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

Judgement reserved on: 09.02.2023
% *Judgement pronounced on : 18.07.2023*

\+ **ITA 191/2018**

COMMISSIONER OF INCOME TAX ..... Appellant
Through: Mr Kunal Sharma, Sr. Standing Counsel, Ms Zehra Khan and Mr S. Bhattacharya, Advs.

versus

SPIRIT GLOBAL CONSTRUCTION PVT.LTD ..... Respondent
Through: Mr S. Krishnan and Mr Amandeep Mehta, Advs.

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

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RAJIV SHAKDHER, J.:

Preface:

1. This appeal concerns Assessment Year (AY) 2010-11. This appeal is directed against the common order dated 04.08.2017 passed by the Income Tax Appellate Tribunal [in short, "Tribunal"] in ITA No.730/Del/2015.

2. *Via* the impugned order, the Tribunal disposed of four (4) appeals including two (2) appeals filed by the above-named appellant i.e., Spirit

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Global Construction Pvt Ltd [hereafter referred to as, "SGCPL"]. The other two appeals which were disposed of by the Tribunal were preferred by Spirit Infradevelopers Pvt. Ltd. [hereafter referred to as, "SIDPL"] and Spirit Infrastructure Pvt. Ltd [hereafter referred to as, "SIPL"].

2.1 Pertinently, three (3) out of the four (4) appeals disposed of by the Tribunal concerned AY 2011-12. The fourth appeal, which was preferred by the appellant named above i.e., SGCPL, concerned AY 2010-11, the remaining appeals as noticed above, related to AY 2011-12.

3. The record shows that on the very first day when the above-captioned appeal and the connected appeals came up before the coordinate bench of this court, they were admitted and a broad question of law was framed; which was modulated on 09.02.2023, after hearing the counsel for the parties. The relevant part of the order dated 09.02.2023 reads as follows:

> *6. Having heard the counsel for the parties, we are of the view, that the question of law, as framed by the coordinate bench, needs modulation. In fact, both counsels agree, that the following questions of law would arise for consideration:*
>
> *(i) Whether the Income Tax Appellate Tribunal [in short, "Tribunal"] erred in admitting and adjudicating the additional ground concerning jurisdictional defect, in the reasons recorded by the Assessing Officer, even when no such ground was raised before the first appellate authority i.e., the Commissioner of Income Tax (Appeals)?*
>
> *(ii) Whether the Tribunal misdirected itself in law in holding that the reasons recorded by the Assessing Officer for triggering proceedings under Section 147/148 of the Income Tax Act, 1961 were vague, bereft of reasons and did not establish a live link between the material available with him and formation of [the] belief that income chargeable to tax had escaped assessment?*

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4. Notably, in this very order, the counsel for the parties conveyed to the court that since facts obtaining in the instant appeal were *pari materia* with those which obtained in the connected appeals, the decision taken in this appeal would apply to the connected appeals as well. Therefore, we intend to advert to, the facts and circumstances arising in the instant appeal.

Broad Facts:

5. The record of the instant appeal, broadly, reveals the following:

5.1 SGCPL had filed its Return Of Income [in short, "ROI"] on 12.04.2011 concerning the aforementioned AY. In the ROI, SGCPL had declared its total income as Rs.1,04,98,240/-.

5.2 On 04.06.2011, the said ROI was processed under Section 143(1) of the Income Tax Act, 1961[in short, "the Act"]. It appears on 19.03.2012, the appellant/revenue conducted a search and seizure action under Section 132 of the Act against what is compendiously described as the K.J.S. Ahluwalia Group [hereafter referred to as, "KJS Group"], which included cases involving another group going by the name Prabhatam Group. Besides this, a survey action under 133A was also carried out against the Spirit Global group of companies [hereafter referred to as, "SG Group"].

5.3 Apparently, the search and survey action brought to the fore certain incriminating material. The said material, according to the appellant/revenue, was suggestive of the fact that loans and advances had been received by SGCPL from certain shell companies which were a part of the KJS Group; the shell companies being: Tanish Tradecom Pvt. Ltd [hereafter referred to as, "TTPL"], Puneet Oils and Chemicals Ltd [hereafter referred to as, "POCL"].

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5.4 The amount said to have been received, as a loan, from TTPL and POCL was Rs. 3.5 crores each i.e., a total of Rs. 7 crores, which was added under Section 68 of the Act; since, according to the Assessing Officer [in short, "AO"], it constituted unexplained credit in the books of SGPCL.

5.5 In the search and seizure action carried out on 19.03.2012, the statement of Mr Suresh Kumar Jain was recorded, which was retracted by him within seven (7) days i.e., on 26.03.2012.

5.6 It is this statement which, perhaps, led to the issuance of a notice dated 11.02.2014 under Section 148 of the Act. *Via* this notice, it was communicated to SGPCL by the AO that he had reasons to believe that income chargeable to tax had escaped assessment and, therefore, he proposed to assess/reassess his income.

