

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on : 10th July, 2013
Judgment pronounced on: 23rd August, 2013

+ **W.P.(C) No.2250/2012**

M/S. SMCC CONSTRUCTION INDIA LTD.

..... Appellant

Through: Mr. Nageshwar Rao with Ms.
Sayaree B. Malik, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME-TAX

... Respondent

Through: Mr. Sanjeev Sabharwal,
Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The petitioner by way of the present writ petition has challenged order dated 15.03.2012 passed by the Assistant Commissioner of Income Tax

disposing of the objections filed by the petitioner against issuance of notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as (the Act) and the very issuance of the notice dated 15.03.2012.

2. The assessment year in issue is 2002-03.
3. The petitioner is an Indian company engaged in the construction business. On 30.10.2002, the petitioner filed its return of income under Section 139(1) of the Act. The petitioner declared an income of Rs.2,26,07,425/-. The petitioner during the said financial year credited certain prior period incomes and debited certain prior period expenses to its profit and loss account. The petitioner disclosed this fact in the Notes to the Accounts in its financial statement for the year 2001-02, which were filed alongwith the return of income. The return of the assessment was accepted by the Assessing Officer and assessment order dated 28.02.2005 was passed under Section 143(3) of the Act and no addition/disallowance was made in the

assessment order.

4. On 31.10.2006, the petitioner was served with a notice under Section 148 of the Act for reopening of the assessment on the ground of escapement of income. In response to the said notice, the petitioner on 15.12.2006 filed the same return as had been originally filed under Section 139(1) of the Act under protest and further requested the respondents to furnish the reasons recorded for reopening of assessment under Section 147/148 of the Act.
5. On 05.02.2007, the reasons were furnished by the respondent. The reason for reopening of the assessment as communicated to the petitioner is as under:-

“It has come to my knowledge that the assessee has debited a sum of Rs.1,20,765/- in the P&L account on account of prior period expenses after netting income of Rs.30,34,463/- and expenditure of Rs.31,55,228/-. The expenditure of Rs.31,55,228/- has not been crystallized during the year 2001-02 relevant to the assessment year 2002-03, such prior period

expenses should have been disallowed. Therefore, I have reason to believe that the assessee's income amounting to Rs.31,55,228/- has escaped assessment. Notice u/s 148 of the I.T. Act issued to the assessee for the assessment of the assessee's income."

6. The petitioner vide its letter dated 16.03.2007 filed objections to the notice under Section 148 of the Act and the reasons recorded by the respondent for issuance of the same.
7. The petitioner contended that there was no failure on the part of the petitioner to disclose fully and truly all the material facts and that all primary and material facts were placed before the Assessing Officer during the course of the assessment proceedings for the subject assessment year and the relevant material was duly disclosed in Schedule 10 of the Notes to the Accounts of the financials for the relevant year and no new material had come to the knowledge of the Assessing Officer and that he had acted on the basis of mere suspicion.
8. By the impugned order dated 15.03.2012, the

respondent dealt with the objection raised by the petitioner qua initiation and rejected the same. With regard to the issue of change of opinion and the fact that true and complete disclosure had been made by the petitioner, the finding recorded in the impugned order is as under:-

“4.2 Coming to the second objection regarding the proceedings being based on “mere change of opinion”, the law on this count is also equally settled that mere change of opinion will not confer jurisdiction on the Assessing Officer. Now the question arises what constitutes a change of opinion. The very expression ‘Change of opinion’ suggests that an opinion of sort must have been formed by the Assessing Officer in the earlier proceedings which he seeks to alter or revise in the subsequent proceedings. In the instant case in the earlier assessment proceedings the AO has neither applied his mind to the issue involved nor can he be said to have formed an opinion in respect thereof. Therefore, in the proceedings at hand, it cannot be said to be a case of change of opinion. The case law cited by the assessee on the point are distinguishable on facts and therefore do not help the cause of the assessee.”

