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

+ **W.P.(C) 614/2014**

YUM! RESTAURANTS ASIA PTE.LTD. Petitioner
Through: Mr. Salil Kapoor, Advocate with Ms.
Ananya Kapoor, Mr. Sumit Lalchandani, Mr.
Sanat Kapoor, Advocates.

Versus

DEPUTY DIRECTOR OF INCOME TAX Respondent
Through: Mr. Rahul Chaudhary, Sr.Standing
Counsel.

CORAM: JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

ORDER
31.08.2017

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Dr. S. Muralidhar, J.:

1. This writ petition by the Yum Restaurants Asia PTE Ltd. seeks the quashing of a notice dated 28th March, 2013 issued by the Deputy Director of Income Tax (Assessing Officer - 'AO') under Section 148 of the Income Tax Act, 1961 ('the Act') for the Assessment Year ('AY') 2006-07. It also challenges the order dated 26th December, 2013 passed by the AO rejecting the objection filed by the Assessee to the reopening of the assessment.

2. One of the grounds of challenge to the re-opening of the assessment is that since the return originally filed was processed under Section 143 (1) of the Act, and the reopening was after the expiry of 4 years from the end of the relevant AY, the requirement under Section 151 (2) of the Act, as it then stood, had to be mandatorily complied with. The case of the Petitioner can

be better understood by examining Section 151 of the Act as it then stood. It reads thus:

“151. Sanction for issue of notice :- (1) In a case where an assessment under sub- section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub- section (1), no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

Explanation -”

3. There are two scenarios that Section 151 envisages. One is where the original return has been picked up for scrutiny and an assessment order has been passed under Section 143 (3) of the Act. In such event, the procedure outlined under Section 151 (1) of the Act has to be followed. Where the reopening is sought to be made after the expiry of 4 years from the end of the relevant AY, and where the return originally filed has been processed under Section 143 (3) of the Act then in terms of the proviso to Section

151(1) of the Act, the approval of the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner has to be obtained to the effect that it is a fit case for issuance of such notice.

4. It is not in dispute that in the present case, the return originally filed by the Assessee for AY 2006-07 was processed under Section 143 (1) of the Act and not under Section 143 (3) of the Act. Therefore, as far as the Petitioner is concerned, the Department ought to have proceeded in terms of Section 151 (2) of the Act. Since the re-opening of the assessment was after the expiry of 4 years from the end of the relevant AY, the proposal of the AO to reopen the assessment should have had the approval of an officer of the rank of Joint Commissioner which in this case was the Additional DIT.

5. The factual scenario, however, is that the note put up by the AO to the DIT read as under:

“Form of recording the reasons for initiating proceedings under Section 148 and for obtaining the approval of the Director of Income-tax/Central Board of Direct Taxes

1	Name and Address of the assessee	:	M/s. Yum! Restaurants (Asia) PTE Limited 99, Bukit Timah Road # 04-01 02, Singapore - 999999
2	Permanent Account No.	:	AAACY2204M
3	Status	:	Non Resident
4	District/Circle/Range	:	Circle 2(2), Intl. Taxation, New Delhi
5	Assessment Year in respect of which it is proposed to issue notice u/s 148	:	2006-07

6	The Quantum of income which ha escaped assessment	:	Exceeding Rupees 1 lakhs
7	Whether the provisions of Sec. 147 (a) to be made first time. If the reply is in the affirmative please state.	:	Yes
8	Whether the assessment is proposed to be made first time. If the reply is in the affirmative please state.	:	No
(a)	Whether any voluntary return had already been filed and	:	N.A.
(b)	If so, the date of filing the said return	:	N.A.
9	If the answer to item 8 is in the negative please state	:	
(a)	The income originally assessed	:	
(b)	Whether it is a case of under assessment that too low a rate, assessment which has been made the subject to excessive relief or allowing of excessive loss or depreciation	:	Under assessment
10	Whether the provisions of Sec. 150 (1) are applicable. If the reply is in the affirmative, the relevant facts may be stated against item no.11 and it may also be brought out that the provisions of Sec. 150 (2) would not stand in the way of initiating proceedings u/s. 147	:	No
11	Reasons for the believe that the income has escaped assessment	:	As per Annexure A

Dated: 26.03.2013

(Mazhar Akram)
Deputy Director of Income Tax
Circ 2 (2), Intl. Taxation, New Delhi

12. Comments of the Addl. DIT, R-2, Intl. Tax., Delhi, if any

- On persual of the reasons I have reasons to believe that income of more than one lakh has escaped assessment.
- The proposal is approved.

Sd/-
(Manish Mishra)
Addl. Director of Income Tax
Range-2, Intl. Tax., New Delhi

13. Whether the Director of Income Tax : (Intl. Tax.)-II, New Delhi is satisfied on the reasons recorded by the ITO/ADIT/DDIT) that it is a fit case for issue a notice u/S 148 *I have perused the reason recorded and find there is income escaping assessment making this a fit case for action U/S 147/148 of the IT Act, 1961.*

(Poonam K. Sidhu)
Director of Income Tax
Intl. Taxation-II, New Delhi

6. Two of the columns in the above note are of immediate relevance. Column 8 poses a question whether the assessment is proposed to be made for the first time. This question is directly relatable to Section 151 (2) of the Act since it seeks to ascertain whether the return filed for the AY in question has only been processed under Section 143 (1) of the Act or was it subject to a scrutiny assessment? If, as in the present case, the return was only processed under Section 143 (1) of the Act, then the answer to the question in Column 8 should have been in the affirmative i.e. “Yes”. If the answer is

in the affirmative, the AO then proceeds to fill up Columns 8 (a) and 8 (b).

