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

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+ **W.P.(C) 2858/2016 & C.M. APPL.11983/2016**

MASTECH TECHNOLOGIES PVT. LTD ...Petitioner
Through : Mr. Ajay Wadhwa and Mr. Sameep Gupta,
Advocates.

versus

DY. COMMISSIONER OF INCOME TAX ...Respondent
Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

ORDER
13.07.2017

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Dr. S. Muralidhar, J.:

Introduction

1. This petition by Mastech Technologies Pvt. Ltd. challenges two notices dated 23rd March, 2015 and 18th January, 2016 issued to it under Section 148 of the Income Tax Act, 1961 ('the Act') by the Deputy Commissioner of Income Tax, Circle 16(2) [hereinafter referred to as the Assessing Officer (AO)] as well as the order dated 21st March, 2016 rejecting the objections filed by the Petitioner.

2. When this petition was heard on 1st April 2016, while directing issuance of notice to the Respondent, this Court directed that "till the next date of hearing, the assessment proceedings may go but no order shall be passed and in the event an order has already been passed, it will be subject to the

outcome of this writ petition”. The Court is informed that in fact on 30th March 2016, an assessment order was passed by the AO pursuant to the reopening of the assessment under Section 148 of the Act against the Petitioner making the additions as proposed. However, in terms of the interim order passed by this Court, the said order has not been given effect to.

3. It may further be mentioned that during the course of hearing of the present petition on 7th December 2016, the original file concerning the reopening of the assessment was brought before the Court by learned counsel for the Respondent. The Court recorded his statement that “there are other parts of the file which are currently not available.” The Court then directed that the record produced on that date to be kept in a sealed cover by the Court.

4. Today, Mr Rahul Chaudhary, learned Senior Standing Counsel for the Revenue, informed the Court no other part of the file is available with the Department. The Court perused the file kept in the sealed cover and returned it to Mr Chaudhary.

Background facts

5. The background facts are that the Petitioner filed its return of income for the Assessment Year (‘AY’) 2008-09 on 28th September, 2008 declaring loss of (-) Rs.6,10,314. The return was processed under Section 143(1) of the Act and an intimation was sent to the Petitioner.

6. Thereafter, on 18th January 2016, the AO issued a notice to the Petitioner

under Section 148 of the Act in which he stated as under:

“Whereas I have reason to believe that your income in respect of which you are assessable to tax for the Assessment Year 2008-09, has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, I, therefore, propose to re-assess/re-compute the income for the said Assessment Year. I hereby require you to deliver to me within 10 days from the date of service of this notice, a return in the prescribed form of your income/the income of the company in respect of which you are assessable for the said Assessment Year.”

7. Thereafter, three distinct events took place nearly one month later on 16th February, 2016. On that date, the Petitioner wrote to the AO through its Chartered Accountant (CA) in which it was stated that the original return filed under Section 139 (1) of the Act should be treated as the return filed under Section 148 of the Act. A request was made to provide to the Petitioner with the 'reasons to believe' for reopening the assessment under Section 148 of the Act.

8.1 Simultaneously, on the same date i.e. 16th February 2016, two notices were sent to the Petitioner by the AO. One notice was titled as “notice under Section 142(1)” of the Act. By this notice, the Assessee was asked to furnish complete details as per Annexure-A to the notice. The said Annexure-A was also in the form of a letter addressed to the Petitioner dated 16th February, 2016.

8.2 The subject matter of the said letter reads: “Proceedings u/s. 148/147 for AY 2008- 2009- show cause notice - Reg.” This Annexure- A runs into 16 pages. It sets out in detail the background of the incorporation of the Assessee, the details of its directors, filing of its return on 28th September,

2008. Thereafter, it states that the information was received from the Investigation Wing and the return of income was scrutinized. It was found that during the year under consideration, the share capital of the loan of the Assessee had increased to the extent as provided in the information of the investigation.

8.3 In paras 6 to 10 “the details of information received regarding escapement of income” are set out. It essentially states that search was conducted against entry operator S.K. Jain and his group. The investigation wing on a detailed enquiry into the working of S.K. Jain Group concluded that S.K. Jain and his group and Virendra Kumar Jain were accommodation entry providers. The *modus operandi* adopted by them was set out in paras 11 to 18. All that was gathered during the investigation qua the operation of S.K. Jain and his brother Virendra Kumar Jain is set out. The details of the bank accounts of the S.J. Jain Group companies were set out.

