

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

5.

+

W.P.(C) 9299/2014 & CM 21069/2014

VIP GROWTH FUND PVT LTD

..... Petitioner

Through: Mr. Satyen Sethi and Mr. Arta Trana
Panda, Advocates.

versus

DY.COMMISSIONER OF INCOME TAX, & ANR..... Respondents

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

%

17.03.2016

1. The challenge in this writ petition is to the notice dated 12th March 2014 issued by the Deputy Commissioner of Income Tax ('DCIT'), Circle-17(1) New Delhi under Section 148 of the Income Tax Act, 1961 ('Act'), seeking to reopen the assessment of the Petitioner for Assessment Year ('AY') 2007-08.

2. The Assessee filed its return for the AY in question on 7th November 2007 declaring NIL income. The return was picked up for scrutiny. On 17th September 2008, notice under Section 143(2) of the Act was issued to the Assessee. This was followed by an elaborate questionnaire under Section 142(1) of the Act issued to the Assessee by the DCIT, Circle-17(1) on 13th July 2009. The Petitioner replied to this questionnaire on 27th November

2009, *inter alia* enclosing the account of M/s Sunlight Projects Pvt. Ltd. ('SPPL') along with copy of the ledger account. In response to query raised on 8th December 2009 as to why no interest was charged from SPPL, the Petitioner submitted a letter dated 15th December 2009 in which *inter alia* it was stated that the Assessee had made investment in the project of development of commercial shopping complex by SPPL on DDA land and that the Assessee's portion would be handed over to it upon completion of the project. The income arising from the complex would be treated as business income.

3. Another query was raised in respect of the share capital raised by the Assessee during the AY in question. By letter dated 5th November 2009 the Assessee submitted a reply in the prescribed format furnishing the details of the parties to whom shares were allotted. The Petitioner also filed the return of allotment, the certificate of incorporation of allottees of shares, their confirmation with complete address and PAN.

4. Thereafter the Assessing Officer ('AO') passed an assessment order on 23rd December 2009 under Section 143(3) of the Act for the AY in question, determining the total income as nil.

5. After the expiry of four years from the end of the AY in question the impugned notice was issued under Section 148 of the Act. On 8th May 2014, the DCIT, Circle-17(1) under Section 142(1) of the Act, required the Petitioner to furnish specified details/information, and enclosed along with it the reasons for reopening the assessment.

6. A perusal of the reasons shows that two broad issues has been adverted to: one concerns the sum of Rs. 1.45 crores advanced by the Assessee to the SPPL for booking the commercial plot with DDA. It was stated that Deputy Director of Income Tax (Investigation) [‘DDIT (Inv.)] had found that SPPL had taken a loan from the Assessee and that no interest was charged by the Assessee from SPPL from the date of the loan. Reference was also made to the balance sheet of the Assessee where the Assessee had been debiting payment of interest towards loans taken from banks/financial institutions and therefore there had to be proportionate disallowance for all the assessment years beginning with AY 2007-08 till such time the arrangement continued.

7. The second broad reason for reopening the assessment was the receipt by the Assessee of Rs. 1.8 crores towards share capital and premium from various companies. In this regard the reasons states that “MCA/ITD database search and local enquiries revealed that these companies are defunct in nature, not found at the addresses given and many of them are in the strike off mode in MCA. It appears, prima facie, the assessee has taken accommodation entries from these defunct companies in the form of share capital and premium”. The 'reasons' then adverted to the “failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year 2007-08”.

8. The objections filed by the Assessee to the reopening of the assessment were rejected by an order dated 30th October 2014 which has also been assailed in the present petition.

9. In response to the notice issued, a counter affidavit has been filed by the Respondent. In the counter affidavit, *inter alia* the stand taken is that it appeared *prima facie* on the basis of the MCA/ITD database search and local enquiries that the companies from whom the Assessee had taken the share capital and premium were not found at the addresses given and many of them were in the "strike off mode" in the MCA, and *prima facie* the Assessee had taken accommodation entries. There is a virtual repetition in the counter affidavit of the reasons for reopening the assessment.

