

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.2230/2012**

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

18.12.2006.

2. The assessment year in issue is 2001-02.
3. The petitioner is an Indian company engaged in the construction business. On 30.10.2001, the petitioner filed its return of income under Section 139(1) of the Act. The petitioner declared an income of Rs.5,18,40,270/-. The petitioner during the relevant financial year of 2000-01 paid managerial remuneration to its Directors in excess of the limits prescribed under the Companies Act. As the managerial remuneration was in excess of the limits prescribed, the petitioner filed an application with the Department of Company Affairs seeking approval of the Government in relation to the same. The permission sought for by the petitioner was rejected by the Government. The return for the Assessment Year 2001-02 was accepted by the Assessing Officer except for an addition of Rs.33,793/- payable on account of difference in the balance payable to creditors. The respondent passed the assessment order under Section 143(3) of the Act on 31.12.2003.

4. On 18.12.2006, 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 22.01.2007 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 Income Tax 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 notice that the Assessee has paid managerial remuneration which are in excess of the prescribed limit by an amount of Rs.60.70 lakhs and was not approved by the Govt. of India, this should have been added to the income of the Assessee, therefore, I have reason to believe that the income of the Assessee amounting to Rs.60.70 lakhs was escaped assessment. Notice u/s 148 of the I.T. Act is issued to the Assessee.”

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 objections raised by the petitioner, inter alia, were that the proceedings were prohibited by law as the same had been initiated after the expiry of the period of four years from the end of the relevant assessment year and in terms of the proviso of Section 147, no action could be taken under Section 147 of the Act unless such income had escaped assessment by reason of the failure on the part of the petitioner to disclose fully and truly all material facts for its assessment. The petitioner further objected that it was a clear case of change of opinion.
8. 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 9 of the Notes to the Accounts of the financials for the relevant year.

9. 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.”

10. Aggrieved by the said order, the petitioner has filed the present petitions. 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.

11. The petitioner in Schedule 9, Notes to the Accounts has mentioned as under:-

“2. Remuneration to Managing Director:

	March 31, 2001 Amount (Rs.)	March 31, 2000 Amount (Rs.)
Salary & Allowances	3,784,672	3,357,921
Company Leased Accommodation	1,800,000	1,800,000
Other Perquisites (Actual and/or evaluated as per Income – Tax Rules, 1963	485,852	401,457

Total	6,070,524	5,559,378
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The company has become a subsidiary of a Public Company under Section 4(7) of the Companies Act, 1956, with effect from November 25, 1997 (i.e. the date of allotment of shares) and has become a Deemed Public company under the provisions of Section 43A of the Companies Act, 1956, w.e.f. April 1, 2000. However, the remuneration to managing director with effect from that date is subject to approval from the Department of Company affairs. The same was rejected by the Department of Company Affairs. The Company is in process of filing the application again for approval to the Department.”

12. 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.)

- 13.** Admittedly the notice under Section 148 has been issued after the period of four years. So the first hurdle that the Assessing Officer has to cross is to establish that there was no full and true disclosure by the Assessee of all material facts.
- 14.** The reason for reopening of the assessment of the petitioner given is that managerial remuneration in excess of the prescribed limit was paid and the same was not approved by the Union Government of India. Notes to the Accounts for the relevant year, as mentioned in the return, clearly record and affirm that the petitioner had disclosed the amount of remuneration paid to the Managing Director and also the fact the same was subject to approval of the Department of the Company Affairs and even rejected by the Department of Company Affairs and that the Assessee company was in the process of filing an application again for approval of the Department.
- 15.** It is apparent from the above that the

Assessee/petitioner had disclosed full and true material particulars and had discharge its obligations under law. Material facts were stated and it is not a case where inference had to be deduced or some application of mind was required to understand and deduce any other fact. There was nothing hidden or imbedded in the document or the accounts. It is not the case of the Assessing Officer that any material had come to its possession or knowledge post the assessment under Section 143(3) of the Income Tax Act. The factual material was already before the Assessing Officer and had been fully and truly disclosed by the petitioner. The Revenue thus had to satisfy the additional requirement as mentioned in condition No. (v) as laid down by the judgment in Usha International case (supra) i.e. there was failure or omission on the part of the Assessee to disclose full and true material facts.

- 16.** In our view, the Assessee had made full and true disclosure of all material facts and as such the re-assessment action of the Revenue is clearly

unsustainable and does not satisfy the additional requirement laid down by the first proviso to Section 147.

17. In view of the above, the impugned order dated 15.03.2012 is, accordingly, set aside and the proceedings initiated pursuant to notice dated 18.12.2006 are hereby quashed. Since we have quashed the proceedings on the ground of failing to satisfy the condition stipulated by the first proviso to Section 147, we need not deal with the objection with regard to change of opinion.

18. The writ petition is accordingly allowed.

SANJEEV SACHDEVA, J.

SANJIV KHANNA, J.

August 23, 2013
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