8.4 In paras 19 to 21 the “summary of evidence relating to the Assessee” is set out. There is a reference to Annexure- A recovered during the search which enclosed the copies of various documents seized from the premises of S.K. Group along with the report. It was stated that “ the Assessee appears to have taken accommodation entry amounting to Rs.1.35 crores “credit from various companies controlled by S.K. Jain Group through intermediary (A.K. Jain).....”

8.5 In paras 20 to 22, the details of the assessment proceedings and the order of the CIT(A) in relation to Virendra Kumar Jain are set out. Paras 24 to 28 set out the conclusion. The analysis is set out in par 23 and the conclusion in

para 25 that a sum of Rs.1.35 crores “unexplained credit under Section 68 of the Act in books of A/c of the Assessee.”

8.6 In para 26, it was stated that the Assessee had obtained share capital from “M/s Shalini Holdings Ltd. which was a company controlled by S.K. Jain Group and that the transaction in question have also failed to pass the test of creditworthiness of creditor since the company was dummy company and that since the entries had been created “to create web of transaction to camouflage the true nature of transaction.” In para 26, the Assessee was asked to show cause why the sum of Rs. 1.35 crores received by it during A.Y. 2008-2009 should not be treated as unexplained credit under Section 68 of the Act.

8.7 Further, in para 27 the Assessee was asked to show cause why Rs.2,43,000/- representing commission paid at the rate of 1.8% as discussed in Para 22.1 of the notice should not be treated as unexplained investment to procure these accommodation entries. The Assessee was asked to furnish its reply to the AO by 24th February, 2016.

9. On 16th February 2016 itself, a notice under Section 143 (3) of the Act was issued by the AO to the Assessee stating that there were certain points in connection “with the return of income submitted by you on 28th September, 2008 for the assessment year 2008-09 on which I would like some further information.” Interestingly, this notice shows that this was a “proceeding under Section 148 of the IT Act for the AY 2008-2009” The Assessee was asked to attend the office of the AO on 23rd February 2016 at 11:10 am.

10 One week later on 23rd February, 2016, the AO wrote to the Assessee with reference to the request made by its letter dated 16th February, 2016. The said letter reads as under:

“Kindly refer to the above mentioned subject.

The reason recorded for re-opening of assessment for the AY 2008 – 2009 as under:

"It has been gathered that you have received accommodation entries of Rs.1,35,00,000 during the year under consideration."

11. The Assessee through its CA submitted its objections dated 7th March, 2016 to the reopening of the assessment. It was inter alia pointed out that the reasons as communicated to the Assessee were without any particulars and without disclosing the material on the basis of which the conclusion that the Assessee's income had escaped assessment was reached. *Inter alia*, the Assessee pointed out as under:

“1. The reason do not reflect any application of mind for reopening of assessment. There is no material mentioned on the basis of which the assessment has been sought to be reopened. Your good self has merely stated that it has been gathered that the accommodation entries of Rs. 1,35,00,000/- were received during the year under reference. How was the information gathered? What is the source of information?

Even the information is incomplete, vague and does not inspire any confidence. It appears to be a mere allegation and nothing beyond that.

2. It is well settled law that the reasons to believe must reflect a prima facie view based on material available. The reasons must show that the material has been received from a credible source and that material leads to a prima facie conclusion that income has escaped

assessment. As per reasons cited by you, there is no mention of what are the entries alleged to be accommodation in nature. Who have they been received from? Is there any statement or allegation by the person who is claimed to have given accommodation entries? What are the accommodation entries and what are their particulars and how have they been treated by the assessee in its books of accounts?”

12. By a letter dated 21st March, 2016, the AO informed the Assessee that its objections to the reopening of the Assessment had been rejected. Thereafter, the present writ petition was filed and as mentioned hereinbefore an interim order was passed on 1st April, 2016 and on that date, as already noted, the AO issued the assessment order pursuant to reassessment proceedings under Section 147/148 of the Act read with Section 143(3) of the Act.

The file of the Department

13. It must be mentioned at this stage that when the file was produced before the Court it contained the order sheet which begins with the dated of 18th January, 2016. Although the file contained the original “form of record, the reasons for initiating proceedings” under Section 148 of the Act prepared by the AO on 17th March, 2015 with the endorsement in Column No.12 of the Additional Commissioner of Income Tax granting his approval to the reopening of 19th March, 2015, no noting for this action was found on the file. This is of some significance as will be explained hereafter.

