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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2739 OF 2017**

Multi Commodity Exchange of India Ltd. ... Petitioner
Versus
The Deputy Commissioner of Income Tax & ... Respondents
Ors.

Mr. Riyaz Padvekar, with Mr. Girish Dave, Mr. Mandar Vaidya and
Mr. T. Padvekar, i/b Dave & Padvekar Associates for the
Petitioner.
Mr. N.C. Mohanty, for the Respondents.

**CORAM: M.S.SANKLECHA &
RIYAZ I. CHAGLA, JJ.**
DATED: 23RD FEBRUARY 2018

PC:-

1. This Petition under Article 226 of the Constitution of India challenges the notice dated 30th March 2017 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice dated 30 March 2017 seeks to re-open the assessment for Assessment Year 2010-11.

2. Briefly the facts leading to this Petition is that for the subject Assessment Year 2010-11, the Respondent No.1 – Assessing Officer had on 22 March 2013 passed an assessment order under Section 143(3) of the Act. Thereafter the impugned notice dated 30th March 2017 was issued by the Assessing Officer, seeking to

re-open the assessment for the Assessment Year 2010-11. The reasons recorded in support of the impugned notice dated 30 March 2017 for reopening indicates the basis of the reasonable belief on the part of the Assessing Officer that income chargeable for tax escaped assessment was the special audit report dated 21st April 2014 of Pricewater House Coopers Private Ltd. (PWC) at the direction of the Forward Markets Commission as directed by its letter dated 17th October 2013. The recorded reasons as communicated to the Petitioner are as under:-

The assessee is electronic spot exchange for commodities. The case of the assessee for A.Y.2010-11 was assessed u/s.143(3) of the Income Tax Act on 31.01.2013 assessing the total income at Rs.3,00,51,25,092/-

A special audit was directed by the Forward Market Commission (FMC) in the affairs of the assessee company from inception till 30th September, 2013 to submit its report on the following aspects:-

- *Identification or related parties (as defined by FMC in the terms of reference and a working definition arrived at for the purpose of review)*
- *review of non-trading transactions between MCX and significant relevant parties.*
- *Review of transactions of expenses incurred (individually) above INR 25 lakhs.*
- *Review of trading transactions covered by related parties identified above on the MCX platform.*
- *Review of Risk Management system of the MCX technology platform.*

- Ascertain whether the meetings of the Board of MCX were held in compliance with the companies act, 1956.

The office is in the receipt of the report of the Auditor (Price Water Coopers Ltd.) dated 21st April 2014 (after the completion of assessment) wherein it is observed that several officers of Financial Technologies India Ltd. (FTIL) and its associate and group companies were in control and management of assessee and that erstwhile management of assessee had executed several dubious and illegal transactions with several related parties, entities in which the management had significant interests. The observations in the audit report made it apparent that persons associated with FTIL and erstwhile officers of MCX were acting at the behest of FTIL, and had conspired to commit a large scale economic fraud for their own benefit at the cost of MCX and its shareholders. The new management of the assessee has also filed various criminal complaints against the concerned companies and persons who were involved in the commission of the offence. I have closely perused the report of the auditor and found that the assessee has not disclosed fully and truly all material facts during the assessment proceedings u/s. 143(3). Hence, I have a reason to believe that the income chargeable to tax for the year under consideration has escaped assessment on account of the following issues as discussed in the succeeding paras:-

1. The assessee has paid a sum of Rs.19.53 crores to two companies i.e. MPPL Enterprises Pvt. Ltd. (MPPL) and Ovira Logistics Pvt. Ltd. (Ovira) as placement fees for divestment of their holding in MCX-SX shares. The auditor has observed that there was no proof of these services being provided to the assessee and that the fees were also much higher i.e. 5.40% in case of MPPL and 5.72% in case of Ovira. Further the report specifies that these companies were subsidiaries of IL & FS (the purchaser). Thus, the action of payment of fees to subsidiaries of the identified purchaser was only with the intention of evade taxes. The said factum was also evidenced by email 13-08-2009 from Mr. Krishna Kumar of IL & FS to Mr. Shreekant Javalgekar, the then director of FTIL (associate concern of the assessee). Therefore, the

assessee has claimed excess deduction of **Rs.19.53 crores.**

2. Financial Technologies Knowledge Management Company Ltd. (FTKMC) was a 100% subsidiary of Financial Technologies India Ltd. (FTIL). The assessee is also a subsidiary company of FTIL. The assessee has claimed to have paid training, consultancy and certification charges to FTKMC. In the report, the auditor has stated that there were various non-compliance of contract terms and that they were not in accordance of agreement and the expenses of Rs.8.82 crores was not genuine. A perusal of report makes it apparent that these amounts were recorded as expenses to merely claim deduction with no real activity being carried out. The payments also being governed by section 40A(2) (b) are also excessive and unreasonable. Therefore, the assessee has wrongly claimed deduction of **Rs.8.82 crores.**

