

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment reserved on: 26th March, 2015
Judgment pronounced on: 27th March 2015

+ **W.P.(C) No.5330/2014**

KROWN AGRO FOODS PVT. LIMITED **Petitioner**

versus

ASSISTANT COMMISSIONER OF INCOME-TAX
CIRCLE 5 (1) NEW DELHI ... **Respondent**

Advocates who appeared in this case:

For the Petitioner: Mr K.R. Manjani, Advocate

For the Respondent: Ms Suruchi Aggarwal with Mr Shashank Menon and Mr
Aamir Aziz, Advocates.

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The petitioner, by way of the present writ petition, has challenged the order dated 23.06.2014 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 18.03.2014.

2. The assessment year in issue is 2012-13.

3. The petitioner is a company registered under the Companies Act. As per the petitioner, on 05.01.2012 Shri A.K. Dhir, one of the Directors of the petitioner who is also Director of M/s. Krown Bakers India Pvt. Ltd. was carrying Rs. 5 lakhs from Delhi to Ghaziabad for both the companies which have got separate factories at Ghaziabad and Head Office in Delhi for payment of wages and other normal expenses on the factories. This amount allegedly consisted of withdrawals made on 03/04.01.2012 of Rs. 4 lakhs i.e. Rs. 2 lakhs from each of the Bank Accounts of the company in Delhi and Rs. 1 lakh from cash balance from the books of M/s. Krown Bakers India Pvt. Ltd.

4. As per the petitioner, in the beginning of February 2012, elections were to be held for the U.P. State Assembly, the Election Commission had issued instructions that if cash of more than Rs. 2,50,000/- was found with any person, the same may be seized and enquiry made whether this cash was for distribution amongst the voters. Shri A.K. Dhir was stopped by U.P. Police on the border of Delhi and U.P. and as cash of Rs. 5 lakhs was found, this amount was seized. His statement was recorded by DDI (Investigation-1) Ghaziabad before whom the relevant copies of the bank accounts and extract of cash books were produced.

5. The petitioner on 27.09.2012 filed its return of income declaring a loss of Rs. 49,88,706/- for the relevant assessment year and filed the return under section 115JC of the Act declaring an income of Rs. 2725/-.

6. The respondent initiated proceedings under section 153(C) of the Act for Assessment Year 2006-07, 2007-08, 2008-09, 2009-10, 2010-11, 2011-12 and 2012-13. However, during the assessment proceedings, it was noticed that the company was incorporated on 18.07.2008, and therefore, proceedings under section 153 (C) for the Assessment Years 2006-07, 2007-08, and 2008-09 were dropped. The proceedings were also dropped for the Assessment Years 2009-10, 2010-11, and 2011-12 as no incriminating information was received for proceeding under section 153(C).

7. On 18.03.2014, notice under section 148 of the Act for re-opening of assessment was issued on the ground of escapement of income. The petitioner was also supplied the reasons for issuance of notice under section 148 alongwith the notice. The reasons for re-opening of the assessment as communicated to the petitioner are as under:-

"Reasons recorded U/s 148(2) of the income Tax Act, 1961

*M/s Krown Agro Foods Pvt. Ltd.
H-78, Shivaji Park, Road No-45,
Punjabi Bagh, New Delhi-110017*

A.Y. 2012-13.

Information has been received from ADIT (Inv.), Ghaziabad, that amount of Rs. 5,00,000/- has been found u/s 132A of the IT Act dated 25.05.2012 in the case of Sh. Anil Kumar Dhir who is the director of M/s Krown Agro Foods Pvt. Ltd. In consequence of this information, summons dated 05.01.2012 u/s 131(1A) was issued and he was examined on oath. When asked about the source of cash of Rs.5,00,000/- he stated that Rs.2,00,000/- was withdrawn from Andhra Bank, Lawrence Road, New Delhi-35 from the account of M/s Krown Agro Foods Pvt. Ltd. on 4.02.2012.

The assessee filed its return of income for the assessment year 2012-13 vide Ack. No. 4977819612770912 on 27.09.2012 declaring total income of Rs.2725/-.

Appraisal report in the case of Anil Kumar Dhir who is the director of M/s Krown Agro Foods Pvt. Ltd. has been received from ITO, Ward 5(3), New Delhi on 25.11.2013. The information has been received after the expiry of twelve months specified in the proviso to sub-section (2) of section 143 of the IT Act.

I, therefore, have reason to believe that the income of Rs.2,00,000/- has escaped assessment within the meaning of section 147 of the IT Act, 1961. I therefore, issue of notice 148 in the case of M/s Krown Agro Foods Pvt. Ltd. for the AY 2012-13.