14. In Column no.11 of this form against the caption “reasons for believing that income has escaped assessment” it is stated “as per Annexure-A attached.” Annexure- A to this form sets out “reasons for issuing a notice under Section 148(2) of the Act in case of the Assessee.” The reasons read as under:

“In the case of assessee company M/s Mastech Technologies Pvt. Ltd., information has been received from Director of Income Tax (Investigation)-II, New Delhi vide letter dated 12th March 2013 that the Assessee namely M/s Mastech Technologies Pvt. Ltd. had received accommodation entry amounting to Rs.1,35,00,000/- during the FY 2007 – 2008 relevant to AY 2008 – 2009. This information came to the notice of the Investigation Wing during the course of search in the case of Shri Surender Kumar Jain Group of cases (Entry Operator) which is as under:

S.No.	Name of the beneficiary	Amount	Cheque / DD No.	Date	Bank Detail	Name of the company used for providing accommodation entry
1	Mastech Technologies Pvt. Ltd	34,00,000	080504	26.04.2007	UTI	Shalini Holdings Ltd.
2	Mastech Technologies Pvt. Ltd	20,00,000	080682	07.05.2007	UTI	Shalini Holdings Ltd.
3	Mastech Technologies Pvt. Ltd	15, 00,000	080562	16.05.2007	UTI	Shalini Holdings Ltd.
4	Mastech Technologies Pvt. Ltd	15, 00,000	080564	21.05.2007	UTI	Shalini Holdings Ltd.
5	Mastech Technologies Pvt. Ltd	15,00,000	080569	05.06.2007	UTI	Shalini Holdings Ltd.
6	Mastech Technologies Pvt. Ltd	24,00,000	081321	11.10.2007	Axis Bank	Shalini Holdings Ltd.
7	Mastech Technologies Pvt. Ltd	12, 00,000	190248	14.01.2008	Axis Bank	Shalini Holdings Ltd.
	Total	1,35,00,000				

There was thus failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for AY 2008 – 2009 which resulted into escapement of income of Rs.1,35,00,000/- for assessment year

2008- 2009. In view of this, I have reasons to believe that the Income of Rs.1,35,00,000/- chargeable to tax has escaped assessment in the case of M/s Mastech Technologies Pvt. Ltd. for the AY 2008 – 2009 within the meaning of section 147 of the Income Tax Act, 1961. Therefore, I am satisfied that it is fit case to be reopened under Section 147 of the Income Tax Act by issue notice under Section 148”

15. It is a matter of fact that the aforementioned reasons in Annexure-A together with form in which the approval of the Additional CIT was recorded had in fact not communicated to the Assessee by the AO pursuant to the request made by it by its letter dated 16th February, 2016. The only reason conveyed to the Assessee was that set out by letter dated 23rd February, 2016 written by the AO to the Assessee, which is one single line which has been extracted hereinbefore.

Submissions of counsel for the Petitioner

16. Mr. Ajay Wadhwa, learned counsel appearing for the Petitioner, made two broad submissions:

(i) A second notice under Section 148(1) of the Act could not have been issued to the Petitioner when no action was taken pursuant to the first notice issued on 23rd March, 2015. Reliance was placed on the decision of High Court of Gujarat in *Aditya Medisales Ltd. v. Deputy Commissioner of Income-tax, Circle 1(1) [2016] 73 taxmann.com 197 (Gujarat)*.

(ii) The reasons for reopening of assessment as contained in the form with Annexure- A thereto were never communicated to the Petitioner. All that was communicated was a single line which did not set out the particulars or the materials on the basis of which the reasons to believe arrived at by the

AO. There was no tangible material on the basis of which such reasons to believe was formed prior to issuing of notice under Section 148 of the Act.

