

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Sr. No.208

CWP-12322-2015

Pronounced on : 28th September, 2016

M/s Franchise India Holdings Ltd.,
Chandigarh

..... Petitioner

VERSUS

Assistant Commissioner of Income Tax,
Circle, Chandigarh

..... Respondent

CORAM: HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
 HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr.Sanjay Bansal, Senior Advocate, with
 Mr.Rohit Kaura, Advocate, for the petitioner.

Ms.Urvashi Dhugga, Advocate, for the respondent.

DEEPAK SIBAL J.

The present petition has been filed at the instance of the assessee seeking therein quashing of the notice dated 24.10.2014, issued under Section 148 of the Income Tax Act, 1961 (for short the “Act”) and order dated 16.04.2015, whereby the petitioner's objections to the aforesaid notice were rejected.

For the assessment year 2010-11 the petitioner filed its return, declaring therein an income of Rs.89,73,250/-. The return was processed under Section 143(1) of the Act. The case was selected for scrutiny. On being asked to produce its records, the assessing officer was informed on behalf of the petitioner that the same was not available as it had been destroyed in a fire which took place in the premises of the petitioner on 10.05.2011. A First Information Report (FIR) in that regard lodged by the

petitioner with the police was also produced. After noticing the destruction of the record in the fire, the assessing officer perused the profit and loss account for the relevant year and finding expenses under certain heads like business, promotions & conveyance expenses, travelling incentives etc. to be on the higher side when compared to the previous assessment year, made a disallowance of a lump sum amount of Rs.10,00,000/-.

On 03.03.2014, audit objections were raised with regard to the petitioner's assessment to tax for the relevant assessment year. The audit objections were as under: -

“During the course of audit, it has been noticed that the auditor vide para 27 of the audit report has been reported that provisions of chapter XVII b has not been complied with. In the profit and loss account, the assessee debited following expenses on which TDS provisions are applicable: -

Rs.2,88,01,473.00/-
Rs. 54,35,000.00/-
Rs. 23,81,740.00/-
Rs.2,03,16,004.80
Total- Rs.5,81,62,260/-

No ledger accounts of the above expenses are available on record to ascertain as to whether the TDS was deducted by the assessee or not? Keeping in view the certificate of the auditor, it seen that TDS was not deducted by the assessee and therefore the same is liable to be disallowed under section 40(a)(ia) of the Income Tax Act, 1961.

In the balance sheet, the assessee has shown Rs.12,28,313 as TDS expenses payable. No proof of payment of TDS to the central Govt. account is available on record, therefore, the same are not allowable expenses u/s 43B of the Income Tax Act, 1961.

The above discrepancies resulted into under assessment to the tune of Rs.5,81,62,260/- involving tax effect of Rs.1,79,73,138/-.

Reference: - The annexure to the balance sheet such as security deposits, loan and advances, secured loan, current liabilities are not found available on record.

The AO requested to examine as to whether any loan or advances or the security deposits are for the business purposes or not?”

Thereafter the petitioner was issued a notice dated 24.10.2014 under Section 148 of the Act as to why it may not be re-assessed. The assessing officer forwarded the reasons for the same under cover of a letter dated 06.01.2015. They read as under: -

“From the information on record, it is seen that the assessee M/s Franchise India Holidays Limited, # 2504, Sector 22-C, Chandigarh during the F.Y. 2009-10 in the profit & loss account has debited the following expenses on which TDS provisions are applicable but no TDS has been deducted by the assessee: -

<i>S. No.</i>	<i>Expenses</i>	<i>Amount</i>
1	Advertisement	Rs.2,88,01,473/-
2	Rent	Rs. 54,35,000/-
3	Courier expenses	Rs. 23,81,740/-
4	Event expenses	Rs.2,03,16,004/-
	Total	Rs.5,69,34,217/-

The above amount should have been disallowed as per the provisions of section 40(a)(ia) and added back to the returned income. But the same has not been disallowed.

Above omission resulted into under assessment of income of Rs.5,69,34,217/-.

In view of the above, I have reason to believe that the above mentioned amount has escaped assessment because of failure on the part of the assessee to disclose truly & fully all material facts.”

After inspecting the record, on 09.03.2015 the petitioner filed its objections to the issuance of the aforesaid notice under Section 148 of the Act, which through order dated 16.04.2015 were rejected. It is in the background of the above facts that the petitioner through the present petition has knocked the doors of this Court for the afore-referred reliefs.

