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

Decided on: 15.01.2015

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ITA 575/2012

CIT

..... Appellant

Through Mrs. Rubal Maini and Mr. Abhishek
Singh Baghel, Advs. for Mr. Balbir
Singh, sr. standing counsel

versus

CENTRAL WAREHOUSING CORPORATION

..... Respondent

Through Mr. Mayank Nagi and Mr. Harkunal
Singh, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K.GAUBA

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. The revenue is aggrieved by the order of the Income Tax Appellate Tribunal (hereinafter referred to as "ITAT") dated 15.7.2011 in ITA 1874/Del/2011. The ITAT affirmed the order of the CIT(Appeals), but had set aside the assessee's second reassessment, pursuant to notice under Section 147 of the Income Tax Act, for assessment year 2002-03. It is urged that the findings are erroneous that the reopening of the proceedings was warranted in the circumstances of the case. The assessee, a statutory Central Government corporation, filed its return declaring loss of ₹2,65,77,24,891/-. The return was processed under Section 143(1). It was later selected for

scrutiny, and notice was served upon the assessee on 17.10.2003 under Section 143(2). During the course of the scrutiny assessment, the assessing officer (AO) framed a detailed questionnaire concerning 18 issues, and asked the assessee to furnish replies and relevant details. The assessee furnished the requisite details in a detailed reply and also annexed the necessary documents. The A.O. therefore completed the assessment on 22.2.2005. In this initial assessment, the A.O. disallowed certain amounts including the exemption claimed under Section 10(29) of the Act, as well as certain categories of income and purchase. (While the matter stood thus, on 17.3.2006, the A.O. issued a reassessment notice, this time alleging that exemption claimed under Section 10(29) was inadmissible. He sought to add back a sum of ₹15,90,10,698/-. This was premised also, *inter alia*, on the footing that Section 37 could not have been sought recourse to, by the assessee in the circumstances. This reassessment notice (hereinafter called the “first reassessment notice”) was set aside by the Appellate Commissioner on 25.10.2007. The matter attained finality.

2. Yet again, on 20.12.2007, the A.O. issued a second reassessment notice under Section 147 – this time not only including the amounts sought to be added earlier, but also other amounts such as prior period expenses, deferred expenditure claimed for purchase of dunnage, its treatment in the books, and the debiting of unabsorbed expenditure in the profit and loss accounts. This reassessment proceeding and order was challenged by the assessee. The CIT(Appeals), by order dated 11.2.2011, was of the opinion that the second reassessment notice in fact was an impermissible “change of opinion”. He also considered the merits of the additions and recorded that

they were untenable. The revenue's appeal to the ITAT was rejected by the impugned order.

3. It is argued that an examination of the assessee's reply to the questionnaire clearly reveals that while it had originally not claimed these allowances, it did so in the revised return filed by it. This has led to the enquiry by the assessing officer who ultimately chose not to pursue the matter in the light of the assessee's reply dated 10.2.2005. The A.O. categorised this as "reason to believe", under Section 147 of the Act, and sought to justify the reopening in the circumstances of the case. Counsel for the assessee urged that upon the opening of original reassessment pursuant to the first reassessment notice dated 17.3.2006, it was open to the assessing officer to look into the entire record and bring to tax such amounts as found necessary. Not having done so, the A.O. could not have fallen back on the record, in the absence of "tangible material" or fresh reason, which alone could have provided him the rationale to issue a reassessment notice.

4. So far as the questions sought to be urged is concerned it is as evident from the above discussion that the second reassessment notice was based upon re-appreciation of the original record. This Court notices that the CIT as well as ITAT have concurrently ruled that whatever material or explanation in respect of the issues sought to be raised in the second reassessment notice to the assessee were part of the record and could have been noticed in the first reassessment proceedings.

