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

+ ITA 436/2009

S.HARISHANKER

..... Appellant

Through

versus

COMMISSIONER OF INCOME TAX

..... Respondent

Through : Mr. Deepak Anand,
Standing Counsel for
Revenue.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

ORDER

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05.09.2018

Mr. Deepak Anand, Standing Counsel for the Revenue is present and he was requested to appear and assist this court in the present appeal on behalf of the Revenue; a paper book of this case was also provided to him.

The following two questions of law were framed in this case:

“(i) Whether the Income-Tax Appellate Tribunal had erred in law in holding that the assumption of jurisdiction by the Assessing Officer under Section 147 of the Income-tax Act, 1961 was valid?”

“(ii) Whether the Income-tax Appellate Tribunal was justified in law in holding that the non-compete fee of

Rs.88,00,000/-received by the assessee was revenue in nature?”

Regarding question no.1, on 09.02.2002, the reassessment notice under Sections 147/148 was issued *inter alia* on the following reasons :

“The income tax return for assessment year 1999-2000 was filed on 29th July 1999 claiming a refund of Rs.26,61,282/-. The assessee was the promoter of overseas Cargo Service Private Limited and had entered into as Asset Transfer Agreement with M/s Bax Global India Pvt. Ltd. for transfer of assets of OCS to Bax. As agreed under the ATA the assessee had entered into a Non Competition Agreement with BAX. Under the terms of NCA, the assessee had undertaken not to engage directly or indirectly, either alone or in association with any person or person in any activity, which will be in competition with the current business of BAX and for observing the restrictions specified in NCA, a consideration amounting to Rs.88 lacs was payable to the assessee by BAX.

The assessee had paid advance tax of Rs.27,60,000/- on the above-mentioned amount of Rs.88 lacs and is now claiming refund of Rs.26,61,282/- on the contention that as it is (the amount of Rs.88 lacs) capital receipt, it should not be chargeable to tax. However, the income of the assessee of Rs.88 lacs received by him should be chargeable to tax as it is not a capital receipt but is to be charged to income tax under the head “Profit & Gains of Business or Profession”. In terms of section 28 of Income Tax Act, 1961, Section 28(ii) is reproduced hereunder to bring the assessee in net of this provision.”

The assessee protested and represented against the re-assessment contending that the non-compete fee was duly disclosed in his return; he pointed out to a note appended to the original return filed. It was submitted that since the assessment was completed after scrutiny, in the absence of the fresh material, the re-assessment was impermissible. Apparently, along with the assessee, the other co-promoter i.e. Atul Kumar Swami was also served with an identical notice, which was phrased in the same manner. The re-opening of the assessment was contested on the ground that there was no tangible evidence to show that the assessee had withheld any material, information or documents. This court in ITA No.112/2014 title *Commissioner of Income Tax-XVI vs. Shri Atul Kumar Swami* rejected the Revenue's appeal on 18.03.2014, stating as follows:

“3. The assessee objected to the reopening of the assessment contending that there was no fresh or tangible material discerned by the revenue for notice for reassessment. This objection was overruled and the AO added back the said amount as business income observing that the nature of the consideration receipt having regard to the terms of the agreement was such that it was income and not capital receipt. The assessee preferred an appeal but without success to the Commissioner (Appeals). The Commissioner (Appeals) had during the pendency of the appeal called for remand report and after discussing its contents rejected the appeal.

4. The Income Tax Appellate Tribunal after considering the decision of the Supreme Court in CIT vs. Kelvinator (India) Ltd. (2010) 320 ITR 561 as well as the later rulings of the Supreme Court and this Court held that there was no tangible material and that the mere circumstance that advance tax to the tune of Rs.27.6 lakhs was paid did not amount to admission by him. The learned counsel for the revenue contends that having regard to the Explanation 1 of section 147 read with section 143(1), the reopening of the assessment in this case was justified. She also argued that the agreement entered into by the assessee under which the amount was paid had not been filed during the assessment stage. This according to the revenue justified the reassessment proceedings.