Mr.Sanjay Bansal, Senior Advocate, appearing on behalf of the petitioner submitted that on receipt of the impugned notice under Section 148 of the Act, in order to respond to the same through an effective reply, the petitioner had sought from the respondents a copy of the audit memo No.99 in respect of audit conducted on 03.03.2014, annotated report dated 11.07.2014 and a copy of the letter dated 04.09.2014. However, the department did not supply the same. The petitioner was only permitted to inspect the record and it is on that basis only that the initial responses to the impugned notice as also the objections to the same were filed. It was submitted that the denial of the documents by the respondents was a clear

violation of the principles of the natural justice.

It was further submitted that it was only much later on the petitioner's filing an application under the Right to Information Act, 2005 that the respondents supplied to the petitioner all the relevant documents. The documents revealed that on the audit objections dated 03.03.2014, the comments of the assessing officer had been sought for. The same were given through an annotated report dated 11.07.2014 in which the assessing officer, after considering the audit objections had recommended no further action. Thereafter, through letter dated 04.09.2014, emanating from the office of the Commissioner of Income Tax, Chandigarh the assessing officer was asked to give reasons as to why he recommended no action to be taken in pursuance to the audit objections and it was only after the receipt of the above letter from the Commissioner that the assessing officer issued the impugned notice dated 24.10.2014 to the petitioner.

Thus, it was submitted that the impugned re-assessment proceedings were only on the basis of audit objections on which, on being asked to comment, the assessing officer had recommended no further action and, therefore, the matter should have been dropped then and there. The initiation of the impugned re-assessment proceedings resulted only on the receipt by the assessing officer of a diktat from the Commissioner in the form of the afore-referred letter dated 04.09.2014 which vitiated the entire proceedings.

It was still further submitted that the initial assessment order dated 19.12.2012 had been made after perusal of the profit and loss account which included all particulars of the expenses incurred by the petitioner including expenses on advertisement, rent etc. and that being so it would be

presumed that while assessing the petitioner the assessing officer had applied his mind qua all the contents of the profit and loss account. Thus, the impugned re-assessment proceedings, seeking to re-assess the income of the petitioner under the same heads, as contained in the profit and loss account which was perused earlier, according to learned senior counsel, were only on the basis of a change of opinion of the assessing officer which was impermissible in law.

Per contra, Ms.Urvashi Dhugga, Advocate, appearing on behalf of the respondent submitted that there was no violation of the principles of natural justice as alleged. The petitioner had admittedly been allowed to inspect the relevant record and that all the relevant documents, though at a later stage, had been supplied. No prejudice had been shown by the petitioner.

The re-assessment proceedings were sought to be justified by submitting that though initially when the audit objections were put to the assessing officer, he had not recommended any further action but when through letter dated 04.09.2014, he was requested by the Commissioner, in his administrative capacity, to give reasons for the same, the assessing officer wrote to the TDS department and summoned the record pertaining to the petitioner and only on the receipt and perusal thereof he formed an independent opinion that the audit objections had been rightly raised and it is on such satisfaction on his part that the impugned notice dated 24.10.2014 under Section 148 of the Act, for initiating re-assessment proceedings against the petitioner, was issued.

Under Section 147 of the Act, if the assessing officer has reasons to believe that any income which should have been chargeable to

tax has escaped assessment, he is well within his rights to initiate proceedings, as prescribed by law, to bring such income to tax. However, the satisfaction to initiate re-assessment proceedings has to be his own and not based on the diktat of another or based solely on audit objections. Re-assessment proceedings also cannot be initiated merely on a change of opinion of the assessing officer. If as per the record before him he had formed an opinion leading to the passing of the assessment order, then he cannot on a re-look of the same record, and based on a change of opinion, review his decision. The opinion of the assessing officer to initiate re-assessment proceedings has to be based on new tangible material.

The Apex Court in *Indian & Eastern Newspaper Society Vs. Commissioner of Income Tax*, [1979] 119 ITR 996 (SC), held that the view expressed by an internal audit party of the Income Tax Department is only to be considered as information and that to initiate re-assessment proceedings on the basis thereof the assessing officer has to, after considering the audit objection form his own independent opinion. It was further held therein that the power of the assessing officer to initiate re-assessment proceedings cannot be exercised on account of oversight, inadvertence or mistake on his part while passing the assessment order.

In *Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.*, [2010] 320 ITR 561 (SC), while interpreting the words “reason to believe” in section 147 of the Act, the Apex Court held that the assessing officer cannot re-open assessments on the basis of mere change of opinion. Making a distinction between the power to review and to re-assess, the Apex Court held that the assessing officer had no power to review. However, he had the power to re-assess provided that such re-assessment

was not a mere change of opinion and that the same is based on some tangible material which comes to his notice after the assessment has been made and on the basis whereof he arrives at a conclusion that there has been escapement of income from assessment.