17. Mr Wadhwa further pointed out that it was only after the disposal of the objections of the Petitioner to the reopening of the assessment, could the re-assessment proceedings have being continued. He submitted that notices issued on 16th February, 2016 under Section 142(1) of the Act and 143(2) of the Act by the AO, which purportedly set out the reasons for reopening of the assessment were not in fact sent pursuant to the request made by the Petitioner for being provided the reasons for the reopening of the assessment. Both these notices therefore, according to Mr Wadhwa, were invalid. He pointed out that the said fresh notice, in any event, did not contain the Annexure-A to the Form in which the approval was granted to the reopening of the assessment by the Additional CIT on 19th March, 2015. Therefore, there was failure to comply with the mandatory requirement of Section 148 of the Act inasmuch as the reasons for reopening of the assessment were not communicated to the Petitioner. Mr Wadhwa pointed out that the second reopening of the assessment under Section 148 of the Act by issuing a second notice on 18th January, 2016, was clearly without approval of the Additional CIT and was, in any event, barred by limitation.

Submissions of counsel for the Revenue

18. Countering the above submissions, Mr Rahul Chaudhary, learned Senior Standing Counsel appearing for the Revenue, submitted that on the strength of Section 129 (1) of the Act, the AO had merely continued the proceedings under Section 148 of the Act which were initiated by issuance of the notice

dated 23rd March, 2015. The Revenue's case, in other words, is that the notice dated 18th January, 2016 did not constitute an initiation of fresh proceedings under Section 148 of the Act.

19. Mr Chaudhary further submitted that on the face of it the notice dated 18th January, 2016 could not be treated as initiation of proceedings under Section 148 of the Act since it had no approval of the Additional CIT. In any event, the reopening of the assessment as on that date was time-barred. He submitted that even if the second notice dated 18th January, 2016 is treated as *non est* for the aforementioned reasons, the reopening of the assessment made on 23rd May, 2015 under Section 148 of the Act remained valid. It was within time and done with the approval of the Additional CIT and the reasons for reopening were clearly recorded on the file.

20. Further, according to Mr Chaudhary although the Petitioner was not furnished the reasons as contained in Annexure-A to the proforma in which the approval to the reopening was obtained from the Additional CIT on 19th March 2015, the reasons were elaborated in Annexure-A to the notice under Section 142(1) of the Act issued by the AO to the Petitioner on 16th February, 2016. He submitted that both the notices under Section 142(1) and 143(2) of the Act dated 16th February, 2016 expressly made a reference to Section 148 of the Act. Therefore, it was obvious that these proceedings were in continuation of the proceedings under Section 148 of the Act which commenced with the notice dated 23rd March, 2015. He submitted that mere absence of any note on the file relating to the initial reopening of the assessment by the AO who replaced the earlier AO would not affect the

validity of the proceedings. He submitted that the decision of Gujarat High Court in *Aditya Medisales Ltd. v. Deputy Commissioner of Income-tax, Circle* (*supra*) was distinguishable on facts and was of no help to the Petitioner.

Analysis and reasons

21. Having considered the above submissions and having perused the file produced before the Court by the Revenue, the Court satisfied that the present case has too many procedural lapses which cannot possibly be sustained as mere irregularities.

22. To begin with, it appears to the Court that for reasons which are not clear, the Revenue did not pursue the notice dated 23rd March, 2015 issued to the Petitioner under Section 148 of the Act. An attempt was made by Mr Rahul Chaudhary to suggest that since the AO who issued the said notice was replaced by another AO, the said notice was not pursued. He, however, insisted that under Section 129 of the Act it was possible to continue proceedings which commenced with the notice dated 23rd March, 2015 and that was in fact what was done on 18th January, 2016 when the second notice was issued by the incumbent AO.

23. A careful perusal of the notice dated 18th January, 2016 reveals that it does not state anywhere that it is in continuation of the earlier notice dated 23rd March, 2015. There is no noting even on the file made by the AO that while issuing the said notice he was proposing to continue the proceedings that already commenced with the notice dated 23rd March, 2015. Annexure-A to the notice under Section 142(1) of the Act reveals what weighed with

the AO when he issued the said notice dated 18th January, 2016. In this document with the sub-heading “proceedings u/s 148/147 of the Act for AY 2008-2009, show cause notice - reg.” the AO states as under:

“Please refer to re-assessment proceedings u/s. 147/148 of Income-tax Act, 1961 pending against you for A.Y. 2008-09. A notice u/s. 148 of the Act was issued **initiating the proceedings vide notice dated 18.01.2016** served upon you through speed post after duly recording the reasons for reopening the same u/s. 148. The case has been reopened u/s. 148 of the Act on account of there being a reason to believe that at least an amount of Rs. 1,35,00,000 has escaped assessment for A.Y. 2008-09. A copy of the reasons for reopening the case is being supplied to you alongwith (*sic* herewith).” (emphasis supplied)

24. It is plain from the above paragraph that according to the AO, the notice dated 18th January 2016 under Section 148 of the Act was issued ‘initiating’ afresh the proceedings. It was not merely in continuation of the earlier proceedings that commenced with the notice dated 23rd March, 2015.