3. The assessee has claimed to have engaged Vardhman International (Vardhaman) for the purpose of creating trader's database and paid a sum of Rs.2.21 crores. The site visits by the auditor has revealed that Vardhman does not exist at the address stated in the invoice. There is no evidence to substantiate that the work was performed by Vardhman. Thus, the assessee has claimed excess deduction of **Rs.2.21 crores.**

4. The assessee has claimed donation u/s.80G of the Act to the tune of Rs.2,65,04,500/-. During the year under consideration, the assessee has claimed to have paid donation of Rs.1.75 Crores to Arunodaya Charitable Trust. The report of the auditor has revealed non existence of the aforesaid trust. Thus, the assessee has claimed excess deduction of Rs.87.50 lakhs (being 50% of the amount claimed to have been paid) and that the income has escaped assessment to that extent.

5. The assessee has claimed to have engaged Splash Media and Infra Ltd for the purpose of outdoor advertising to display hoarding at Mahim causeway and Haji Ali locations in Mumbai from Dec. 09 to Mar 10 and expended a sum of Rs.86.03 lakhs for the same. The payments made to Splash Media and Infra Ltd are non

genuine and that even the said party has not recorded the said amount as revenue in its books of accounts. Accordingly, the sum of Rs.86.03 lakhs has escaped assessment as the assessee has claimed excess deduction on this ground.

6. The assessee has claimed advertisement expenses on engaging Mediacom Communications as its media agency for outdoor, print and TV campaigns. However, the assessee could not even submit the confirmation of Mediacom Communication.

7. NBHC was a wholly owned subsidiary of the assessee which was sold to FTIL, related to the assessee company. The assessee has claimed to have paid a sum of Rs.4.51 crores as warehousing charges to NBHC. The assessee has been unable to provide address of the warehouse for which charges have been claimed. Site visits by the auditor has revealed the some of the warehouse did not exist and some belonged to other companies. The assessee has also paid rent for unused warehouses where no physical deliveries had taken place. Thus, the assessee has claimed excessive expenditure of Rs.4.51 crores as warehousing charges.

8. The assessee has entered into technology agreements with FTIL, management. The auditor has pointed that there was no proper procedure or bidding for awarding these agreements. After the change in the assessee's management, these charges have reduced by 1/3rd of actual consideration. This shows that highly unreasonable expenditure is paid to the related concern. FTIL and has been claimed by the assessee in the year under consideration.

9. The assessee disclosed around 235 related parties. A background and public domain check has identified 676 additional related parties of the assessee. Various payments to these parties have been made without underlying documents or agreements. In this regard, the genuineness and reasonableness of these expenses stands unsubstantiated.

In view of above and considering the material on record coupled with the fact of voluminous and complex nature of the accounts, it is established that the accounts of the

assessee are manipulated on various grounds. Hence, the assessee has not disclosed fully and truly all material facts necessary for the assessment carried out u/s. 143(3) for the year under consideration. Accordingly, I have reason to believe that the income chargeable to tax of the assessee of more than Rs.36.80 crores for the year under consideration has escaped assessment within the meaning of Section 147 of the Income-tax Act, 1961 for Assessment Year 2010-11. Hence, the assessee's case is required to be reopened for reassessment u/s. 147 of the Act for Assessment Year 2010-11. As per section 151(1) of the Act, since the case is being reopened after the expiry of four years from the end of the A.Y.2010-11, notice u/s 148 is to be issued after obtaining administrative approval of Pr. Commissioner of Income Tax.

3. The Petitioner objected to the issuing of the impugned notice before the Assessing Officer. However, the same was rejected by an order dated 28th July 2017 by the Assessing Officer.