5. Furthermore the CIT(Appeals) and the ITAT considered elaborately on the merits of the addition and held that the effort of the assessing officer

to bring such amounts to tax was not justified. The ITAT pertinently noticed as under :

“The formation of such belief exhibiting the escapement of income or the reasons should have a direct nexus with the information enabling the Assessing Officer to form such belief. The interdiction provided in first proviso appended to section 147 puts and embargo upon the powers of the Assessing Officer. It contemplates that if an assessment under Sec. 143(3) has been made for the relevant assessment year and four years have expired from the end of the relevant assessment year then such notice would not be issued unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of assessee to make a return under Sec. 139 or in response to a notice issued under Sec.142(1) or Sec. 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. Admittedly, the assessee has filed the return under Sec. 139 of the Income Tax Act, 1961. The only requirement left is whether the assessee can be charged with an allegation that it failed to disclose all material facts fully and truly in respect of the income escaped. Thus, operative force of the proviso is, that Assessing Officer should demonstrate, failure of assessee to disclose all material facts fully and truly, which gives rise to escapement of the income. In this connection, we have gone through the record carefully. The first item referred by the Assessing Officer in the reasons relates to allowability of certain expenditure which has to be ascertained whether incurred wholly and exclusively for the purpose of the business or not. Assessing officer thereafter referred to certain expenditure. In the questionnaire issued on 14.01.2005 at Sr. No.5, Assessing Officer called for the explanation of assessee on one item is :-

“Expense incurred on engineering division has been charged to revenue instead of capitalizing it with the project/capital assets.”

Apart from this one query, the assessee has placed on record details of all other expenses referred by the Assessing Officer in the reasons. The learned counsel for the assessee at the time of hearing, referred Schedule No.5 at page Nos.125 & 126 of the paper book which contains details of miscellaneous expenses on page 125 at Sr.No.5, assessee has made a reference to deferred revenue expenses written off. Similarly at sr. No.8, it refers to Dunnage. At sr.No.24, expenses relating to quality improvement expenses (ISO) has been shown and at Sr.No.32, expenses related to unabsorbed overhead on capital work has been shown. The learned counsel for the assessee thereafter referred to page No.133 and pointed out that assessee has placed on record income and expenditure account relating to prior periods. In this connection, it has referred loss on write off assets also which is sought to be enquired by Assessing Officer in these reasons. The net Rs.1,70,42,520 worked out by the assessee in the income and expenditure account has duly been taken in the computation of income. For buttressing this learned counsel for the assessee drew out attention towards Annexure B at page 22 of the paper book wherein computation of assessable income/loss has been placed on record. In this computation, he pointed out that prior period expenditure charged to the P&L account has been added at Rs.1,70,42,520. The learned counsel for the assessee similarly explained the other items. After going through all the details, we find that assessee has disclosed all the material facts fully and truly. Assessing officer has merely made a mention in the reasons that it failed to disclose all material facts fully and truly. We have

gone through the accounts which were made available to the assessing officer in the original round of litigation. When Assessing Officer sought to reopen the assessment at the first instance, he did not make reference to these aspects though he made a reference to the allowability of expenses under Sec. 37 of the Income Tax Act, 1961. In view of the above discussion, we are of the view that assessee has demonstrated on the record, that all facts relevant for the assessment of its income have been declared by it fully and truly.”

6. This Court had in the judgment reported as *Honda Siel Power Products Ltd. V. DCIT* 340 ITR 53 held that page 81 para 13 held that a question as to whether there is failure or omission to disclose fully and truly material facts as essentially one of fact. This was affirmed by the Supreme Court in *Honda Siel Power Product V. DCIT* 340 ITR 64 (SC). The Supreme Court ruling in *Commissioner of Income Tax vs. Kelvinator India Ltd.* 320 ITR 561 (SC) is authority for the view that the “reason to believe” on which a reassessment can be validly ordered should necessarily be based on “tangible material” which an A.O. comes by after the assessment. Necessarily, such material is outside the record. Straying from this clear path would be sliding down the slippery slope into a quagmire of re-appreciation of existing material and –even the process of reasoning which is impermissible as it is a forbidden “merits review”. Reassessment, if permitted in such instances would be a route which (to borrow the phrase from another context) “unlocks the gate which shuts” the A.O’s review on merits. (*Attorney General for New South Wales V. Quin* 1990 (64) Aust LJR 237).

7. In view of the above discussion this Court is of the opinion that impugned order does not suffer from any infirmity.

8. The appeal is consequently dismissed.

S. RAVINDRA BHAT
(JUDGE)

R.K.GAUBA
(JUDGE)

JANUARY 15, 2015

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