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

% **Judgment reserved on: 23 July 2024**
Judgment pronounced on: 09 September 2024

\+ W.P.(C) 2516/2016
DIVINE INFRACON PRIVATE LIMITED ..... Petitioner

Through: Mr. Salil Aggarwal, Sr. Adv. with Mr. Madhur Aggarwal and Mr. Uma Shankar, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX CENTRAL CIRCLE -18, NEW DELHI ..... Respondent

Through: Mr. Vipul Agrawal, Sr.SC with Mr. Gibran Naushad and Ms. Sakashi Shairwal, Advs.

\+ W.P.(C) 2530/2016

DIVINE INFRACON PRIVATE LIMITED ..... Petitioner

Through: Mr. Salil Aggarwal, Sr. Adv. with Mr. Madhur Aggarwal and Mr. Uma Shankar, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX CENTRAL CIRCLE -18, NEW DELHI ..... Respondent

Through: Mr. Vipul Agrawal, Sr.SC with Mr. Gibran Naushad and Ms. Sakashi Shairwal, Advs.

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. These two writ petitions, W.P. (C) 2516/2016 & W.P. (C) 2530/2016 pertaining to Assessment Years **["AY"**] 2011-12 and 2010-11 respectively impugn the reassessment action initiated in terms of notices under Section 148 of the Income Tax Act, 1962 [**"Act"**], both dated 30.03.2015. The principal question which stands posited for our consideration is whether the report of the District Valuation Officer [**"DVO"**] of the Income Tax Department, per se, can be made basis or reason for issuance of notice under Section 148 of the Act.

2. Petitioner is a Private Limited Company and is engaged in the business of trading of real estate development and running of hotels.

3. A search and seizure operation under Section 132(1) of the Act was conducted at Plot No. 4, Sector-13, Dwarka City Center on 14.09.2010. For the AY 2010-11, petitioner filed its return of total income under Section 139(1) of the Act on 15.10.2010, declaring 'Nil' income and for the AY 2011-12, the return of total income under Section 139(1) of the Act, was filed on 29.03.2012, declaring the income of Rs. 12,87,070/-.

4. The Assessing Officer [**"AO"**] issued notice (s) under Section 153A of the Act on 15.09.2012 in respect of AY 2010-11 and on 26.09.2012 in respect of AY 2011-12.

5. During the course of Original Assessment Proceedings, petitioner filed complete books of account, bill and vouchers for the verification

by the AO. The assessment for the AY 2010-11 was framed by the AO on 28.03.2013 at a total income of Rs. 35 Crores as against the declared income of Nil and for AY 2011-12, the Order of Assessment was framed on 28.03.2013 at a total income of Rs. 14,76,960/-.

6. Petitioner preferred appeals against the aforesaid Orders of Assessment before the Commissioner of Income Tax (Appeals), which are pending adjudication.

7. Vide impugned notice (s) under Section 148 of the Act dated 30.03.2015, petitioner was directed to furnish its returns of income for the subject Assessment Year (s) on the allegation that there has been escapement of income.

8. Petitioner filed its reply dated 30.10.2015, submitting that the return (s) originally filed under Section 139(1) of the Act may be treated as return (s) in response to the aforesaid notice (s) under Section 148 of the Act.

9. Respondent, vide letter dated 02.11.2015, provided the purported reasons recorded for issuance of impugned notices under Section 148 of the Act. The following reasons were communicated to the petitioner:-

> "Reasons for the belief that income has escaped assessment:-
> A reference was made to the valuation cell during Assessment Proceedings to find out the cost of the property situated at Plot No. 4, District City Center, Sector-13, Dwarka, New Delhi vide reference dated 20.02.2013. Subsequently, valuation cell report dated 30.01.2015 was received in this office.
> After perusal of the valuation report, it was found that the DVO has estimated the investment made in renovation/reconstruction in the property situated at Plot No. 4, District City Center, Sector-13, Dwarka, New Delhi at Rs. 2,11,99,57,449/- for the period August 2009 to 31" March. The valuation report also mentions that the assessee has declared total investment as NIL.
> Since, the report of the DVO was not before the Assessing Officer during the assessment proceedings for the AY 20 11-12 and 2010-

> 11, the issue of investment in the above mentioned property was not examined. Therefore, I have reason to believe that this amount of Rs. 2,11,99,57,449/- represents income of the assessee chargeable to tax which has escaped assessment for the AY 2011-12 and 2010-11."

