

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

+ **Writ Petition (C) No. 8685/2010**

Le Passage to India Tours & Travels Pvt. Ltd. Petitioner
Through Mr. Ajay Vohra, Ms. Kavita Jha and
Mr. Somnath Shukla, Advocates.

VERSUS

Addl. Commissioner of Income Tax & Anr. Respondents
Through Mr. N.P. Sahni, Standing Counsel
for Income Tax Department.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

ORDER
% **09.03.2011**

Mr. N. P. Sahni, Standing Counsel for the Income Tax Department waives the right to file reply and states that as a short issue is involved, the matter may be heard and disposed of on the basis of the paper book filed by the petitioner.

2. The petitioner is engaged in operating inbound tour business. It specializes in package tours and tailor made holidays for foreign tourists. The petitioner contends that it arranges for complete itinerary for visiting tourists including boarding, lodging, transportation, sight seeing, etc. The petitioner bills for the gross amount, which include payment to be made to third parties towards boarding, lodging and sight seeing etc.

3. For the assessment year 2006-07, the petitioner had filed return declaring total income of Rs.8,55,11,040/-. The case came up under scrutiny and an assessment order under Section 143(3) dated 26th December, 2008 was passed, assessing the total taxable income of Rs.8,55,51,563/-. We are not concerned with the additions made in the assessment order.

4. Notice dated 17th February, 2010, under Section 148 of the Income Tax Act, 1961 (Act, for short) for reopening of the assessment was issued and the petitioner filed copy of their original return of income on 17th March, 2010, and requested Respondent No. 2, Deputy Commissioner of Income Tax, the Assessing Officer, to furnish the reasons recorded under Section 147 of the Act. Thereafter there was hiatus and no further proceedings took place for some time.

5. On 28th October, 2010, the petitioner filed objections to the reopening of the assessment. It was stated that the reasons recorded for reopening were without any substance and basis and this was a case of mere change of opinion. In terms of the law declared by the Supreme Court in ***GKN Driveshafts India Limited vs. ITO,(2003) 259 ITR 19(SC)***, the Assessing Officer dismissed the objections by the impugned order dated 1st November, 2010.

6. The issue raised in the present writ petition is whether preconditions for reopening of assessment as stipulated under Section 147 of the Act are satisfied in the present case.

7. It may be noted that the present writ petition was filed on 23rd December, 2010 and was listed for hearing on 24th December, 2010. By an interim order on 24th December, 2010, it was directed that the assessment proceedings shall continue till finalized but the same shall not be given effect to. Opportunity was also granted to the Revenue to file reply and the case was adjourned to 17th January, 2011. No reply was filed and Mr. N.P. Sahni, Standing Counsel for the Revenue was directed to produce the original record and the matter was adjourned to 8th March, 2011. On 8th March, 2011, the matter was adjourned for hearing for today. It may be noted that an assessment order has been passed by the Assessing Officer.

8. The reasons recorded by the Assessing Officer under Section 147 of the Act read as under:-

“01. Assessment in this case was completed under section 143(3) on 26.12.2008 at an income of Rs.8,55,51,563/- as against the returned income of Rs.8,55,11,040/-. Scrutiny of income tax assessment records revealed that as per the notes to accounts assessee had earning of Rs.129,79,20,362/- in foreign currency on accrual basis from the sales and services but assessee had shown Rs.21,03,01,531/- only in the P&L account

under the head income from services. Thus, Rs.108,76,18,831/- (Rs.129,79,20,362/- - Rs.21,03,01,531/-) needed to be added back in a taxable income of the assessee. The mistake resulted in under assessment of income of Rs.108,76,18,831/- involving tax effect of Rs.48,69,03,022/-.

02. In view of the above, I have reasons to believe that the income of Rs.108,76,18,831/- chargeable to tax has escaped assessment within the meaning of section 147/148 of the Income tax Act, 1961.”

9. In the objections filed before the Assessing Officer, the petitioner had stated as under:-

“1) Income on Tours is accounted after netting off all direct expenses relating thereto. It comprises of the margin earned on services provided for tour arrangements i.e. billing less all direct costs incurred in operating the Tour. Every tour comprises direct costs like : hotel, transport, guides, air fare, rail fare, monuments entrance fees etc. These costs are directly matched with Revenue earned on every tour and balance being the margin earned is transferred to “Income from Tours A/c.”