(Adita Singh)
Assistant Commissioner of Income Tax,
Circle 5(1), New Delhi."

8. The petitioner by letter dated 31.03.2014 raised the following objections to the notice issued under section 148 of the Act and the reasons recorded by the respondent for issuance of the same:

"1. PRELIMINARY OBJECTION

Rs. 5.00 lakh were found on 05.01.2012 with Shri Anil Kumar Dhir, Director of the Companies. He was carrying the amount from Delhi Offices to Ghaziabad Offices of two companies M/s Krown Agro Food P. Ltd. and M/s Krown Bakers P. Ltd. Income Tax Department (DD Investigation-I Ghaziabad) had started action on 05.01.2012 and intimation for this was also sent to you before 26.10.2012, also confirmed by your CIT-II New Delhi vide his letter F. No. CIT/Delhi- II/Hq.- II/Grievance Misc./2013-14/448 dated 03.06.2013 stating that as per concerned A.O., seized material has been received. This shows that all material was in Delhi before 26.10.2012 Copy attached and if it did not reach you within time, it is not fault of assessee. So far as the assessee is concerned, the Department is one and department cannot take advantage of its fault of delay, specially where time barring is involved, when Hon'ble High Courts and Tribunal have been stressing timely action in these matters. Limitation is right of assessee and cannot be dispensed with. Still you did not take any action even though you knew it that the limitation for sending the notice u/s 143(2) was 30th Sept., 2013. This shows there is a clear lapse on the part of the Department and no one can be allowed to take the advantage of one's own wrong is settled law. The reason that because you did not take timely action, the assessee should suffer is wrong and against settled law. On this account alone, the action is arbitrary and bad in law.

**2. THERE IS NO CONCEALMENT, WHICH IS A
PRIMARY REQUIREMENT FOR ISSUE OF NOTICE
UIS 148**

The amount of aforesaid Rs. 5.00 lakh was from withdrawal of Rs. 2.00 lakh each from the Banks of these companies 1-2 days before this date and Rs. 1.00 lakh was cash available in the books. The amount was taken by the Police not because the assessee had no explanation but because of the instructions of the Election Commission that no one is permitted to carry cash over Rs. 2.5 lakh. The explanation which is supported by documentary evidence like copy of Bank Statements and also the Cash Book, does not in any way, lead to the proposition that this amount is unexplained especially because the amount was carried from Office in Delhi to Branch in Ghaziabad by the Director of two companies and for use of their companies in Ghaziabad. Even otherwise, it is settled law that mere possession of money does not lead to presumption of concealment which is especially true in this case because the assessee has documentary evidence in support of the source of amount. On this account, there is no material leading to belief of concealment.

As shown above, it is also incorrect that information was received about this after 30th Sept., 2013.

Your assertion that Rs. 2.00 lakhs have escaped the assessment can by no stretch of imagination be treated as escaped assessment because this amount is from withdrawal of cash from companies bank account on 4.1.2012 ie. one day before this amount was found with Shri Dhir."

9. The objections have been disposed of by the Impugned order and the reasoning given is as under:

I have considered the various submissions made by the assessee in his letter dated 31.03.2014 and found no force in them. The assessee has filed a Return showing loss of Rs. (49,88,706/-) for the A.Y. 2012-13. The date of receipt of the information in the office of the Assessing Officer is not affecting the interest of the assessee adversely. The assessee is clearly accepting that based on the information in this case, it was to be assessed u/s-143(3) by issuing of notice u/s-143(2) prior to 30.09.2013. If the AO due to internal communication received the information after 30.09.2013 and thereafter, it was considered that the information could only be verified by initiating assessment proceedings u/s-147/148 for A.Y. 2012-13. The interest of the assessee is not been adversely affected if the information received from the office of DDIT (Inv) is being verified and assessed u/s-143(3) or s-147/143(3). The issue raised by the assessee for the limitation is not legally tenable or valid as per the provisions of the Income Tax Act, 1961. The raising of this objection by the assessee is an attempt to escape assessment, so that it does not have to prove the genuineness of the cash seized during the election time in the hands of its Director, Mr. Anil K. Dhir.

In the case of M/s Krown Bakers (India) Private Ltd. for A.Y. 2012-13, it was assessed u/s- 143(3) by ITO Ward 5(3). The details of the assessment order dated 31.03.2014 was sought from ITO Ward 5(3) by letter dated 26.06.2014. In response to the letter the copy of the Assessment Order u/s 143(3) was received by letter dated 27.06.2014 in the office of the undersigned. It was noted from the reading of the assessment order, that the Director, Mr. Anil Kumar Dhir was carrying cash of Rs.