7. As is evident from the above note prepared by the AO, he chose to answer the question in Column No. 8 in the negative. This meant that according to the AO, the return filed by the Assessee for AY 2006-07 had in fact been picked up for scrutiny and an assessment order was passed under Section 143 (3) of the Act. However, the factual position was to the contrary. The only conclusion, therefore, to be drawn is that when the AO filled up Column 8 with a negative answer, he did not himself peruse the file as that would have clearly shown him whether the return was subject to scrutiny or not. This was definitely, therefore, an instance of non-application of mind by the AO.

8. If in fact the AO had seen the record, then apart from answering the question at Column 8 in the affirmative, he would have, in response to the question in Column 8 (a), again answered in the affirmative and in Column 8 (b) given the date on which the return was filed. Clearly, therefore, it appears that the AO did not peruse the record containing the return filed by the Assessee.

9. At this stage, it must be noted that for AY 2005-06, where a separate order has been passed by the Court today in W.P. (C) No.1353/2013, the stand taken by the Department was that the file for that AY was not traceable. However, as far as the present AY is concerned, the Department has not stated anywhere that the file was not traceable.

10. One mistake led to the other. Having answered the question in Column 8 in the negative, then logically the AO should have filled up Columns 9 (a) and 9 (b). Not only was Column 9 (a) left blank but Column 9 (b) was answered by stating 'under assessment', when in fact there was no pending assessment as far as the AY in question was concerned.

11. The purpose of Section 151 of the Act is to introduce a supervisory check over the work of the AO, particularly, in the context of reopening of assessment. The law expects the AO to exercise the power under Section 147 of the Act to reopen an assessment only after due application of mind. If for some reason, there is an error that creeps into this exercise by the AO, then the law expects the superior officer to be able to correct that error. This explains why Section 151 (1) requires an officer of the rank of the Joint Commissioner to oversee the decision of the AO where the return originally filed was assessed under Section 143 (3) of the Act. Further, where the reopening of an assessment is sought to be made after the expiry of four years from the end of the relevant AY, a further check by the further superior officer is contemplated.

12. In the present case, having started off on a wrong note that the original assessment was scrutinized and an order was passed under Section 143(3) of the Act, the AO proceeded to put up the note to the DIT as is evident from the title of the note but, through the Additional DIT. Both the Additional DIT and the DIT appear to have concurred with the reasons for reopening the assessment but without applying their minds to the fact that the return originally filed was only processed under Section 143(1) of the Act and not

under Section 143(3) of the Act. Had the Additional DIT realised this mistake, he would not have put up the file further for the approval of the DIT. Clearly, therefore, at the level of Additional DIT there was non-application of mind. Had the DIT realized the mistake, he would have declined to make a noting and would have returned the file to the Additional DIT drawing his attention to Section 151 (2) of the Act which did not require any further approval by the DIT where the return originally filed is only processed under Section 143 (1) of the Act. On the contrary, the DIT again recorded his concurrence with the views of the AO and the Additional DIT. Therefore, at the second level also plainly there was non-application of mind.

13. Mr. Rahul Chaudhary, the learned Senior Standing Counsel for the Department, sought to characterise this whole exercise as an 'over-application' of mind. According to him, it was out of anxiety that the reopening of the assessment might ultimately be invalidated, that these officers enthusiastically participated in the exercise by treating the return originally filed as having been subjected to scrutiny under Section 143 (3) of the Act.

14. What is evident to the Court is the non-application of mind by three officers of the Department - the AO, Additional DIT and the DIT. Plainly they did not bother to examine the record themselves.

15. The counter affidavit filed by the Department, in the present case, makes for an interesting read. In para 9, it seeks to explain the lapse as under:

“9. That, the contents of Para No. 23, are wrong, prejudiced and out of context, hence, the same are denied in totality as the objections raised by assessee company has been validly and correctly disposed off vide office letter dated 26.12.2013. Furthermore, the case laws cited by the assessee were distinguishable from the facts & circumstances of the case of assessee, and, hence, out of context. In respect of case laws relied for sanction of issuance of notice u/s 148, the same are distinguishable from the present case. From the records available in this circle for A.Y 2006-07, it was not clear as to whether the scrutiny assessment was done. Therefore, as a matter of abundant caution, prior approval of both Addl. DIT, Range-2, Intl. taxation, New Delhi and DIT (Intl. Tax)-II, New Delhi was taken. Besides, as detailed at Para 2, 3 & 7 above, there was valid reasons for reopening of the reassessment proceedings.”

16. It is not understood how from the records available for AY 2006-07 it was not clear whether a scrutiny assessment was made. The records obviously would have contained the order of the AO under Section 143 (3) of the Act. If, as is the case, there was no such order then clearly the only conclusion to be drawn was that the return was processed under Section 143 (1) of the Act. Since it is not the case of the Department that the file for AY 2006-07 went missing, as was the case for AY 2005-06, the above statement in the counter affidavit filed on 9th September 2014, more than a year after the reopening, is inexplicable.

17. At the highest, the note prepared by the AO should have been candid in Column 8 that it was not clear whether the assessment was being made for the first time or not. That, at least, would have told the Court that the AO had applied his mind to the facts of the case. In any event, if such a

note had been put up to the Addl. DIT and thereafter to the DIT, either of those officers could have applied their minds and ascertained if indeed the return was processed under Section 143 (1) of the Act or picked up for scrutiny. The explanation now offered in the counter affidavit only underscores the non-application of mind at all three levels in the Department.

18. The Court, therefore, quashes the impugned notice dated 28th March 2013 issued by the AO under Section 148 of the Act seeking to reopen the assessment for AY 2006-07. The order dated 26th December 2013 of the AO rejecting the Petitioner's objections is also set aside.

19. The writ petition is accordingly allowed but, in the circumstances, with no order as to costs.

S.MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 31, 2017

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