27.05.2022 issued under Section 148A(b) of the Income Tax Act, 1961 [**"Act"**], order under Section 148A(d) and consequent notice under Section 148, both dated 30.07.2022 for the Assessment Year [**"AY"**] 2014-15. For the purpose of the present writ petition, we deem it apposite to take note of the following essential facts.

2. Petitioner is a company and is an Income Tax Assessee for the AY-2014-15. Petitioner was selected for scrutiny under Section 143(3) of the Act.

3. During the course of assessment proceedings, petitioner was, *inter alia*, asked about the share holding pattern of M/s Centrodorstory (India) Pvt. Ltd., in whose shares an investment of Rs. 2 crores was made. Petitioner submitted its reply. After considering the submissions of the petitioner, and after being fully satisfied, Assessment Order dated 21.12.2016 was passed, thereby, assessing the income of the petitioner as 'Nil'.

4. After completion of assessment proceedings, notice under Section 263 of the Act was issued to the petitioner by the Principal Commissioner of Income Tax-II **["PCIT"],** stating therein as under:-

> "2. As per the financials, during the year under consideration, the assessee company had purchased 20,00,000 equity shares of Rs. 10/- each from M/s Centrodorstroy (India) Pvt. Ltd. against the fair market value of Rs. 40/-. As per provisions of section 56(2)(viia) of the IT Act, 1961, if a closely held company purchases any share of any other closely held company for a consideration which is less than fair market value of the share, then such difference is to be taxed as income of the investor company. Accordingly, consideration for 20,00,000 shares at the rate of Rs. 30/- per share (Rs. 40-Rs. 10) is to be treated as income of company u/s 56(2)(viia) of the IT Act,1961.
> 3. In view of the above, the order passed by the AO on 21.12.2016 u/s 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of the revenue, causing loss of Rs. 6,00,00,000/-."

5. Petitioner submitted reply to the notice under Section 263, stating that he was already an existing subscriber and had received the shares as "Right Issue", and therefore, provisions of Section 56(2)(viia) does not have any application. After considering submissions of the

petitioner, PCIT dropped the proceedings initiated vide Show Cause Notice under Section 263 of the Act.

6. After more than two years, a notice dated 28.06.2021 under Section 148 of the Act was issued to the petitioner for the AY 2014-15.

7. Reassessment proceedings of the petitioner and other similar placed assesses were reviewed in the light of the judgment of the Hon'ble Supreme Court in the case of **Union of India v. Ashish Agarwal (2023) 1 SCC 617** and a notice under Section 148A(b) was issued to the petitioner on 27.05.2022.

8. Petitioner filed reply to the said notice where after an order under Section 148A(d) and the consequential notice under Section 148 of the Act, both dated 30.07.2022 came to be issued, which are subject matter of challenge in the present writ petition.

9. Learned counsel for the petitioner has submitted that the present case is a clear case of "change of opinion". It has been stated that the issue which is sought to be reopened now, has already been inquired at the time of original assessment proceedings and the Assessing Officer **["AO"]** after applying its mind to the transaction, had passed assessment order in favor of the petitioner. On the same very issue i.e. alleged purchase of shares at less than fair market value of M/s Centrodorstory (India) Pvt. Ltd., the PCIT has invoked its jurisdiction under Section 263 of the Act and upon consideration of entire facts and circumstances, the PCIT had dropped the proceedings under Section 263 of the Act. It is further submitted that once the PCIT being satisfied had chosen not to take any adverse view, the AO has now chosen to invoke the reassessment proceedings and thus it is a clear case of

"change of opinion", which is not permissible in view of the ratio of the decision rendered by the Supreme Court in the case of **Commissioner of Income Tax, Delhi vs. Kelvinator of India Limited (2010) 2 Supreme Court Cases 723**.

10. Alternatively, it has also been submitted by the learned counsel for the petitioner that provisions of Section 56(2)(viia) of the Act are not applicable as the assessee had acquired and subscribed the equity shares of a closely held company at below fair market value under the 'Right Issue'. However, the order under Section 148A(d) of the Act is completely a non-speaking order and does not set out the reasons for not accepting the right of the petitioner.

11. Per contra, the learned counsel for the respondent has argued that the assessee made investment in M/s. Centrodorstory (India) Pvt. Ltd. by purchasing 20 lakh equity shares. The fair market value for each share was Rs. 39.53/- or Rs. 40/- (each) approximately, as evident from the balance sheet of M/s. Centrodorstory (India) Pvt. Ltd. as on 31.03.2013, as against the assessee company allegedly purchasing the same at Rs. 10/- each and therefore, it is a clear case of escapement of income. It has been submitted that the proceedings under Section 263 of the Act were dropped by the PCIT but fresh proceedings for reassessment have been initiated with due permission from PCCIT, which is a higher authority than the PCIT and therefore the present proceedings are not barred.

