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IN THE HIGHCOURT OF DELHI AT NEW DELHI

% **Judgment reserved on: 30 August 2024**
Judgment pronounced on: 08 November 2024

+ W.P.(C) 13225/2018
DISCOVERY COMMUNICATIONS INDIA ..... Petitioner
Through: Mr. Mayank Nagi and Mr. Sandeep Yadav, Advs.

versus

ADDL. COMMISSIONER OF INCOME TAX, SPECIAL RANGE - 3, NEW DELHI. ..... Respondent
Through: Mr. Shlok Chandra, Sr. Standing Counsel with Ms. Madhavi Shukla, Jr. Standing Counsel, Ms. Priya Sarkar, Jr. Standing Counsel and Mr. Sudarshan Roy, Advocate.

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 petition is directed against notice under Section 148 of the Income Tax Act, 1961 [**"the Act"**], issued to the petitioner on 31.03.2018, seeking to reopen the assessment which had been completed under Section 143(3) of the Act on 30.10.2015 in respect of Assessment Year **["AY"**] 2011-12.

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FACTUAL BACKGROUND:

2. Discovery Communications India (Petitioner) was engaged in the business of distribution, advertisement sales, marketing and production of educational and entertainment programs for Discovery Channel, Discovery Travel, Living Channel and Animal Planet Channel. Petitioner filed Return of Income for AY 2011-12 on 30.11.2011. The return of the petitioner was selected for scrutiny and notice under Section 143(2) of the Act, was issued to the petitioner on 03.08.2012. Another notice under Section 143(2) of the Act was issued to the petitioner on 19.09.2014 along with a detailed questionnaire. Reply to the said questionnaire was filed by the petitioner on 21.11.2014 along with relevant material.

3. The Transfer Pricing Officer **["TPO"**] passed an order dated 30.01.2015 proposing a transfer pricing adjustment amounting to Rs. 45,14,38,652/-.

4. On 23.03.2015, Draft Assessment Order was passed by the Assessing Officer ["AO"], giving effect the order passed by the TPO. A disallowance of Rs. 44,63,40,998/- and Rs. 3,89,63,085/- was proposed by the AO on account of mismatch in Form 26AS and advertising expenses claimed in the Profit & Loss Account **["P&L Account"**] respectively.

5. Dispute Resolution Panel [**"DRP"**] issued directions under Section 144C(5) of the Act, deleting the disallowance of advertisement expenses claimed in the P&L Account by the petitioner.

6. Final Assessment Order dated 30.10.2015 was passed by the AO, giving effect to the directions issued by DRP.

7. In the meanwhile, a notice under Section 142(1) of the Act was

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issued to the petitioner for AY 2012-13, on 14.10.2015. In response to queries raised vide questionnaire dated 14.10.2015, the details of production and translation expenses were submitted on record by the petitioner for AY 2012-13. The details regarding claim of Discovery Appreciation Plan [**"DAP"**] expenses were also placed on assessment record before the AO" in AY 2012-13.

8. Final Assessment Order was passed by the AO under Section 144C/143(3) of the Act for the AY 2012-13.

9. The Assessment Order dated 30.03.2015 was later rectified under Section 154 of the Act on account of certain mistakes apparent from record.

10. Notice under Section 148 of the Act was issued by the respondent on 31.03.2018, reopening the assessment concluded vide Final Assessment Order dated 30.10.2015 for the AY 2011-12.

11. On 05.10.2018, petitioner filed objections to assumption of jurisdiction under Section 148 of the Act, but the same were dismissed by the respondent vide order dated 12.10.2018.

12. The impugned notice proposing the reassessment action for AY 2011-12 has been challenged in the present writ petition.