4. The first grievance of the Petitioner is to the jurisdiction of the Assessing Officer to issue the impugned notice dated 30th March 2017 particularly when the regular Assessment was completed on 22 March 2013 under Section 143(3) of the Act. The impugned notice admittedly is beyond a period of four years from the end of the Assessment Year 2010-11. Therefore, it is submitted that in the absence of any failure to fully and truly disclose of material facts, the impugned notice is hit by the first proviso for Section 147 of the Act. This is more particularly so as

the reasons do not indicate the failure of which material fact not being disclosed. In particular it is submitted that at the time of regular assessment proceeding leading to the order dated 30 March 2017, the special audit report dated 21 August 2014 was not even published much less available.

5. We note that the assessment for the subject Assessment Year 2010-11 was completed on 22nd March 2013 under Section 143(3) of the Act. At that time admittedly the report of the special auditor dated 21st April 2014 was not available. Therefore, it is contended that the impugned notice would be hit by the proviso as it is beyond the period of four years relevant to the Assessment Year 2010-11, as there was no failure on the part of the Petitioner to truly and fully disclose material facts necessary for assessment. This was at the time when the assessment was completed on 22nd March 2013. In support reliance is placed upon the decision of the Apex Court in the case of **Indian Oil Corporation v. Income Tax Officer**,¹. The above decision will have to application, as in that case during the regular assessment proceeding allocation of expenses had been done on the basis of the auditor's opinion. During the regular assessment proceedings auditor's opinion was sought for, but not produced. Nevertheless the

¹ (1986) 3 Supreme Court Cases 409.

regular assessment was completed without awaiting the auditor's opinion. In the above circumstances, the Court held that there is no failure to disclose fully and truly all basic facts. As against the above in this case the special audit report dated 21st April 2014 is not available during the regular assessment, leading to order dated 22 March 2013. The special audit report is the fresh tangible material now available with the Assessing Officer. On examination of the special audit report dated 21 August 2014, the Assessing Officer found that claims made by the assessee – Petitioner for deduction and expenditures were excessive and to that extent the claims made were *prima facie* bogus (subject to examination in assessment proceedings). In fact the Supreme Court in ***Phool Chand Bajrang Lal & Anr. v. Income Tax Officer & Anr.***² has observed as under:-

“... Acquiring fresh information, specific in nature and reliable in character, relating to a concluded assessment which went to expose the falsity of the statement made by the assessee at the time of the original assessment was different from drawing a fresh inference from the same facts and material available with the Income-tax Officer at the time of the original assessment proceedings. The two situations were distinct and different. Where the transaction itself, on the basis of subsequent information was found to be a bogus transaction, the mere disclosure of that transaction at the time of the original proceedings could not be said to be a disclosure of “true” and “full” facts and the Officer would

2 (Vol.2013 ITR p.456.

have jurisdiction to reopen the concluded assessment in such a case”.

6. Therefore in the above circumstances *prima facie* the Petitioner cannot take shelter of the first proviso to Section 147 of the Act. Further the reasons recorded does indicate that the special audit report dated 21 April 2014 is the basis of the reopening notice. Thus in the above facts, it cannot be said that the Assessing Officer did not have reasonable belief that *prima facie* income chargeable to tax has escaped assessment.

7. The second grievance is of non-application of mind by the Assessing Officer to issue the impugned notice, as it is issued upon the borrowed satisfaction of the special audit. On perusal of the reasons recorded, we find that it does indicate application of mind by the Assessing Officer to the facts in the context of audit report to reach the reasonable belief that the income chargeable to tax has escaped assessment. The special audit report was the tangible material which formed the basis of the Assessing Officer's reasonable belief. Thus there is no merit in the above grievance also.

8. It was then contended that the special audit report dated 21 April 2014 was for purposes other than to detect tax evasion.

Thus, it could not be relied upon as tangible material to issue the impugned notice. In support our attention was invited to fact that the special audit report was directed by the Forward Market Commission on 17th October 2013 and the scope of the audit was *inter alia* to examine in terms of clauses 10 (a) to 10 (d) are as follows:-

- a) Examine the trading data of IBMA and trading done by any other entity related to the promoters or group companies directly or indirectly, on MCX.*
- b) review the Risk management system (margining system, defaults, warehouses etc.) at MCX.*
- c) Examine all related party (entities related directly or indirectly with the group companies of the promoter / anchor investor) transactions of any nature.*
- d) All major financial transactions above value of Rs.25 lakh.*

9. Further attention is also invited to the disclaimer clause of audit report dated 21st April 2014 that the audit report has been prepared for Forward Market Commission and the Petitioner. Thus, the same cannot be relied upon by third party and further that the it does not constitute examination / review in accordance with the generally accepted audit standards prescribed by Institute of Chartered Accountants of India. Therefore, the report prepared on certain information which may be hearsay and may not be accurate and reliable could not be relied upon which is a hearsay, has been identified in the report.