5.7 Therefore, SGCPL was granted five (5) days from the date of service to file a return. It appears the SGPCL *via* response dated 17.02.2014 indicated that the ROI already placed on record should be treated as its true and fair return in response to the notice issued under 148 of the Act.

5.8 Since reasons for issuing notice under Section 148 had not been furnished, on the very same date when the reply was filed i.e., 17.02.2014, the respondent/assessee asked to be furnished a copy of the reasons recorded for triggering assessment/reassessment proceedings against it.

5.9 The AO, instead of immediately furnishing reasons recorded by him for triggering reassessment/assessment proceedings, issued two separate notices of even date i.e., dated 19.02.2014 under Section 142(1) and 143(2) of the Act. Evidently, the notice issued under Section 142(1) of the Act was accompanied by a questionnaire with twenty-three (23) queries**.** The

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information and documents sought had to be provided, in person, by 26.02.2014, at the time set out in the notice.

6. Furthermore, a notice under Section 133(6) of the Act was also issued to TTPL, POCL and another entity, going by the name Pankaj Infotech Pvt. Ltd [hereafter referred to as, "PIPL"]. Apparently, the said notices were neither returned nor was any reply received.

6.1 The record shows that *via* reply dated 18.03.2014, SGPCL responded to the questionnaire served upon it wherein, *inter alia*, it was indicated that TTPL and POCL had furnished loans to SGCPL.

6.2 The aforementioned notice issued under Section 142(1) of the Act was followed by yet another notice dated 20.03.2014, whereby the SGCPL was called upon to produce information and documents by 26.03.2014, once again, at the designated hour.

6.3 The respondent/assessee filed replies to the aforesaid notices. SGCPL filed a reply dated 26.03.2014, in which, broadly, the stand taken was that the loans reflected a long-standing credit, received from KJS Group, which, on a specific request of the lender i.e., KJS Ahluwalia, was repaid against fresh loans given to it via the aforementioned companies i.e., TTPL and POCL.

7. The AO, was not satisfied with the responses given by SGCPL and, thus, proceeded to pass an assessment/reassessment order dated 31.03.2014.

7.1 The AO, *inter alia*, held that since TTPL and POCL had very meagre income, despite which they received funds from some other private limited. companies, which were then passed on to other companies including SGCPL. In other words, the AO was of the opinion that the companies were

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paper companies which acted as conduits to facilitate loan transactions of the kind that SGCPL claimed to have entered into with the aforementioned two companies.

7.2 In sum, the AO concluded that SGCPL had failed to discharge its onus since it did not produce the parties for verification of creditworthiness and genuineness of loan transactions. This is evident on perusal of the following part of the assessment order which forms the main plank of the AO's conclusion:

> *"From the above details it can be seen that these companies are declaring income just nominal and [in] their documents relating to balance sheet statements, it is seen that these companies are just receiving funds from some private limited companies and then transferring the same to other private limited companies which gives the idea that these companies are nothing but paper companies created as conduit companies to facilitate these type of transactions. Further, these investors had shown nominal income in their returns of income which further suggested that the companies have no legitimate income in their hands. This fact also strengthened the fact that these investors are just conduit companies created on paper."*

8. Being aggrieved, SGCPL carried the matter to the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"]. CIT(A), via order dated 12.12.2014, sustained the addition made by the AO.

9. SGCPL, being dissatisfied, escalated the matter to the Tribunal. In the appeal filed with the Tribunal, SGCPL not only raised arguments concerning the merits of the matter but also sought to plead an additional ground, which questioned the jurisdiction of the AO to invoke the provisions of Section 148, read with Section 147 of the Act.

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10. A perusal of the impugned order passed by the Tribunal shows that the additional ground was admitted, having regard to the fact that it was a pure question of law, based on material already on record and that no new facts were required to be investigated.

11. In reaching this conclusion, the Tribunal, *inter alia*, adverted to the decision of the Supreme Court in ***National Thermal Power Co. Ltd. v CIT*** 229 ITR 383 and the judgement of the Gujrat High Court in the matter of ***P.V Doshi v CIT*** 113 ITR 22 (Guj)

12. Furthermore, insofar as this additional ground was concerned, the Tribunal reached the following conclusion, while perusing the reasons recorded by the AO to trigger assessment/reassessment proceedings against SGCPL:

(i) That the AO had failed to apply his mind was evident from the fact that he had referred to a provision i.e., sub-clause (i) of clause (c) appended to Explanation 2 of 147(b) of the Act, when it had been removed from the statute more than two decades ago.