5. As to what constitutes valid “reasons to believe” is no longer a matter of debate. So long as the law declared in Kelvinator (supra) stands, a valid reopening of assessment has to be based only on tangible material to justify the conclusion that there is escapement of income. In the present case the note forming part of the return clearly mentioned and described the nature of the receipt under a non-compete agreement. The reasons for the notice under section 147 nowhere mentioned that the revenue came up with any other fresh material warranting reopening of assessment. In these circumstances, the Court is of the opinion that mere conclusion of the proceedings under section 143(1) ipso facto does not bring invocation of powers for reopening the assessment. We are satisfied that the Tribunal’s reasons are justified and do not call for any interference. The appeal is accordingly without merit and is dismissed.”

This being the correct position with respect to the re-opening of the assessment, the court is of the opinion that the first question of law has to be answered in favour of the assessee. Accordingly, the re-opening of the assessment is held to have been invalidly done.

As far as question no.2 is concerned, the facts are that the assessee was carrying on export-import business consultancy and a cargo forwarding agency - along with Shri Atul Kumar Swami. The assessee, under the name and style of M/s Overseas Cargo Services Pvt. Ltd. apparently entered into an Asset Transfer Agreement with M/s Bax Global India Pvt. Ltd. on 01.06.1998. On the same day, the Non-Competition Agreement was entered into; contemporaneously, the assessee also entered into employment of M/s Bax Global India Pvt. Ltd. It is contended on behalf of the assessee that in the re-assessment proceedings, the addition by the disallowance of the amounts claimed as non-compete fee was unjust. Learned counsel relies upon an amendment to Section 28(va) of the Income Tax Act, 1961, which was made w.e.f. 01.04.2017, and also relied upon the judgments of this court in *Principal Commissioner of Income Tax-11 v. Satya Sheel Khosla*, 2018 SCC OnLine Del 6867 in ITA No.289/2016 and *Commissioner of Income Tax, Del vs. Tara Sinha*, 2017 TaxPub(DT) 3850 (Del-HC) : 2017 SCC OnLine Del 9811. He also relied upon the Supreme Court ruling in *Commissioner of*
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Income Tax v. Sapthagiri Distilleries Ltd., (2015) 53 Taxmann.com 218 (SC).

On the merits of the above, we notice that all the Revenue authorities i.e. the Assessment Officer (A.O.); Commissioner of Income Tax (CIT) and the Income Tax Appellate Tribunal (ITAT) have ruled against the assessee. The basis of this adverse view is that once the assessee entered into the Asset Transfer Agreement and parted with the business, as it were, and also concurrently entered into the employment with M/s Bax Global India Pvt. Ltd., there was no question of any non-compete fee or consideration of that kind for the reason; the rationale being that upon exclusive full-time employment, there was no occasion for the assessee to compete against his employer. Therefore, it was submitted that the A.O. and the lower appellate authorities concluded that the amount claimed as non-compete fee was really a camouflage for what was otherwise in excess of permissible deductions on account of salary and perquisites under Rule 3(1) of the Income Tax Rules.

This court is of the opinion that the judgment of the Supreme Court in *Sapthagiri Distilleries Ltd.* (supra), relied upon by the assessee is not relevant in the facts of this case. The question of non-compete fee would arise in circumstances when an assessee or a business vendor continues to transact business – possibly in a different line and does not set itself up in competition with the other entity, with whom it enters into such a non-compete

agreement. Clearly, in the facts of this case, the terms of employment prohibited the assessee from entering into any business transaction, much less from competing with his own employer.

In these circumstances, we perceive no error of law in the approach or conclusions of the Tribunal on the second question of law. It is accordingly answered against the assessee and in favour of the Revenue.

For the above reasons, this appeal is partly allowed.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

SEPTEMBER 05, 2018/aj