9. Aggrieved by the said order, the petitioner has filed the present petition. We have examined the record of the case and also the Income Tax Returns originally filed and are of the view that the re-opening cannot be sustained.
10. The petitioner in Schedule 10, Notes to the Accounts, has mentioned as under:-

12. Details of Prior Period Adjustment.

	<i>Current Year Amount (Rs.)</i>	<i>Previous Year Amount (Rs.)</i>
<u>Expenditure</u>	-	-
<i>Subcontract costs</i>	2,911,573	-
<i>Interest Paid</i>	243,655	-
<i>Royalty</i>	-	-
<u>Income</u>	-	-
<i>Material Cost</i>	(1,986,566)	-
<i>Project Related Income</i>	(1,047,897)	-

<i>Net</i>	<i>120,765</i>	<i>1,661,890</i>
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The Petitioner claims to have further made a disclosure in the notes to computation of income as under:

"11. Prior period expenses (Net) Rs. 120,765 (after adjusting prior period income of Rs. 3,034,463) have been claimed in the present assessment year as liability in respect thereof was crystallized/settled during the year"

- 11.** The law in respect of reopening of the assessment under Section 143(3) of the Act is no longer res integra and has been the subject matter of various judicial pronouncements. In the recent decision of the Full Bench of this High Court in *Commissioner of Income Tax-VI, New Delhi vs. Usha International Limited* (2012) 348 ITR 485 (Del) FB, one of us (Sanjiv Khanna, J) speaking for the majority held as under:-

“5. For reopening an assessment made under Section 143(3) of the Act, the following conditions are required to be satisfied:-

- (i) The Assessing Officer must form a tentative or prima facie opinion on the basis of material that there is under-assessment or escapement of income;
- (ii) He must record the prima facie opinion into writing;
- (iii) The opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.
- (iv) Reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.
- (v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. Explanation to the Section stipulates that mere production of books of accounts or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to “full and true disclosure of material facts”. (The proviso is not applicable where reasons to believe

for issue of notice are recorded and notice is issued within four years from the end of assessment year.)

12. It would be the proximity of the reasons with the belief of escapement of income which would be the determinative factor for reopening of the assessment. The remoteness of the 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 reopening of assessment.
13. The prior period expenses are eligible for deduction during the current year provided the liability was determined and crystallized during the relevant year.
14. The reason to believe recorded by the Assessing officer "that the assessee has debited a sum of Rs 1,20,765/- in the P & L account on account of prior period expenses after netting income of Rs 30,34,463/- and expenditure of Rs. 31,55,228/-. The expenditure of Rs. 31,55,228/- has not been crystallized during the year 2001 – 02 relevant to

the assessment year 2002 – 03, such prior period expenses should have been disallowed" is not based on any material that had come to the knowledge of the Assessing Officer. The Assessing Officers has placed reliance on the notes to the accounts that were available at the time of the scrutiny assessment. But the notes also states that the prior period expenses had crystallized/ settled in the year. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that the said expenditure had not crystallized during the year relevant to the assessment year. It is apparent the Assessing Officer suspects that the income has escaped assessment. But mere suspicion is not enough. The reasons to believe must record reasons, the reading of which should demonstrate, that such a reasonable belief could be formed on some basis/ foundation and was in fact formed by the Assessing Officer that income has escaped assessment. No such reasonable belief can be formed from the reasons to believe recorded.

15. The words "reason to believe" indicate that the belief must be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The reason to believe recorded do not refer to any material that came to the knowledge of the Assessing Officer whereby it can be inferred that the Assessing Officer could have formed a reasonable belief that the expenditure referred to had not crystallized during the relevant year. The reasons to believe recorded that income has escaped assessment are not based on any direct or circumstantial evidence and are in the realm of mere suspicion. The requirement of law is "reason to believe" and not "reason to suspect". In the present case Since the reasons to believe recorded indicate that the Assessing Officer has acted on mere surmise, without any rationale basis, the action of reopening of the Assessment is thus clearly contrary to law and unsustainable.

16. In view of the above, the impugned order dated 15.03.2012 is, accordingly, set aside and the

proceedings initiated pursuant to notice dated 31.10.2006 are hereby quashed.

- 17.** The writ petition is accordingly allowed with costs of Rs.10,000/-.

SANJEEV SACHDEVA, J.

SANJIV KHANNA, J.

August, 23, 2013
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