13. Despite opportunity, no reply has been filed by the respondent.

SUBMISSIONS:

14. Learned counsel appearing for the petitioner has submitted that there was no fresh tangible material on the basis of which the assessment framed under Section 143(3) could be reopened. The reasons recorded do not specify the trigger. It is further submitted that the material for reopening has been gathered from the assessment record of the subsequent year. There were no intervening circumstances

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between the framing of original assessment and reopening of reassessment. It is stated that an assessment concluded under Section 143(3) can be validly reopened only if there is some fresh tangible material. It has been pointed out that the details of production and translation expenses were placed on record in reply to the queries raised vide questionnaire dated 14.10.2015 in AY 2012-13. The details regarding DAP expenses were also placed on assessment record before the AO vide submission dated 14.03.2016 and on consideration of material so placed, the claim of DAP expenses as also translation expenses were allowed by the AO on merits for the AY 2012-13. It is also submitted that the claim of deductibility of the said expenses was again allowed in AY 2013-14. In view thereof, it has been submitted that there was no tangible material leading to a prima facie belief that income chargeable to tax has escaped assessment in the subject AY. Rather, it is a case of change of opinion as compared to opinion formed and expressed in the later years.

15. The submission of the learned Standing Counsel appearing for the Revenue is that petitioner had debited an amount of Rs. 2.01 crore on account of DAP paid to the employees during AY 2011-12, which was over and above the normal salary and allowances. Employees were given amount equal to the appreciation in the value of unit over given period of time which was in the nature of dividend as the DAP unit was linked to the shares of holding company. This issue was not examined during the assessment proceedings under Section 143(3) on account of its ambiguous nature. It has been further argued that the reopening action has been initiated on the basis of prima facie opinion. The sufficiency or correctness of the material is not to be gone into at this

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stage as it will be open to the assessee to prove during the reassessment proceedings that there was no escapement of income.

ANALYSIS & CONCLUSION:

16. It is evident that notice under Section 148 was issued beyond the period of four years from the end of the relevant AY. Consequently, the first proviso to Section 147 of the Act would be applicable in this case Section 147 reads as under:-

> "147. 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 the 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:"

17. Learned counsel for the petitioner has submitted that reassessment action was erroneously initiated as the conditions stipulated in the first proviso to Section 147 of the Act has not been fulfilled. According to him, there was no failure on the part of the petitioner to disclose fully and truly all the material facts necessary for the assessment. It is also submitted that there is not even an allegation with regard to such failure in the reasons supplied to the petitioner subsequent to the issuance of the impugned notice.

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18. Upon the issuance of notice dated 31.03.2018, petitioner asked for the reasons behind the issuance of the notice, which was later supplied to the petitioner. The purported reasons read as under:-

> "During the course of assessment proceedings forAY 2012-13, it was observed that assessee had debited Rs. 1.23 Crores on account of discovery appreciation plan as per which participating employees were paid an amount equal to the appreciation in the value of units given over a period of time apart from normal salary and allowances. As the amount debited was related to the distribution of profits and was in the nature of dividend which is not admissible expenditure. The assessment proceedings for this assessment year was completed u/s 143(3) of the Income Tax Act, 1961. From the details available on record, it is also observed that identical claim was made by the assessee during AY 11-12 also which was also assessed u/s 143(3) of the Act.
>
> During the perusal of assessment record of A Y 2012-13 also it is observed that the Assessee Company has debited Rs. 2.01 Crores on account of Discovery Appreciation Plan ('DAP} in A Y 2011-12 also. Reference Para 23(a), Notes to Financial Statements for March 31, 2012 (A. Y. 2012-13). This is a plan in which participants i.e. employees were paid an amount equal to the appreciation in the value of unit over given period of time apart from normal salary and allowances. DAP unit was linked to the shares of the holding company. Since the amount debited is related to the distribution of profits and a kind of dividend therefore, it should not have been allowed as expenses. Thus assessee has been allowed over expenses of 2.01 Crores. The mistake resulted in under assessment of Income of Rs. 2.01 Crores for AY 2011-12. Similarly, the assessee has claimed Rs. 8,17,06,5621- as production expenses which has been allowed to assessee without verification. Thus amount of Rs.10,18, 06,562/- has escaped assessment."

19. In his objections, petitioner took the plea of limitation and non-compliance with the conditions precedent, as provided in proviso to Section 147. He also took the objection that the reasons for reopening of assessment constitute a change of opinion.