10. As far as the first broad reason for reopening the assessment is concerned regarding non-charging of interest from SPPL on the sum advanced, it appears to the Court that the Petitioner did disclose all the material facts necessary for the assessment. Apart from the fact that the return was picked up for scrutiny, a detailed questionnaire was issued, in which specific questions touching upon the said loan to SPPL were raised. The Petitioner replied to the said letter disclosing all the necessary information. Consequently, as far as the first ground for reopening of the assessment is concerned, the Court is satisfied that the precondition of the first proviso to Section 147 regarding failure on the part of the Assessee to fully and truly disclose the material facts, is not fulfilled. The mere fact that the assessment order may itself not advert to the fact that a questionnaire was issued and a reply was filed thereto by the Assessee would not *ipso*

facto lead to an inference that the AO did not apply his mind and form an opinion on that ground. Consequently, the Court holds that the first reason for reopening the assessment for the AY in question is bad in law.

11. Turning to the question of the share capital received by the Assessee during the AY in question, it was sought to be urged by learned counsel for the Revenue that the MCA database search itself constituted tangible material to justify the assumption of jurisdiction to reopen the assessment. It was submitted that the AO was only required to form a *prima facie* view on the basis of the material that was gathered and that it was only in the assessment proceedings that a further detailed examination was required to be undertaken whether there was, in fact, a true and full disclosure of the material facts by the Assessee. Reliance is placed on the decision of the Full Bench of this Court in ***CIT v. Usha International Ltd (2012) 348 ITR 485(Del.)*** and the decision of the Bombay High Court in ***Export Credit Guarantee Corporation of India Ltd. v. ACIT (2013) 350 ITR 651(Bom)***.

12. The decision in ***Export Credit Guarantee Corporation of India Ltd.*** is distinguishable on facts. There, the reopening was done within a period of four years and therefore the question of applying the first proviso to Section 147 did not arise. As far as the decision of Full Bench of this Court in ***Usha International(supra)*** is concerned, it clarified that the “failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked”. However, whether in fact there was a failure on the part of the Assessee to state true and correct facts would depend on the existence of

some tangible material which can provide a live link to the formation of the belief that income escaped assessment. The statement that the MCA/ITD database search showed that the companies which had invested in the shares of the Assessee were in the “defunct mode” is vague inasmuch as it is not clear whether any of the said companies were defunct on the date the Petitioner disclosed the details in response to the questionnaire issued to it.

13. Mr. Rahul Chaudhary then urged that the Revenue should now be permitted to produce before the Court the complete record which if perused might substantiate the reasons recorded for reopening of the assessment. As far as this plea is concerned, it requires to be rejected for a simple reason that time and again, the Courts have reiterated that when a challenge is laid to the reopening of an assessment under Section 148 of the Act, the Court is to be guided only by the reasons recorded for reopening the assessment and not by the reasons and explanations given by the AO at a later stage. In *Northern Exim (P) Ltd. v. DCIT [2013] 357 ITR 586 (Del)*, after referring to a large number of decisions, the Court reiterated the legal position as under:

“15. The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/ or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law.”

14. Consequently, even if the records are now to be produced before the Court and perused by it, it is not open for the Court to gather from the records the material/information which would support the reasons as communicated to the Petitioner by the DCIT. The court is therefore satisfied, that even in respect of the second reason for reopening the assessment, the mandatory requirement of the AO having to form a *prima facie* view regarding failure on the part of the Assessee to fully and truly disclose all the material facts is not fulfilled.

15. For the aforementioned reasons, the Court quashes the impugned notice dated 12th March 2014 as well as the order dated 30th October 2014 passed by the DCIT.

16. The writ petition is allowed and the application is disposed of in the above terms.

S.MURALIDHAR, J

VIBHU BAKHRU, J

MARCH 17, 2016
mg