10. We find that the power of the Assessing Officer to reopen an assessment under Section 147/148 of the Act on the basis of reasonable belief is not fettered or circumscribed, to be formed only on material found during a tax audit or with material found during examining a case of tax evasion. In fact the basis of fresh tangible material is unqualified i.e. the source of the material could be from any place, however, the only pre-condition is that on the basis of the material so found / obtained by the Assessing Officer, he himself must form a reasonable belief that income chargeable to tax has escaped assessment before issuing a notice for reopening. In fact the Apex Court has observed in ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***³ has observed that if the Assessing Officer for whatever reasons (material) has reason to believe that income chargeable to tax has escaped assessment then jurisdiction is conferred upon the Assessing Officer to reopen the assessment. Without prejudice to the above in this case, the remit / scope of report of the special audit included expenditure in excess of Rs.25 lakhs, related party transactions etc. Therefore there is no merit in this objection and *prima facie* the Assessing Officer has jurisdiction to issue the impugned notice.

3 (2007) 291 ITR 500 (SC).

11. It was next contended that criminal proceedings initiated on the basis of the special audit report was quashed by this Court. Therefore, the same cannot form the basis of reasonable belief of the Assessing Officer. The considerations which come into play in criminal proceedings and in tax proceedings are entirely different. The special audit report dated 21 August 2014 has itself not been declared to be bad by any Court. The facts recorded therein may not form the basis for criminal proceedings but from that to conclude that even a reasonable belief of income chargeable to tax has escaped assessment (cannot be formed subject to further enquiry during assessment proceedings) is to say that least, too much of a stretch. This is only a *prima facie* view and the Petitioner would have full opportunity to establish that no income chargeable to tax has escaped assessment during the reassessment proceedings. Therefore, this grievance also does not have merit.

12. It was lastly submitted that the objection to the reasons were not appropriately considered by the order disposing of the objections. We have at this stage found that the reasons recorded by the Assessing Officer does indicate that there was sufficient material for the Assessing Officer to come to *prima facie*

satisfaction that the income chargeable to tax has escaped assessment. The objections raised by the Petitioner have been dealt with in the light of the Apex Court decision in **G.K.N. Driveshafts (P.) Ltd. vs. ITO**⁴ to have a second look at the notice after consideration of the Petitioner's – Assessee's objections. The order disposing of the objections have dealt with the objections in some detail in as much as each objection has been considered and found unacceptable. This view while disposing of the objection does not close all options on merits, which are available to the Assessee in the reassessment proceedings. The order disposing of objections, in our view on facts cannot be said to be suffering from non-application of mind to the objections raised by the Petitioners. In the above view, this grievance of the Petitioner also does not have merit.

13. We are conscious of the fact that there is sanctity attached to the orders of the assessment passed under Section 143 (3) of the Act. The Assessing Officer is entitled to reopen an assessment only if the jurisdictional requirements as pointed out under Section 147 and 148 of the Act satisfied. Therefore, though the orders of assessment passed under Section 143 (3) of the Act have sanctity

4 259 ITR 19.

attached, it does not grant immunity to an assessee from proceedings for reopening of assessment year of Section 147 / 148 of the Act, provided the jurisdictional requirements therein are satisfied, at the time when the reopening notice is issued.

14. In the above view, we find no merit in this Petition. Accordingly, the Petition is dismissed.

15. At this stage Mr. Padavekar, the learned counsel appearing for the Petitioner states that the Petitioner seek stay of the order for a period of six weeks from today. We have at the stage of admission found no merit in the Petitioner's case. There is no reason why the Petitioner should not subject itself to reassessment proceedings under the Act. The issues raised by the Petitioner in this Petition are not novel and / or debatable issues. If we were of that view, we would have admitted the Petition for consideration. Therefore, we decline the prayer for stay.

(RIYAZ I. CHAGLA J.)

(M.S.SANKLECHA, J.)