3,00,000/- which was claimed to have been withdrawn from M/s Krown Bakers (India) Private Ltd. account for business purposes only. There is another addition of Rs. 9,43,279/- on account of discrepancy noted in the manufacturing results.

Hence, it is evident that the information received in the case of M/s Krown Agro Foods Private Ltd. also needs to be examined and the credit worthiness of the assessee has to be proved beyond doubt to accept the claim of Mr. Anil K. Dhir. Therefore, the proceedings u/s- 147/148 have been initiated to safeguard the interest of revenue and in consideration of the assessment completed in the case of M/s Krown Bakers (India) Private Ltd for A.Y. 2012-13 as well. The assessee has not submitted anything other than the return to be able to verify its claim against the amount seized.

The assessee company has capital of only Rs. 1,00,000/- and has filed a Return showing a loss of Rs. 49,88,706/-. In view of these facts, it becomes essential to verify the source of Rs. 2,00,000/- and the purpose for which it was brought to Ghaziabad during election time.

The assessee has also submitted that initiation of proceedings u/s 147 and the issuance of notice u/s 148 on the basis of the information received from the DDIT (Investigation), Ghaziabad is, without application of mind to the information and forming an opinion. This submission of the assessee is again not well founded and is untenable.

In the case of ITO vs. Selected Balurband Coal Co. Pvt. Ltd. (1996) 217 ITR 597 (SC). It was held that as under:-

"A letter was written by the Chief Mining Officer to the Income Tax Officer informing him that inspection of

assessee's colliery showed, that there was under-reporting of raising figures to the extent indicated in the letter, Held: The Income Tax Officer could form a belief on the basis of the letter that income had been under-assessed or had escaped assessment. Hence the notice issued under section 148 read with section 147(a) on the basis of the letter was valid."

In the case of Midland Fruit and Vegetable Products (India) Ltd v CIT (1994) 208 ITR 266 (Del.), it has been held that there was adequate material for holding a belief that income had escaped assessment even when the assessee had given confirmatory letters of the creditors in whose names loans were shown in the assessee's books of account but however, later on when one of the creditors was examined he admitted that the loans shown to have been advanced were bogus.

In view of the above, the assessee's submissions for dropping of the reassessment proceedings U/S 147 are rejected as devoid of merits. The assessee is now therefore, requested to comply with further proceedings to follow in their case for the year under consideration.

(Underlining supplied)

10. 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. 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**, 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.)”*

11. 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.

12. The reasons only record that amount of Rs. 5,00,000/- has been found with the director and the assessee and when examined on oath and asked about the source of cash of Rs.5,00,000/- he stated that Rs.2,00,000/- was withdrawn from Andhra Bank, Lawrence Road, New Delhi-35 from the account of M/s Krown Agro Foods Pvt. Ltd. on 04.02.2012. In the order, disposing of objections it has been held that, the information was received after 30.09.2013 and the information could only be verified by initiating assessment proceedings u/s 147/148 for A.Y. 2012-13. It is recorded that the interest of the assessee will not be adversely affected if the information received from the office of DDIT (Inv) is verified. It is further recorded that the information received needs to be examined and the credit worthiness of the assessee has to be proved beyond doubt to accept the claim of its director.

13. The reason to believe recorded by the Assessing officer is not based on any material that had come to the knowledge of the Assessing Officer. There is a mere suspicion in the mind of the

assessing officer and the notice under section 147/148 has been issued for the purpose of verification and for clearing the cloud of suspicion. The reasons to believe recorded do not show as to on what basis the Assessing Officer has formed a reasonable belief that the said amount of Rs. 2,00,000/- had escaped assessment. It is apparent the Assessing Officer suspects that the income has escaped assessment. However, mere suspicion is not enough. The reasons to believe must be such, which upon a plain reading, should demonstrate that such a reasonable belief could be formed on some basis/ foundation and had in fact been formed by the Assessing Officer that income has escaped assessment. No such reasonable belief can be inferred from the purported reasons to believe recorded.

14. 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 in the case 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 said amount had escaped assessment. The purported belief that income has escaped assessment is not based on any direct or circumstantial evidence and is 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

purported reasons to believe recorded indicate that the Assessing Officer has acted on mere surmise, without any rational basis, the action of reopening of the Assessment is thus clearly contrary to law and is unsustainable.

15. In view of the above, the impugned order dated 23.06.2014 is set aside and the proceedings initiated pursuant to the notice dated 18.03.2014 are hereby quashed.

SANJEEV SACHDEVA, J.

MARCH 27, 2015
sk/HJ

BADAR DURREZ AHMED, J.