In the case of ICICI Home Finance Co. Ltd. Vs. Assistant Commissioner of Income Tax [2012] 25 taxmann.com 241 (Bom.), a Division Bench of the Bombay High Court interpreted Section 147 of the Act, by holding as under: -

“6. The power to reopen a completed assessment under Section 147 of the Act has been bestowed on the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. In fact, the Supreme Court in the matter of India Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi, reported in 119 ITR page 996 has held that whether an assessment has escaped assessment or not must be determined by the Assessing Officer himself. The Assessing Officer cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment. In the present facts, it would be noticed that the reasons for which the assessment for the assessment year 2006-2007 is sought to be reopened by communication dated 12.10.2011 are identical to the objection of the audit authority dated 29.12.2009. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the Assessing Officer before he issued the impugned notice. On this ground alone, the assumption of jurisdiction by the Assessing Officer can be faulted.

7. However, as submissions were made on other issues also we are examining them also. It is a settled position in law that where assessment sought to be reopened is before the expiry of four years from the end of the relevant assessment year, then in such cases the power to reopen an assessment is very wide. However, even though such a power is very wide yet such a power would not justify a review of the assessment order already passed. The Supreme Court in the matter of the Commissioner of Income Tax v. Kelvinator (India) Ltd, reported in 320 ITR page 561 has observed that the power to reassess is conceptually different from a power to review. The Assessing Officer under the said Act has only power to reassess on fulfillment of certain precondition namely, he must have reason to believe that income has escaped assessment and that there must be tangible material to come to the conclusion that there is an escapement of income from assessment. The Apex Court cautioned that in the garb of reopening an assessment review should not take place. This court following the Apex Court in the matter of Cartini India Ltd. v. Addl. C.I.T. reported in 314 ITR 275 has also held that even where reassessment is sought to be done within four years from the end of the relevant assessment year, there must be reason to believe that income has escaped assessment and such reason to believe should not be on account of mere

change of opinion. Therefore, where facts have been viewed during the original proceeding and an assessment order has been passed then in such cases, reopening of an assessment on the same facts without anything more would be a review and not permitted under the garb of reassessment. This would be a mere change of opinion in the absence of any tangible material and is not sufficient to assume jurisdiction to issue the impugned notice. In fact, our court in the matter of Idea Cellular Ltd v. Deputy Commissioner of Income tax reported in 301 ITR 407 has held that once all the material with regard to particular issue is before the Assessing Officer and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. Further, as observed by the Full Bench of Delhi High Court in the matter of C.I.T. v. Kelvinator of India Ltd. Reported in 256 ITR 1, when the entire material is placed before the Assessing Officer at the time of original assessment and he passes an assessment order under Section 143(3) of the Act a presumption can be raised that he applied his mind to all the facts involved in the assessment.

To the same effect is a Division Bench judgment of this Court in “State Bank of Patiala Vs. Commissioner of Income Tax [2015] 375 ITR 109.

On applying the above settled principles of law to the facts of the present case, we are of the opinion that the petitioner deserves no relief. Before the original assessment order dated 19.12.2012 was passed, the relevant record of the assessee had been destroyed in fire. On perusal of the profit and loss account finding the expenses shown therein, when compared with the previous assessment year to be higher, the assessing officer imposed a lump-sum deduction of Rs.10,00,000/-. On 03.03.2014, an audit objection was raised qua the above assessment which was to the effect that as required, no TDS had been deducted by the petitioner qua expenses on advertisement, rent, courier services and event expenses. Thus, as per the provisions of Section 40(a)(ia) of the Act these expenses were liable to be disallowed and added back to the assessee's income.

On the above objections the comments of the assessing officer were sought who recommended no further action. The Commissioner through letter dated 04.09.2014 requested the assessing officer to spell out

reasons for not recommending any action on the audit objections. The gist of the letter dated 04.09.2014, reads as under: -

“Kindly refer to your report bearing no.1921 dated 11.7.2014 on the subject mentioned above.

2. The audit objection has been raised by the IAP as the Auditors in the report pointed out that provisions of section XVIIB has not been complied with. Thus, the following expenses are liable to be disallowed and added back u/s 40(a)(ia) of the I.T. Act:

To Advertisement	Rs.2,88,01,473/-
To rent	Rs. 54,35,000/-
To courier expenses	Rs. 23,81,740/-
To event expenses	Rs.2,03,16,004/-

3. In this regard, you are requested to send your comments whether the objection is acceptable or not. If not, reasons thereof and if yes, you are requested to kindly propose the action suggested to be taken.”

