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

Date of Decision: 08.02.2018

+ ITA 935/2009

COMMISSIONER OF INCOME TAX DELHI IV Appellant
Through: Mr. Raghvendra Singh, Adv.

versus

GEE KAY FINANCE & LEASING CO. LTD. Respondent
Through: Dr. Rakesh Gupta with
Ms. Somil Agarwal, Ms. Monika Ghai &
Mr. Rohit Kumar Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE VINOD GOEL

S. RAVINDRA BHAT, J.(ORAL)

1. The question of law framed for this appeal – on 09.10.2009 is as follows:

“1. Whether ITAT was correct in law in holding that the notice issued by the Assessing Officer u/s 148 of the Act beyond the 04 years after the end of relevant assessment year was bad in law as the necessary approval of Chief Commissioner or Commissioner of Income Tax as per the provisions of Section 151 (1) of the Act had not been obtained by the Assessing Officer?”

2. The facts in brief are:

The assessee's return declared a loss, filed on 25.11.1997 was processed under Section 143(1); later a scrutiny assessment was completed on 30.03.2000 at a loss of ₹29,94,053/-. A notice was issued under Section 148 of the Income Tax Act, 1961 (hereafter referred to as "the Act") on 26.03.2003 leading to re-assessment. After rejecting the assessee's challenge to the re-opening, the AO proceeded to complete the re-assessment and added back substantial amounts under Section 68 of the Act (to the tune of ₹2,71,62,000/-) and completed the assessment. The CIT(A) affirmed the order of the Assessing Officer. The assessee appealed contending that the issuance of notice under Section 148 of the Act, was without jurisdiction as the concerned Assessing Officer (the Deputy Commissioner of Income Tax) proceeded to re-open the assessment without the sanction of the Commissioner of Income Tax, as required by Section 151(1). This contention found approval by the ITAT. The ITAT relied upon the judgment of the Calcutta High Court in *East India Hotels Ltd. v. Deputy Commissioner of Income Tax* (1993) 204 ITR 435. Reliance was also placed upon the judgment of the Allahabad High Court in *Dr. Shashi Kant Garg v. Commissioner of Income Tax* (2006) 285 ITR 158. Following the ratio in the judgments of the two High Courts, the ITAT allowed the assessee's appeal.

3. Counsel for the Revenue relies upon various amendments effected to Section 151 of the Act – through the Direct Tax Laws (Amendment) Act, 1987 (with effect from 01.04.1989); Finance Act, 1990 (with effect from 01.04.1990); and Finance (No.2) Act, 1998 (with effect from 01.10.1998). It is pointed out that before the 1989 amendment, the structure of the provision (Section 151 of the Act) was entirely different. It was also the Board which could grant approval to any Assessing Officer, as a condition precedent for issuance of notice in the event of expiry of 8 years from the end of the relevant assessment year. In other cases, after 4 years of such expiry, the Chief Commissioner or Commissioner had to be satisfied that the reasons of the AO, were justified. With the 1989 amendment, urged counsel for the Revenue, the position changed and notices could be issued by Assessing Officers of the rank of Assistant Commissioner or Deputy Commissioner, *suo moto*, without the approval of a higher official provided it was within the period of four years from the end of the assessment year. It was urged that in cases of assessments completed by Assistant Commissioners/Deputy Commissioners, there was no need for obtaining approval of the Chief Commissioner/Commissioner. Emphasis was placed upon the expressions “no such notice” and “Assessing Officer aforesaid” to say that it was only in the event of completed assessments by AOs, below the rank of Deputy Commissioner/Assistant Commissioner that sanction or approval was necessary. It was

submitted that this statutory position remained more or less unchanged except that in the case of Section 151(1), after the amendment of 1998 [Finance (No. 2) Act of 1998 with effect from 01.10.1998] approval of the Joint Commissioner was necessary, wherever completed assessments were made by officers below the rank of Assistant Commissioner or Deputy Commissioner.

4. Mr. Raghvendra Singh, learned counsel who argued for the Revenue submitted that the interpretation placed by the Calcutta High Court in *East India Hotels Ltd. (supra)* renders the two expressions concurrent in the proviso and virtually results in the proviso becoming an independent sub-section or provision by itself, beyond the Parliamentary contemplation.

5. Dr. Rakesh Gupta, learned counsel who appeared on behalf of the assessee urged that the view of the Calcutta High Court is sound and does not require to be dissented from. He relied upon Section 2(7A) and highlighted that the changes which occurred in the definition of “Assessing Officer” led to inclusion of Joint Commissioner as one of the assessing authorities only with effect from 1998. However, as far as the approval in the case of completed scrutiny assessments, which needed to be beyond the period of 4 years was concerned, there could be no quarrel with the proposition, the plain manner of the proviso [Section 151(1)] was that in the event the Joint Commissioner completed the assessment, no approval was essential but in all other cases approval was essential. Learned

counsel also highlighted that in other cases i.e. where assessments were merely framed under Section 153(1), the Parliamentary intent was to ensure that the approval of the higher authorities was always necessary, by reason of Section 151(2). The Calcutta High Court after noticing, the provision which existed when it decided the case (i.e. on 13.02.1992), in relation to notice issued on 13.08.1991) observed as follows:

“..... Therefore, the satisfaction of the Chief Commissioner or the Commissioner is a sine qua non before issuance of a notice under section 148 by the Assessing Officer. The Assessing Officer may be of the rank of an Income-tax officer or the Astd. Commissioner or the Dy. Commissioner, but when such notice is to be issued after the expiry of four years after the end of the relevant assessment year, the sanction of the Chief Commissioner or the Commissioner is a pre-condition.