(ii) Although the reasons recorded showed that the material on record conveyed that a search had been conducted on KJS Group and the survey action pertained to the sister concern of the respondent/assessee, no reasons were recorded which would point to the document that persuaded the AO to conclude that SGPCL's income, which was otherwise chargeable to tax, had escaped assessment.

(iii) The reasons recorded did not indicate what prompted the AO to infer that TTPL and POCL were dubious companies.

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(iv) The reasons did not disclose the source of the information and what was the credibility and quality of such information.

13. Based on the aforesaid, the Tribunal concluded that the AO had proceeded in a "mechanical manner". Thus, according to the Tribunal, there was the absence of independent application of mind by the AO, at that, he had based his decision to reopen his assessment on the information received from the investigation wing.

14. It is against this backdrop that the appellant/revenue has preferred the instant appeal.

Submissions of Counsels:

15. We have perused the record. Arguments on behalf of the appellant/revenue were advanced by Mr Kunal Sharma, while submissions on behalf of the respondent/assessee were made by Mr S. Krishnan.

16. Mr Kunal Sharma made the following broad submissions.

(i) The Tribunal ought not to have allowed the respondent/assessee to raise the additional ground. The objection concerning jurisdiction was raised by SGCPL for the first time before the Tribunal. Given this position, the Tribunal ought not to have entertained the additional ground.

(ii) The decision rendered by the Tribunal is, primarily, founded on its decision concerning the jurisdiction of the AO to commence proceedings against SGCPL under Section 148/147 of the Act.

(iii) SGCPL had failed to discharge its onus concerning the genuineness, credit worthiness of the creditors. Therefore, the addition made under Section 68 of the Act ought not to have been disturbed by the Tribunal.

(iv) The Tribunal, *inter alia*, ought not to have held that the AO had not

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applied his mind, merely, because there was reference to a provision which had been deleted. This was an obvious mistake which could not have invalidated the assessment/reassessment proceedings, as it fell within the scope and ambit of 292B of the Act.

17. Mr S. Krishnan refuted the submissions made by Mr Sharma.

17.1 According to Mr Krishnan, the Tribunal had got it right in entertaining the additional grounds concerning jurisdiction, as no fresh facts were required to be examined. Mr Krishnan submitted that all that the Tribunal was required to look at were the reasons for reassessment placed on record by the AO.

17.2 Mr Krishnan stated that objections to the reasons recorded could be raised at any stage, which included the appellate stage, as it brought to the fore the absence of jurisdictional prerequisites for invoking Section 148/147 of the Act based on the record available with the Tribunal. [See ***CIT v Expeditors International India (P) Ltd.*** (2012) 205 taxman 107 (Delhi) (Mag.), ***Inventors Industrial Corpn. Ltd. v CIT*** (1992) 194 ITR 548 (Bombay), ***Abdul Majid v Commissioner of Income Tax, Lucknow*** **(**2006) 153 taxman 131 (Allahabad), ***CIT v Trilokchand Swaroop Chand*** (1998) 98 taxman 82 (MP)].

17.3 Section 292B would have no application, given the fact that the mistake made by the AO, while referring to a deleted provision, was inextricably linked to the observation made by him that SGCPL had failed to disclose truly and fully, all material facts.

<u>Analysis and Reasons:</u>

18. Having heard the counsels for the parties and perused the record, it is

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quite evident that the foundation of the impugned order is its decision concerning what the Tribunal considered the absence of jurisdictional prerequisites for triggering assessment/reassessment proceeding against SGCPL. [See ***Jute Corporation Of India v CIT*** 187 ITR 688.**,** ***CIT v Expeditors International India (P) Ltd.*** (2012) 205 taxman 107 (Delhi) (Mag.) and ***National Thermal Power Co. Ltd. v CIT*** 229 ITR 383].

18.1 The explanation given by SGCPL concerning the subject transaction i.e., the loan that it obtained from TTPL and POCL, lost much of its significance.

18.2 The Tribunal, as noticed above, felt impelled to allow admission of the additional ground as it went, according to it, to the root of the jurisdiction of the AO to trigger assessment/reassessment proceedings.

19. In our view, the Tribunal was right in entertaining the additional ground, for the reason that no fresh material or facts were required to be collated and/or ferreted out. The Tribunal had to form a view based on the reasons recorded by the AO for the initiation of proceedings under Section 147/148 of the Act against SGCPL.

20. The reasons, metaphorically speaking, are the main key which unlocks the door that allows the AO to enter the arena concerning the commencement of reassessment proceedings *qua* an assessee.

20.1 The other keys, of course, *inter alia*, are related to limitation and approval. Insofar as the period in issue is concerned, after the expiry of four (4) years from the end of the relevant AY, the AO is required to form an opinion that the respondent/assessee had failed to disclose, truly and fully, all material facts necessary for his assessment for the AY in issue. The other

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grounds generally available to the AO for reopening are the failure of the respondent/assessee to either file a return under Section 139 or in response to a notice under Section 142(1) or 148 of the Act.