(Emphasis supplied).

The petitioner terms the above letter as a diktat by the Commissioner to the assessing officer leading to the initiation of re-assessment proceedings. We do not agree. The Commissioner by this letter merely sought reasons from the assessing officer. He did not direct him to initiate proceedings for re-assessment. The assessing officer could have furnished reasons and reiterated his decision not to reopen the assessment. It is also important to note an aspect regarding the annotated reply. The audit objections were specifically with respect to the issue of TDS. The assessing officer's response was silent on this issue except for stating that he was informed that the record had been destroyed. He had admittedly not seen any other record pertaining to the issue. The Commissioner as a superior officer, in his administrative capacity was well within his rights to ask his subordinate to back his recommendation with reasons when the same were found lacking, especially when such recommendation was made contrary to the audit objections which contained both reasons and

provisions of law.

After the receipt of the above quoted letter, the assessing officer apparently now acting in a more responsible manner through a communication dated 23.09.2014 addressed to the TDS wing of the department sought the record pertaining to the deposit of TDS by the petitioner with regard to the expenses on which the petitioner was supposed to deduct TDS at the time of release of payments. The record was supplied by the TDS wing to the assessing officer through letter dated 17.10.2014 on the examination of which the assessing officer found that the petitioner had, in fact, not deducted TDS as required by law on the expenses incurred by it towards advertisement, rent, courier services and event expenses. This information which would come under “tangible material” was not before him at the time when the original assessment was made and on the basis whereof, on recording of reasons, which were later supplied to the petitioner, the re-assessment proceedings were initiated. It may be noted that at the time of framing of the original assessment, the assessing officer had sought record from the petitioner which was not produced on the ground that the same had been destroyed in a fire which took place in the premises of the petitioner. This fact would have also contributed towards the escapement of the above income from tax.

Mr.Bansal placed strong reliance upon the audit report, the profit and loss account and the assessment order under Section 143(3). The assessment order states that the assessing officer perused the profit and loss account. This, however, was in relation to items unconnected with those relating to TDS. Mr. Bansal however, submits that it must be presumed that the assessing officer had perused the entire profit and loss account. The

profit and loss account refers to payments which required tax to be deducted at source. He also relied upon item 27 of the audit report which reads as under: -

- | | | |
|----------|---|------|
| “27. (a) | Whether the assessee has complied with the provisions of Chapter XVII-B regarding deduction of tax at source and regarding the payment thereof to the credit of the Central Government. | NO |
| | [Yes/No] | |
| (b) | If the provisions of Chapter XVII-B have not been complied with, please give the following details*, namely | N.A. |
| (i) | Tax deductible and not deducted at all | |
| (ii) | Shortfall on account of lesser deduction than required to be deducted | |
| (iii) | Tax deducted late | |
| (iv) | Tax deducted but not paid to the credit of the Central Government | |
| | Please give the details of cases covered in (i) to (iv) above.” | |

Mr.Bansal, therefore, submits that it must be presumed that the assessing officer formed the opinion that tax was not to be deducted at source.

These references in fact support the case for reopening the assessment. In answer to the query at item 27(a) the petitioner rightly says “NO”. But in answer to the query at item 27(b) the petitioner say “N.A.” i.e. not applicable. This was patently incorrect and misleading. We will assume that it was the petitioner's bonafide impression that TDS was not applicable. The fact remains, however, that the answer was incorrect. An assessee who makes an incorrect statement in the main body of the audit report cannot turn around and say that he had stated the facts in an annexure from which the assessing officer could have discovered the incorrect statement. Moreover, the assessing officer could legitimately have thought

this statement to be correct even with respect to the payment mentioned in the annexure for instance on the basis that the payee had deposited the same and that therefore, the question of the assessee paying the same did not arise.

The plea of violation of principles of natural justice raised on behalf of the petitioner, needs to be considered only to be rejected. It is the admitted position that the petitioner was permitted to inspect the relevant record before he filed his objections to the initiation of re-assessment proceedings. Even otherwise, the entire record, as asked for by the petitioner, was made available under the Right to Information Act, 2005. The petitioner has also not shown any prejudice on this ground.

In view of the above, the writ petition being without any merit is ordered to be dismissed.

[S.J. VAZIFDAR]
CHIEF JUSTICE

28th September, 2016
shamsher

[DEEPAK SIBAL]
JUDGE

Whether reasoned/speaking : Yes / No

Whether reportable : Yes / No