In that view of the matter, I am of the view that the notice issued under section 148 of the Income-tax Act beyond four years after the end of the relevant assessment year is bad in law inasmuch as the sanction of the Chief Commissioner or the Commissioner was not obtained before issuance of the notice.”

6. The changes brought about by the amendments, particularly, the amendment brought into force with effect from 01.04.1989, constituted the subject matter of Board's circular, issued on 31.10.1989. The relevant extract of that circular reads

as follows:

“7.10. For the same reasons as discussed in para 7.7 ante, the Amending Act, 1987 has substituted a new section 151, which contains substantially changed provisions. The issuing or sanctioning authorities will now depend upon whether the case is a scrutiny case [i.e., where an assessment order has been passed under section 143(3) or section 147] or non-scrutiny case, and also the period after which the case is being opened or re-opened. Thus, a scrutiny assessment will not be re-opened by an Assessing Officer of the rank below the rank of an Assistant Commissioner. After the expiry of 4 years from the end of the relevant assessment year, a scrutiny assessment can be re-opened only with the approval of the Chief Commissioner or Commissioner. A non-scrutiny case can be opened or re-opened by any Assessing Officer and after the expiry of 4 years from the end of the relevant assessment year it can be opened or re-opened with the approval of the Deputy Commissioner. However, where the Assessing Officer is the Deputy Commissioner himself, no sanction of the higher authority will be necessary for opening or re-opening a non-scrutiny case.

7.11 The new provisions of Section 149(1) regarding time limits and section 151 regarding issuing and sanctioning authorities for the issue of a notice under section 148 are explained in the following chart:

<i>Sl. No.</i>	<i>Upto 4 years</i>	<i>Beyond 4 years but upto 7 years</i>	<i>Beyond 7 years but upto 10 years</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>
<i>1.Scrutiny cases {i.e., where an assessment order has been passed under section 143(3) or 147}</i>	<i>Assessment can be reopened only by an Assessing Officer of the rank of an Assistant Commissioner or Deputy Commissioner</i> <i>(ii) Assessment can be re-opened whatever be the amount of income which has escaped assessment</i>	<i>(i)Same as (1) in Col.(2)</i> <i>(ii) Assessment can be re-opened only if the income which has escaped assessment is Rs. 50,000 or more for that year</i> <i>(iii) Assessment can be re-opened only with the approval of the Chief Commissioner or Commissioner</i>	<i>(i)Same as (1) Col.(2)</i> <i>(ii) Assessment can be re-opened only if the income which has escaped assessment is Rs. 1 lakh or more for that year.</i> <i>(iii) Same as (iii) in Col. (3).</i>
<i>2. Non-scrutiny cases {i.e. where no assessment</i>	<i>(i)Any Assessing Officer can re-open an</i>	<i>(i)Same as (i) in Col.(2).</i> <i>(ii)Assessment</i>	<i>(i)Same as (i) in Col.(2)</i> <i>(ii)Assessment</i>

<i>order has been passed under section 143(3) or 147}</i>	<i>assessment himself.</i> <i>(ii) Assessment can be re-opened whatever be the amount of income which has escaped assessment.</i>	<i>can be re-opened only if the income which has escaped assessment is Rs. 25,000 or more for that year.</i> <i>(iii) Assessment can be re-opened by Assessing Officer below the rank of Deputy Commissioner only with the approval of the Deputy Commissioner.</i>	<i>can be re-opened only if the income which has escaped assessment is Rs. 50,000 or more for that year.</i> <i>(iii) Same as (i) in Col.(3).</i>
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7. It is quite obvious from a reading of the above circular that the Revenue authorities at a higher level existed and interpreted the amendments in the manner that the Calcutta High Court did. The arguments of the Revenue by laying emphasis on the expression “as aforesaid” appeared to have some force. However, a closer reflection would reveal that “as aforesaid” is capable of two interpretations – narrow – textual one as is urged on behalf of the Revenue and a broader one.

In the contention of Section 151(1), the proviso when it refers to an Assessing Officer, could also mean not merely an Assessing Officer below the rank of Assistant Commissioner and Deputy Commissioner but also all Assessing Officers. The latter interpretation has been clearly followed by the Calcutta High Court – as well as the Revenue authorities. There is yet one more reason which persuades us to reject the Revenue's submission to disagree with the Calcutta High Court's judgment which is that in the case of a non-assessment (i.e. when the assessment is framed under Section 143(1), a higher standard of approval of the Joint Commissioner is insisted upon. The interpretation given by the Calcutta High Court – where endorsed in this judgment, places even scrutiny assessment at par with such assessments and ensures that there is no disconnect and a minimum safeguard, by way of an opinion by the higher official expressing satisfaction is on the record before a notice is issued under Section 148, in respect of a period beyond 4 years from the end of the relevant assessment.

8. For the above reasons, this Court is of the opinion that the question of law framed needs to be and is answered in favour of the assessee; the appeal fails and is accordingly dismissed.

S. RAVINDRA BHAT, J

VINOD GOEL, J

FEBRUARY 08, 2018/kks