10. Petitioner filed objections dated 30.03.2015 to the validity of initiation of proceedings under Section 147 of the Act by issuance of notice (s) under Section 148 of the Act for the AY 2011-12 and 2010-11. However, the objections raised by the petitioner were disposed of by the respondent vide order dated 16.02.2016.

12. Learned counsel for the petitioner has submitted that there is no material much less tangible material which could enable the AO to form a prima facie belief that the income of the petitioner company had escaped assessment. It is submitted that proceedings under Section 147 of the Act can be initiated only on the basis of tangible material and not on the basis of assumptions and presumptions. It is submitted that even the report of the DVO is without application of mind, as in his report, it has been stated that the petitioner has shown the investment as 'Nil' without taking note that the cost of the property has been declared by the petitioner under the "Fixed Assets and Capital WIP" at Rs. 592,13,59,681/- as on 31.03.2011. It is averred that the DVO has estimated the cost of the property only at Rs. 211,99,57,449/-, whereas, the petitioner has declared the value of the aforesaid property under the head "Fixed Assets and Capital WIP" at Rs. 592,13,59,681/-. Since the petitioner has correctly recorded the cost of the property which is much more than the value estimated by the DVO, as such, the assumption that the income of the petitioner has escaped assessment is wholly arbitrary and misconceived and hence unsustainable. It is submitted that had the

AO applied his mind to the report of the DVO and examined the books of the petitioner, then it could have been found that the cost of the property declared by the petitioner was higher than that estimated by the DVO and in such circumstances, there would have been no conclusion of escapement of income.

13. Learned counsel appearing from the side of the Revenue has argued that the scope of proceedings before the Court while considering a notice under Section 147/148 is limited. The Court should not enter into the merits of the subjective satisfaction of the AO or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such conclusion. It is submitted that the sufficiency of correctness of the material is not to be considered at this stage. The learned counsel placed strong reliance on the decision of Supreme Court in **Bawa Abhai Singh v. Dy. Commissioner of Income-Tax (2002) 253 ITR 83,** wherein, reopening done on the basis of valuation report was upheld. With regard to the argument of the petitioner regarding non-consideration of the books of accounts prior to making reference to the DVO, it has been submitted that Section 142A does not mandate such a requirement. It is submitted that reasons recorded reveal that AO had applied his mind to the contents of the report of the DVO before forming a prima facie view and therefore reopening in the present case cannot be said be illegal or bad in any manner whatsoever.

14. Having heard the learned counsels for the petitioner and respondent, we are of the view that the writ petitions have merit and the

reassessment proceedings initiated by the respondent are not sustainable for the reasons set out below.

15. The power of Income Tax Officer to reopen assessment though vide are not plenary, the words of statute are “reason to believe” and not “reason to suspect”. The reopening of assessment after lapse of many years is a serious matter. The Act, no doubt contemplates the reopening of assessment if grounds exist of believing that the income of the assessee has escapement assessment. The obvious reason for that is that instances of concealed income or other income escaping assessment many a times come to the notice of the authorities after the assessment has been completed. However, before action for reassessment is taken, the requirement of law is that there should be a live link of close nexus between the material before the Income Tax Officer and the belief which he was to form regarding the escapement of the income of the assessee. Once there exists reasonable grounds for the Assessing Officer to form the belief, that would be sufficient to clothe him with jurisdiction to issue notice. The Court is not to investigate whether the grounds are adequate or not. The sufficiency of grounds which induce the AO to act is not a justiciable issue. However, it is open to the assessee to contend that AO did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged but not the sufficiency for the reasons to believe. Expression “reasons to believe” does not mean a purely subjective satisfaction on the part of the AO. The reason must be held in good faith and cannot be merely a pretence.

16. In the case of Bawa Abhai Singh (supra), it was observed that valuation report received after assessment can constitute a valid basis for initiation of reassessment proceedings. It was held that information, however, must be more than mere rumour, gossip or a hunch and there should be some material which may be regarded as justification for action under Section 147 of the Act. Court had further observed that meticulous examination of the information is not required as in depth enquiry has to be made post-issue of notice. It was also held that the "reason to believe" must be tenable in law. Only if the information or the reason has no nexus with the belief or there is no material or tangible information for forming of requisite belief, then only the Court can interfere, otherwise not.

