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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Writ Petition (Civil) No. 5302/2005

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Judgment reserved on: 20th December, 2011

Date of Decision: 20th March, 2012

D.T.T.D.C. Ltd.

....Petitioner

Through Mr. R.P. Garg, Mr. Rajiv Tyagi &
Mr. S.K. Bansal, Advocates.

Versus

Deputy Commissioner of Income Tax

...Respondent

Through Mr. Sanjeev Sabharwal, Sr. Standing Counsel

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

Delhi Tourism and Transportation Development Corporation Ltd.

(DTTDC), the petitioner has filed this writ petition, which pertains to the assessment year 2000-01, for quashing of notice under Section 148 of the Income Tax Act, 1961 (Act, for short) dated 16th April, 2003. The petitioner has also prayed for quashing of notice dated 17th February, 2005, under Section 142(1) of the Act.

2. In the year in question, the petitioner had filed its return of income on 30th November, 2000 along with provisional tax audit report as the audit was not complete. Subsequently, notice under Section 139(9) of the Act was issued by the respondent, Deputy Commissioner

of Income Tax/Assessing Officer to remove the deficiency. In compliance thereof, on 27th December, 2001, the petitioner filed audited accounts with the tax audit report. Thereafter the petitioner filed revised return on 22nd December, 2002.

3. The return filed by the assessee was not taken up for scrutiny and no notice under Section 143(2) was issued.

4. Subsequently, the impugned notice under Section 148 dated 16th April, 2003 was issued and served on the petitioner. By letter dated 6th May, 2003, the petitioner informed the respondent that the return filed on 22nd February, 2002 may be treated as return filed in response to this notice. The petitioner asked for furnishing of “reasons to believe” recorded in writing before issue of notice under Section 148 of the Act. The contention of the petitioner is that there was delay and failure to supply the exact reasons recorded by the Assessing Officer. The petitioner was not allowed to inspect the order sheet and note down the exact reasons recorded for issue of notice under Section 148 of the Act.

5. The petitioner had objected to reopening vide letter dated 21st February, 2005, but the objections were rejected vide order dated 4th March, 2005. The petitioner wrote letter dated 9th March, 2005,

drawing attention to the alleged factual mistake in the order dated 4th March, 2005. The contention of the petitioner was rejected by the respondent vide letter dated 16th March, 2005. Thereafter the present writ petition was filed.

6. The reasons recorded by the Assessing Officer for reopening read as under:-

“Scrutiny assessment in this case for Assessment year 2001-02 is in progress. During the verification of various issues involved in this case, it was noticed that the assessee is not offering its income earned on infrastructure utilization Fund (IUF) and interest earned thereon in its income chargeable to tax.

Appeal to Hon’ble High Court in Assessment year 1996-97 has been filed on 11.10.2001 on the same issue. In this year, Rs.16,76,04,995/- are not included in the total income of the assessee and even the interest of Rs.2,67,65,000/- earned on IUF has not been included in the total income of the assessee.

In addition to this issue, the assessee has also claimed long term capital loss of Rs.2.78 crores. Addition to share capital of Rs.40 lakhs, deduction u/s 80G and interest income claimed exempt Rs.49.67 lakhs.

Therefore, I have reason to believe that income to the tune of Rs.19,43,69,995/- has escaped assessment. Hence, it is, requested that permission to issue notice u/s 148 may be granted in this case.”

7. The contention of the petitioner is that the amount deposited in the aforesaid fund namely Transport Infrastructure Utilisation Fund (TIUF, for short) and interest earned thereon is not income of the

assessee and, therefore, reasons to believe are a mere reason to suspect or surmise and do not disclose or state that there has been under assessment of income. It is further submitted that taxability of TIUF was subject matter in other assessment years including assessment years 1990-91 and 1991-92 and the issue has been decided in favour of the petitioner.

8. Taxability of TIUF, has been decided by us vide judgment delivered today in ITA Nos. 166/2001, 161/2004 & 320/2004 & ITR Nos. 30 - 33/1997. After examining the nature of the fund we have upheld the finding and order of the tribunal for the assessment years 1990-91 and 1991-92 that the amount deposited and transferred to the said fund are income/profits in the hands of the petitioner and did not get diverted at source in the said years. We have also held that the expenditure incurred for construction of flyovers/pedestrian facilities are allowable expenditure under Section 37 of the Act. In the same order, we have noticed that the tribunal has wrongly interpreted and understood their order for the assessment years 1990-91 and 1991-92 in the assessment years 1992-93, 1994-95 and 1996-97 and decided the matter/issue in favour of the petitioner.

9. Learned counsel for the petitioner has also placed reliance on the decision of this Court in W.P.(C) No. 13603/2004 filed by the petitioner, reported in (2010) 324 ITR 234 (Del.). The petitioner had preferred writ petition challenging the notice issued under Section 147 and 148 of the Act in respect of assessment years 1997-98, 1998-99 and 1999-2000. In the decision, it has been recorded that for the three years in question, original assessment orders under Section 143(3) of the Act were passed on 28th March, 2000. The Assessing Officer in the course of original proceedings had examined the nature and character of TIUF and had brought interest on the said amount to tax but had not taxed the amount transferred to TIUF. Reopening notice was questioned on the ground that it was case of change of opinion as the said aspect had been examined in the original assessment proceedings. Reopening, it is settled, is not permissible on the ground of change of opinion as the Assessing Officer does not have power of review (see ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited***, (2010) 2 SCC 723). The High Court while allowing W.P.(C) No. 13603/2004, had specifically noted that they had only examined and considered matter from the aforesaid aspect and from the point of view of jurisdiction to reopen

and had not examined the merits of the issue with regard to the taxability of amount transferred to TIUF.

10. In the present case, admittedly there were no original assessment proceedings and no notice under section 143(2) was issued. The time for issue notice under Section 143(2) had lapsed. The Assessing Officer, therefore, could have only examined the question/aspect after issue of notice under Sections 147/148 of the Act. Whether or not notice can be issued in such cases is no longer res integra and has been decided by the Supreme Court in case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Private Limited***, (2008) 14 SCC 208, wherein it has been held as under:-:

“22. So long as the ingredients of Section 147 are fulfilled, the assessing officer is free to initiate proceeding under Section 147 and failure to take steps under Section 143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation under Section 143(1) had been issued.”

11. In view of the aforesaid, we do not find any merit in the writ petition and the same is dismissed. However, it is clarified that in this order we have not expressed any opinion on merits. It will also be open to the petitioner to explain and show that the orders of the tribunal and this court for the assessment years 1990-91 and 1991-92 should be not

be applied to the assessment year in question due to change of facts/
circumstances. In the facts of the case, there will be no order as to
cost.

(SANJIV KHANNA)
JUDGE

(R.V. EASWAR)
JUDGE

March 20th, 2012
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