2) The method of accounting is standard accounting practice followed by the travel industry. The scheme of accounting entries followed for a specific tour can be explained with the help of following example:

Invoice raised on Foreign Tour	
Operator	Rs.1,00,000/-
Bills received from various	
Hotels	Rs. 50,000/-

Bills received from various
Hotels Rs. 10,000/-

Air fare charges for this tour Rs. 20,000/-

Guide charges for this tour Rs. 4,000/-

The accounting entries passed would be as follows:-

- i) For invoice raised on the foreign Tour operator

<u>Debit/Credit</u>	<u>A/c Particulars</u>	<u>Amount(Rs.)</u>
Debit	Foreign Tour Operator	1,00,000
Credit	Tour ABC A/c.	1,00,000

- ii) Various entries passed for booking the direct expenses for this particular tour can be summarized as below:

<u>Debit/Credit</u>	<u>A/c Particulars</u>	<u>Amount(Rs.)</u>
Debit	Tour ABC A/c.	84,000
Credit	Various Hotel A/c	50,000
Credit	Various Transporters A/c	10,000
Credit	Airline A/c.	20,000
Credit	Guide A/c	4,000

- iii) The balance in this specific tour account of Rs.16,000/- is the margin earned on this tour, which is transferred to the "Income from Tours A/c." by the following entry:

<u>Debit/Credit</u>	<u>A/c Particulars</u>	<u>Amount(Rs.)</u>
Debit	Tour ABC A/c	16,000

Credit	Income from Tours	16,000
--------	-------------------	--------

From the above accounting entries it is evident that the Invoice raised for a particular tour and all direct costs incurred for that tour are accounted for in the Specific Tour Account and the Margin earned on the particular tour after netting off all direct costs is transferred to "Income from Tours A/c" in the Profit & Loss A/c.

- 3) In view of the method of accounting adopted by the assessee-company (being the standard method followed by the travel industry) and the Scheme of accounting entires explained above, the total billing is not reflected in the Profit & Loss A/c., but only the Margin earned on Tour after netting off all direct expenses is shown as "Income from Tours A/c." in the Profit & Loss A/c."

10. In the said objections, it was further stated that in the reconciliation of accounts which was filed before the Assessing Officer at the time of original assessment, the petitioner had stated that Rs.1,29,79,20,362/- was shown as earnings/billing in foreign exchange on accrual basis and a further amount of Rs.1,31,47,463/- was shown as earnings in Indian currency. Thus the total billing declared was Rs.1,31,10,67,825/- and out of this amount direct costs incurred of Rs.1,14,29,03,442/- were deducted. Income from tours was declared at Rs.16,81,64,383/- and commission income of Rs.4,21,37,149/- was added and the total income shown from services in the profit & loss

account was as Rs.21,03,01,532/-. It was stated that during the original assessment proceedings under Section 143(2), the petitioner had duly explained the factual position and net method of accounting adopted by the petitioner vide their letter dated 31st October, 2008. Copy of the said letter has been filed before us as Annexure-H to the writ petition. It is stated that this letter/explanation was issued in response to the notice/order dated 21st January, 2008 issued by the Assessing Officer in the original assessment proceedings to give a note on justification of the returned income/returned loss. The relevant portion of the said letter reads as under:-

“TOUR INCOME

Le passage to India Tours & Travels Pvt. Limited is engaged in operating inbound tour business. With its' head-quarter in New Delhi and network of branch offices in India. Le Passage to India specializes in package tours and tailor made holidays for foreign tourists visiting India, Nepal, Bhutan and Sri Lanka.

Tours operated by Le Passage comprises of mainly foreign tourists which comes from entire global mainly covers countries such as Italy, France, Germany, Switzerland, USA and USSR. During the assessment year 2006-07, Le Passage to India has been able to generate foreign exchange amounting to Rs.1,29,79,20,362.

Income from tours comprises of margin kept by Le Passage to India on the total costs incurred for operating the tours. Every tour comprises of direct

costs such as Hotels, Transport, Guide, monument entrances and other directly costs. These costs are directly matched with revenue earned on tours operated and balance amount is income from tours.

Summarized value of Income from tours handled / operated during the assessment year 2006-07 is as follows:

Billing	1,31,10,67,825.00
Costs	1,14,29,03,442.00
Margin	16,81,64,383.00
% Margin	12.83%

In order to recognize revenue for a particular period le passage to India has adopted a policy of recognizing revenue on the date of arrival of tourist in India. Even the tour/which is falling in two accounting periods is recognized in the previous year.”