17. However, in a subsequent decision, the Supreme Court in **Assistant Commissioner of Income Tax, Gujarat vs. Dhariya Construction Company (2010) 15 Supreme Court Cases 251**, observed and held that opinion of the DVO *per se* is not an information for the purposes of reopening assessment under Section 147 of the Income Tax Act, 1961. The AO has to apply his mind to the information, if any, collected and must form a belief thereon.

18. Dealing with an identical issue, this Court in the case of **Mahashay Chunnilal vs. Deputy Commissioner of Income-Tax and Others (2014) SSC OnLine Del 561**, while referring to the decisions of the Supreme Court in Bawa Abhai Singh (supra) and Dhariya Construction Company (supra) observed as under:-

> "**16**. The valuation report of this nature requires some statement or an averment by the Assessing Officer as to what was the basis and why he should proceed on the valuation report, its contents and why

he should rely on the same while recording reasons to believe. This in the present case is lacking and absent.

17. The contention of the Revenue that the report submitted by the District Valuation Officer was material on the basis of which the reopening proceedings could be initiated in the facts of the present case is not sustainable.

18. In the case of CIT v. Puneet Sabharwal (2011) 338 ITR 485 (Delhi), a Division Bench of this court relying on the decision of CIT v. Smt. Suraj Devi (2010) 328 ITR 604 (Delhi) held that the primary burden of proof to prove understatement or concealment of income is on the Revenue and it is only when such burden is discharged that it would be permissible to rely upon the valuation given by the DVO. It was further held that the opinion of the Valuation Officer, per se, was not an information and could not be relied upon without the books of account being rejected which had not been done in that case. The Division Bench also referred to the decision in CIT v. Naveen Gera (2010) 328 ITR 516 (Delhi) to hold that the opinion of the District Valuation Officer per se was not sufficient and other corroborated evidence was required.

19. The Supreme Court in the case of Asst. CIT v. Dhariya Construction Co. (2010) 328 ITR 515 (SC) observed (page 515):

> "Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). The opinion of the DVO per se is not an information for the purposes of reopening assessment under section 147 of the Income-tax Act, 1961. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment.

20. The ratio discernible from the aforesaid decision is that the Assessing Officer has to apply his mind to any information in the form of the valuation report and must form a belief thereon that there is escapement of income. The opinion of the DVO is per se not an information for the purpose of reopening of an assessment. The Assessing Officer has to apply his mind to the report of the DVO and only if on application of mind, if he forms a belief that there is escapement of income, he can seek to reopen the assessment under section 147 of the Act."

19. Proximity of the reasons with the belief of escapement of income is the determinative factor for re-opening of the assessment. Absence of

reasons would obviate the possibility of a belief and would bring the case in the realm of mere suspicion which cannot be a ground for re-opening of assessment.

20. On a perusal of the reasons recorded by the AO, it is apparent that the sole ground for reopening the assessment is the valuation of the Officer who had estimated the investment made in renovation/ reconstruction of the property at Rs. 211,99,57,449/-, even though, the petitioner had declared the cost of the said property under the head "Fixed Assets and Capital WIP" at Rs. 592,13,59,681/-. Simply relying upon the report/estimate of the Valuation Officer, AO jumped to the conclusion that the amount of Rs. 211,99,57,449/- represents the income of the assessee chargeable to tax which has escaped assessment for the AY 2011-12 and 2010-11.

21. There is no statement or discussion by the AO as to what was the basis and why he should proceed on the valuation report, its contents and why he should rely on the same. The reasons do not reflect that AO has applied his mind to the facts of the case to ascertain as to whether in fact the assessee had already declared the value of the aforesaid property under "Fixed Assets and Capital WIP" or whether such valuation is correct and proper and not. In these circumstances, we are therefore, of the opinion that the case of the petitioner is squarely covered by the ratio laid down by the Apex Court in the case of Dhariya Construction Company (supra).

22. In view of the aforesaid proposition of law, impugned notice (s) under Section 148 of the Income Tax Act dated 30.03.2015 for the AY 2011-12 and 2010-11 are unsustainable. Both petitions are accordingly

allowed. The impugned notice (s) dated 30.03.2015 issued by the AO for reopening of the assessment for the AY 2011-12 and 2010-11 under Section 148 of the Income Tax Act are quashed and set aside along with the proceedings initiated consequent to issuance of such notices.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

09 September 2024/*RM*