20. However, AO rejected the objections stating that AO while recording the reasons for reopening the case considered the issues raised in Audit Objections, applied his mind independently and was

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Signing Date:08.11.2024
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satisfied that there were reasons to believe that income chargeable to tax escaped assessment.

21. It is well settled through a catena of decisions that escapement of income by itself is not a sufficient ground for reopening the assessment in a case covered by 1st proviso to Section 147 of the Act unless and until there is failure on the part of the assessee to have disclosed, fully and truly, facts necessary for assessment. The reasons must record that such a failure on the part of the assessee or, in the least, the reasons must lead to the clear and direct inference that there was a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. The reasons must indicate which material fact was not fully and truly disclosed. The Division Bench of this Court in **Swarovski India (P) Ltd. vs. Deputy Commissioner of Income-tax, Circle 7(1), New Delhi , 2017 SCC Online Del 10162**, quashed the notice under Section 148 of the Act for being issued after expiry of four years from the relevant assessment year. In this case, there was no mention as to which material facts were not disclosed by the assessee in the course of the original assessment proceedings under Section 143(3) of the Act.

22. Assessment cannot be reopened under Section 147 of the Act merely on the basis of change of opinion beyond the period of four years when there was no fault on the part of the assessee to disclose truly and completely the material particulars. In this regard, we may refer to some of such judgments of the Supreme Court and of our own High Court. **In CIT v. Goetze (India) Ltd. [2010] 229 CTR 167 (Delhi), reliance was placed on the judgment of CIT v. Kelvinator of India Ltd. (2002) 174 CTR (Delhi) 617**, wherein, it was

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specifically observed that when a regular order of assessment is passed in terms of Section 143(3), presumption can be raised that such an order has been passed on application of mind. The Full Bench observed that if it were to be held that an order that has been passed purportedly without application of mind, would itself confer jurisdiction upon the AO to reopen the proceedings without anything further, the same would amount to giving premium to an Authority exercising a quasi-judicial function to take benefit of its own wrong. The Full Bench decision also makes it clear that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon mere change of opinion. The appeal arising out of the Full Bench decision of this Court has been dismissed by the Supreme Court in the case of **CIT vs. Kelvinator of India Ltd. (2010) 228 CTR (SC) 488**. The Supreme Court after taking note of the amendments in Section 147 held as under:-

> "*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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. 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 pre-condition 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. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer."*

23. Similarly, a Coordinate Bench of this Court in **CIT v. Suren International Private Limited: (2013) 357 ITR 24 (Delhi)**, after referring to earlier decisions of this Court observed as under:-

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Signing Date:08.11.2024
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> "In the reasons as furnished by the Assessing Officer, we find that there is neither any allegation that the assessee had failed to truly disclose any material facts at the time of assessment, nor can we readily infer the same in view of the fact that a detailed enquiry had been conducted by the Assessing Officer with regard to the identity and creditworthiness of the share-applicants and genuineness of the transactions in relation to the share application money received by the assessee. Further the mere statement that the DRI has seized certain goods of the assessee and levied a penalty also cannot be stated to be a reason for reopening of assessment of the assessee as the said statement made is neither followed by the recording of a belief that the income escaped on that count or that the assessee has failed to disclose all relevant material, fully and truly, at the stage of the first assessment."

24. In the present case, the material for reopening the assessment has been gathered from the assessment record of AY 2012-13. The reasons recorded are clear and self-explanatory. The only case made out by the respondent was of alleged escapement of income. There is no whisper, what to speak of any allegation, that the asseessee had failed to disclose fully and truly all material facts necessary for its assessment and because of that failure, there had been an escapement of income chargeable to tax. In fact, AO specifically records in the reasons that it was a 'mistake' which resulted in under assessment of the income of 2.01 crores for AY 2011-12. AO also records in the reasons that "production expenses have been allowed to the assessee without verification." It is, therefore, manifest that AO has not attributed the alleged escapement of income to any failure on the part of petitioner but to a mistake and lack of verification on its own part. Petitioner cannot be allowed to suffer because of lapse of the AO. The Coordinate Bench of this Court in **CIT v. Eicher Ltd. [2007] 294 ITR 310 (Delhi)**, after making reference to different judgments of various High Courts, observed that if the entire material had been placed by the

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Signing Date:08.11.2024
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assessee before the AO at the time when the original assessment was made and the AO applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the AO did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.