25. Although the facts of the present case are different from those in the case before the Gujarat High Court in *Aditya Medisales Ltd. v. Deputy Commissioner of Income-tax, Circle* (*supra*), it is evident that the entire proceedings under Section 148 of the Act stood vitiated since even according to the AO, he initiated proceedings on 18th January, 2016 on which date such initiation was clearly time barred. Secondly, the fresh initiation did not have the approval of the Additional CIT, as required by law.

26. Consequently, on this ground itself the Assessee is entitled to succeed and all proceedings pursuant to the notice dated 18th January, 2016 cannot be

sustained in law.

27. The second problem is in the manner in which the AO has proceeded. The AO has indeed followed a very strange procedure. As already noticed, the reasons that he furnished the Petitioner by the letter dated 23rd February, 2016 contained only one sentence. For some reasons, the AO did not provide the Petitioner the reasons recorded in Annexure-A to the proforma which contained the approval of the Additional CIT dated 19th March, 2015. Also, clearly, these were not the reasons for reopening of the assessment on 18th January, 2016. Perhaps for that reasons what was communicated to the Assessee on 23rd February, 2016 was a single line which did not have the approval of the Additional CIT.

28. It is not possible to accept the plea of Mr Chaudhary that the Court should proceed as if the second notice dated 18th January, 2016 does not exist. The fact that the said notice was issued by the AO initiating proceedings under Section 148 of the Act is plain from the Annexure-A dated 16th February, 2016 enclosed with the notice under Section 142 (1) of the Act. That being the position, the legal consequences of such action have to follow. Mr Chaudhary's submission that in the absence of any approval granted to the issuance of notice dated 18th January, 2016 by the Additional CIT and with the said notice being time barred, it should not be taken to have been issued at all, is unacceptable.

29. The Court has not been provided with any satisfactory explanation as to why the notice dated 23rd March, 2015 issued by the AO under Section 148 of the Act was not carried to its logical end. The mere fact that the AO who

issued that notice was replaced by another AO can hardly be the justification for not proceeding in the matter. On the other hand, the AO did not seek to proceed under Section 129 of the Act but to proceed *de novo* under Section 148 of the Act. This was a serious error which cannot be accepted to be a mere irregularity.

30. As regards the non-communication of the reasons as contained in Annexure-A to the proforma on which the approval dated 19th March, 2015 was granted by the Additional CIT, there is again no satisfactory explanation. The fact remains that what was communicated to the Petitioner on 23rd February, 2016 was only one line without any supporting material. There appears to be also no clarity of how the case had to be proceeded with by the Revenue. On one date i.e. 16th February 2016, the AO was issuing notice both under Section 142(1) of the Act as well as notice under Section 143(2) of the Act when on that very date the Petitioner had asked for the reasons for reopening by notice dated 18th January, 2016. Again, it is not clear why the AO did not wait for the process of supplying reasons to the Petitioner, considering the Petitioner's objections thereto and passing a reasoned order thereon to be completed before issuing the notice under Section 142(1) and 143(2) of the Act. There appears to be non-application of mind by the AO to the legal requirement.

31. Consequently, the Court noticed that there are numerous legal infirmities which leads to inevitable invalidation of all the proceedings that took place pursuant to the notice issued to the Petitioner first on 23rd March, 2015 and then again on 18th January, 2016 under Section 148 of the Act. Interestingly,

even in the assessment order issued on 30th March, 2016, the AO failed to acknowledge that a fresh notice was issued to the Assessee on 18th January, 2016 and that the Assessee was never communicated the reasons for the reopening as contained in Annexure – A to the form in which the Additional CIT gave his approval on 19th March, 2015.

Conclusion

32. For all of the aforementioned reasons, the notices dated 23rd March, 2015 and 18th January, 2016 - both under Section 148 of the Act and all consequential proceedings including the assessment order dated 30th March, 2016 are hereby set aside.

33. The petition is accordingly allowed in the above terms but in the circumstances no orders as to costs.

S.MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 13, 2017/rd