12. In order to appreciate the controversy, it would be apposite to refer to Section 147 & 148 of the IT Act. The relevant extract of Section 147 & 148 of the Act is reproduced below:-

"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 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:

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"**148. Issue of notice where income has escaped assessment**.-(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:

xxx
xxx

> (2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

13. Section 147 certainly empowers the AO to initiate action for reassessment of escaped income subject to Section 148 to 153 of the Act. However, such power is subject to the condition that the AO has reasons to believe that income has escaped assessment. The use of words "reasons to believe" in Section 147 has to be interpreted schematically as any other interpretation would lead to the consequence of conferring arbitrary powers on the AO, who may even initiate such reassessment proceedings merely on a change of opinion on the basis of same facts and circumstances already considered during the original assessment proceedings. The provision for reassessment was brought into the statute book to empower the AO to reassess any income only on the ground which was not brought on record during the original proceedings and escaped its knowledge. The law regarding reassessment is no more *res-integra*. It has been held by the Supreme Court in the case of **Income Tax, Delhi vs. Kelvinator of India Limited** *(supra)* as under:-

> "5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.

> 6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.
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> 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, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

14. The decision rendered in **Income Tax, Delhi vs. Kelvinator of India Limited** *(supra)* was also taken note by the Hon'ble Supreme Court in the case of **Income Tax Officer Ward No. 16(2) v. M/s. TechSpan India Private Ltd. & Anr. Civil Appeal No. 2732/2007**, wherein, it has been observed as under:-

> "9) Section 147 of the IT Act does not allow the re-assessment 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 assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.
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> 10) To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection."

15. Reverting to the facts of the present case, undoubtedly, vide notice dated 05.09.2016. AO had requested the assessee to submit the share holding pattern of M/s. Centrodorstory (India) Pvt. Ltd. for whose shares, the assessee had made investment of Rs. 2 crores. The Assessment Order dated 22.12.2016, clearly reveals that the details called for were filed, examined and placed on record and after considering them, the income was assessed as 'Nil'.

16. The reason for sending the notice under Section 263 of the Act dated 22.02.2019 was as under:-

> "In view of the above, the order passed by the AO on 21.12.2016 u/s 143 143(3) of the Act is erroneous in so far as it is prejudicial to the interest of the revenue, causing loss of Rs. 6,00,00,000/-."

17. Admittedly, after considering the reply of the assessee, PCIT had dropped the proceedings initiated under Section 263 of the Act. Thus, it is evident that at the time of initial assessment, as also while conducting proceedings under Section 263, the authorities were aware of shares held by the assessee for a consideration which was considered to be less than fair market value. However, Revenue still proceeded further to purpose initiation of reassessment proceedings by issuing notice under Section 148A(b) based on following reasons:-

> *"On perusal of assessment records, it has been found that, as per the details furnished by the assessee company, it had made the following investment during the year under consideration:*
> *20,00,000 Equity shares of Rs.101- each of M/s Centrodorstroy India Pvt. Ltd at par for a total consideration of Rs. 2,00,00,000/-.*
>
> However, from perusal of the Balance Sheet of M/s Centrodorstroy India Pvt. Ltd, it is seen that the Fair Market Value of the shares of Mis Centrodorstroy India Pvt. Ltd as on 31.03.2013 was RS.39.53 or Rs.40/- (approx.)."

18. It is clear that the reasons for issuing notice under Section 148A(b) were exactly similar to the reasons on which the PCIT invoked Section 263 of the Act. Once the PCIT decided in favour of the petitioner after having considered its reply, AO had no authority to reassess and reopen the assessment under Section 148 of the IT Act. It is a clear case of "change of opinion" and the reassessment proceedings are in the nature of review of the previous assessment. Grant of approval by the senior authority i.e. PCCIT would not confer legitimacy to the initiation of the reassessment action as the point on which the reassessment was initiated, had already been considered in the previous proceedings. The higher authority cannot grant approval which is in violation of the settled principles on the basis of which reassessment action can be initiated.

19. For the aforesaid reasons, we are unable to sustain the impugned action for reassessment. The writ petition is accordingly allowed. The impugned notice under Section 148A(b) dated 27.05.2022, order passed under Section 148A(d) and notice under Section 148 of the Act, both dated 30.07.2022 as also the consequential proceedings emanating there under are set aside.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

26 September 2024/*RM*