11. The Assessing Officer in the impugned order dated 1st November, 2010, has referred to the provisions of the Act and several judgments of Supreme Court and High Court of Delhi and has quoted the same. The reasoning of the Assessing Officer is in paragraph 9. The said portion reads as under:-

“9. In this case, the belief of the AO has been held in good faith and not on the basis of any rumour. In fact the reasons for issue of notice existed at the time of issue of notice and the reasons are genuine. They were in fact communicated to the assessee also. The reasons recorded are quite detailed. As is evident from the perusal of the reasons recorded, they in fact record the satisfaction of the AO that the income has escaped

assessment on the basis of the reasons elucidated, and the material on record as relied upon by the AO at the time while recording his satisfaction that the income had in fact escaped assessment.

9.1 Further, as per the facts of the case, the AO originally, while passing the order u/s 143(3) dated 26.12.2008 has not opined on the issues which have later been raised while issuing the notice u/s 148. Thus as discussed in para 8 above, this does not constitute a 'change of opinion'.

9.2 These issues have not been decided while passing assessment order under section 143(3) and therefore as per the facts of the case, the same cannot be said to be a case of change of opinion.

9.3 Therefore, the objections of the assessee are devoid of merit. In fact the reasons for issue of notice existed at the time of issue of notice and the reasons are genuine. In view of the above mentioned facts, the notice u/s 148 has been validly issued, the objections raised by the assessee, and the plea taken for dropping proceedings u/s 147 of the I.T. Act are devoid of merit.”

12. The aforesaid reasoning is laconic and sketchy and it does not deal with the contentions and the issue raised by the petitioner namely that there is no material to justify reopening and secondly this aspect was examined and considered at the time of the original assessment and therefore reopening is bad in law on the ground of change of opinion.

There is no cavil and doubt that change of opinion, when a matter has been examined and considered at the time of original assessment, cannot be a ground for reopening of assessment even under the amended Section 147 of the Act. The observation of the Delhi High Court in *Kelvinator of India Limited vs. CIT 1994(3) AD (Delhi) 1533*, stand affirmed by the Supreme Court in *Commissioner of Income Tax vs. Kelvinator of India Ltd. (2010) 2 SCC 723*. The Supreme Court has held:-

“5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment 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 1-4-1989), 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 reopen 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 reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment 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 reopening the assessment, review would take place.

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, the assessing officer has power to reopen, 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 reintroduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the assessing officer.”

13. The ground and reasoning for reopening quoted above relate to the very basic nature and character of the accounting method adopted by the petitioner. The petitioner has adopted a system of netting as their billing was inclusive of “direct costs” incurred which were paid to third parties. It is impossible to perceive and accept the contention of the Standing Counsel for the Revenue that the Assessing Officer during the course of the original assessment proceedings would have not reflected and considered the method of accounting adopted by the petitioner. This is not possible as the Assessing Officer at the very first instance was required to examine the said aspect. The method of accounting adopted by the petitioner was set out in clear terms and explained by the petitioner in their letter dated 31st October, 2008, which has been quoted above. The petitioner has stated that they have always and continue to follow the said method of accounting. This is not a case where explanation 1 to Section 147 is applicable. The question relates to the

very method and manner of accounting, which will be apparent and clear to any person when scrutiny of the return and accounts is undertaken. The reopening is, therefore, bad for want of jurisdictional pre-condition under Section 147 of the Act. It is a case of change of opinion and the ratio in the case of *Kelvinator (supra)* is applicable.

14. With the aforesaid position, Mr. N.P. Sahni, learned standing counsel for the Revenue has submitted that the Assessing Officer in the original assessment proceedings had not examined and gone into the direct expenditure/costs incurred of Rs.1,14,29,03,442/- and, therefore, the reopening of assessment is justified. It is pointed out that this is not the reason for reopening mentioned by the Assessing Officer. The reasons for reopening have to stand on their legs and cannot be substantiated for reasons and grounds which are not mentioned therein.

15. Faced with the above difficulty, Mr. N.P. Sahni has submitted that liberty may be granted to the Assessing Officer to reopen the assessment after recording fresh reasons. We will only state that this order does not and will not operate as a bar or prohibition. It is open to the Assessing Officer to record reasons and reopen assessment for the year 2006-07 in accordance with law. Needless to say, if any fresh notice is issued, it is equally open to the petitioner to defend the said proceedings on all grounds and reasons as available in law.

16. In view of the aforesaid discussion, the present writ petition is allowed and the impugned notice dated 17th February, 2010 under Section 148 of the Act and the order dated 1st November, 2010 are quashed. The reassessment order passed by the Assessing Officer will become null and void. Clarification given in paragraph 15 will apply.

17. In the facts and circumstances of the case, there will be no orders as to costs.

SANJIV KHANNA, J.

CHIEF JUSTICE

March 9, 2011

kkb