25. Similarly, in the case of **CIT v. Batra Bhatta Company (2008) 174 Taxman 444 (Delhi)**, another Division Bench of our own High Court held as under:-

> "7. We feel that the observations of the Supreme Court in the aforesaid decision clearly apply to the case at hand. Merely because the Assessing Officer felt that the issue required 'much deeper scrutiny, is not ground enough for invoking section 147. It is not belief per se that is a pre-condition for invoking section 147 of the said Act but a belief founded on reasons. The expression used in section 147 is - 'If the Assessing Officer has reason to believe' and not- 'If the Assessing Officer believes'. There must be some basis upon which the belief can be built. It does not matter whether the belief is ultimately proved right or wrong, but, there must be some material upon which such a belief can be founded. In the present case, the Commissioner of Income-tax (Appeals) as well as the Tribunal have found as a fact that there was no material upon which the Assessing Officer could have based his belief that income had escaped assessment."

26. The existence of failure on the part of the assessee to disclose fully and truly should not only be integral to the reasons but it must also be spelt out in the reasons as to what was to be disclosed but had not been disclosed. The absence of such averments in the reasons renders the whole exercise nugatory. Such lapse on the part of the AO cannot be regarded as a mere procedural irregularity but is a defect which goes to the root of the matter. The purported reasons that prompted the AO

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to reassess and disallow the expenditure incurred on DAP and production and translation expenses only demonstrate a change of opinion on the part of the AO, which cannot form the basis of reopening the assessment.

27. In order to assume jurisdiction under Section 147, the stand of the AO was that DAP expenditure was allowed owing to a 'mistake', whereas, production and translation expenses were allowed without any verification. Even if, such an argument is to be accepted, the appropriate remedy in such a situation may lie under Section 263 of the Act. In **CIT v. Usha International Ltd., 348 ITR 485 (Del.) [FB]**, the Court held as under:-

> " ... where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion."

28. Consequently, one of the essential ingredients for reopening the assessment beyond the period of four years has not been satisfied in the present case. Reassessment proceedings are therefore bad in law.

29. Quite apart from above, it is also important to note that the details regarding DAP and production and translation expenses were placed before the AO in AY 2012-13 and on consideration of material so placed on record, the claim of DAP expenses as well as production and translation expenses were allowed by the AO. Order of assessment for AY 2012-13 has attained finality as on date. We also take note of the undisputed position as brought to our notice during arguments that the claim of deductibility of the said expenses was not only allowed in AY 2012-13 but also in AY 2013-14. Thus, identical expenditure has

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been claimed by the petitioner year after year and there has been no disallowance. Since there has been no disallowance of the deductions in the subsequent AYs, we agree with the submission of learned counsel for the petitioner that the basis for the "reasons to believe" do not survive any more, as held by this Court in **A.T. Kearney India Ltd. v. ITO [2015] 371 ITR 179/63 taxmann.com 200 (Delhi), Ultra Marine Air Aids (P) Ltd. v. IAC [2011] 12 taxmann.com 436/201 Taxman 69 (Mag.) (Delhi) and Silver Oak Laboratories (P.) Ltd. v. Dy. CIT [W.P. (C) No. 17719-20/2006**. The observation of this Court in Ultra Marine (supra) is apt and reads as under:-

> "As the notification has been quashed and, the same has not been assailed by the Revenue Department, the reasons for reopening the assessment under section 147/ 148 of the Income-tax Act, 1961, do not survive. The very basis and foundation for issue of reassessment notice have ceased to exist. Consequently, the writ petition is allowed ..."

30. In view of aforesaid discussion, we are unable to sustain the impugned notice under Section 148 dated 31.03.2018. As a result, the impugned notice dated 31.03.2018 as also the proceedings initiated pursuant thereto are set aside.

31. The writ petition is allowed as above with no order as to cost.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

November 08, 2024/*RM*

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