21. In this particular case, SGCPL had indicated to the AO that the return already filed should be treated as a return filed in response to the notice issued under Section 148 of the Act. Furthermore, the AO did, in a sense, pay ostensible obeisance to the provisions of Section 147 of the Act (as obtaining at the relevant point in time) by recording that SGCPL had failed to disclose, truly and fully, all material facts.

22. That said, the AO grievously erred in referring to sub-clause (i) of clause (c) appended to Explanation 2 to Section 147 of the Act, which had been removed from the statute with effect from 01.04.1989.

23. Furthermore, Section 292B of the Act can have no application in the instant case, as a perusal of the reasons placed on record seems to indicate that the AO did attempt to tie in the said provision with his assertion that the respondent/assessee had failed to disclose, truly and fully, all material facts concerning the AY in issue.

23.1 A mistake, which can be corrected under Section 292B of the Act, should be such that if excised it does not change the tenor and scope of the documents/proceedings referred to therein i.e., the return of income, assessment, notice, summons or other proceedings, taken, furnished or made or issued or taken or purported to have been furnished or made or issued or taken against the assessee under the provisions of the Act.

24. The reasons for reopening, and, thus, concluding that there had been a failure on STCPL's part to disclose, were the following:

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(i) Search and seizure operation 19.03.2012 conducted *vis-à-vis* KJS group.

(ii) survey action conducted on SGCPL's sister concern, SIPL.

(iii) documents seized during the aforementioned survey action.

(iv) information received that SGCPL had raised a loan from TTPL and POCL, which were dubious entities.

24.1 It is these observations, in the reasons recorded by the AO, which, apparently, persuaded him to issue a notice under Section 148 of the Act to SGCPL. Thus, for the sake of convenience, the reasons recorded by the AO which form the main basis of the assessment/reassessment proceeding, are set forth hereafter:

> *"Reasons for [the] issue [sic issuance]of notice u/s 148 of the Act in the case of M/s Spirit Global Constructions P. Ltd. A. Y. 2010-11 The above mentioned assessee filed its return of income for the Assessment Year 2010-11 on 12.4.2011 which was further processed u/s 143(1) of the Act on 4.6.2011. A search and seizure operation was conducted on KJS Ahluwalia and related groups on 19.3.2012. A survey action was also conducted on the premise Plot no. 9, Sector B1, LSC Vasant Kunj, New Delhi 70 in respect of M/s Spirit Infrastructure Pvt. Ltd. During the search and survey Operation several documents have been seized/impounded.*
>
> *In respect of the above mentioned assessees information has been received that this company has raised loans from KJS Ahluwalia group mainly through Kolkata based dubious entities namely M/s Tanish Tradecom P. Ltd. M/s Puneet Oils & Chemicals P. Ltd. From the above I have reason to believe that such loans raised by M/s Spirit Global Constructions Pvt. Ltd. for the A. Y. 2010-11 has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts for his assessment and the same needs to be assessed/reassessed as per the provisions of sub clause (i) of clause (c) to Explanation 2 to Section 147 (b) of the Act in the A. Y. 2010-11. Issue notice u/s 148 of the Act for the Assessment Year 2010-11. "*

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25. Clearly, the reasons disclosed and placed on record do not allude to the material that was available to the AO which persuaded him to form a belief that income in the concerned AY, pertaining to SGCPL, which was otherwise chargeable to tax, had escaped assessment.

25.1 While the reasons placed on record by the AO referred to information received by the AO that SGCPL had raised a loan from KG Group, through TTPL and POCPL, there was no reference to how he had, at that juncture, formed a view that they were "dubious entities".

25.2 In other words, the reasons did not advert to the material that was available to him and which persuaded him to form a belief that income chargeable to tax had escaped assessment.

26. That this was a jurisdictional prerequisite is a well-established principle, as reason to suspect is qualitatively different from reason to believe. The statutory [prerequisite] condition was not met by the AO before entering the realm of reassessment/assessment proceedings. [See ***Chuggamal Rajpal v S.P. Chaliha and Ors.*** (1971) 1 SCC 453, ***Synfonia Tradelinks Pvt. Ltd. v Income Tax Officer*** 2021 SCC Online Del 2692***, ITO v Lakhmani Mewal Das*** 103 ITR 437].

26.1 Since this is a consistent view that the courts have taken, we are not inclined to rule otherwise and interdict the decision of the Tribunal.

Conclusion:

27. Given the foregoing discussion, the questions of law as framed are answered in favour of the respondent/assessee and against the appellant/revenue.

28. The appeal is disposed of in the aforesaid terms. There shall be no

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order as to costs.

(RAJIV SHAKDHER)
JUDGE

(TARA VITASTA GANJU)
JUDGE

JULY 18th, 2023

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