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

Date of decision: 02.08.2018

+ **W.P.(C) 7117/2017 & CM APPL. 29526-29527/2017**

BHARAT HOTELS LTD.

..... Petitioner

Through: Mr. Ajay Vohra, Sr. Advocate with
Mr. Gaurav Jain and Mr. Aditya
Vohra, Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME-TAX & ANR.

..... Respondents

Through: Mr. Raghvender Singh, Advocate.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

HON'BLE MR. JUSTICE S. RAVINDRA BHAT (ORAL)

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The petitioner/assessee complains that the reassessment notice issued to it under Sections 147/148 of the Income Tax Act, 1961 ('the Act' hereinafter) is illegal and unsustainable.

2. The assessee had, during the relevant Assessment Year (A.Y.) (i.e. 2010-11) and for other periods, imported an aircraft, which it claimed, at the stage of importation that it was needed for charter hire. Since the Customs Authorities had issues with that claim and wished to value the imported items at a higher rate, the petitioner approached the Settlement Commission, which ultimately made its order on

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02.03.2012. In the meanwhile, the petitioner's claim for depreciation – in respect of the aircraft (which it claimed was used for business purposes) was a subject matter of assessment for A.Y. 2010-11, which was completed on 30.03.2012 under Section 143(3) of the Act. The petitioner alleges that in its returns and the supporting documents, the claim for business use of the aircraft was made, which entitled it to depreciation at ₹5.21 Crores. It is also alleged that the Assessing Officer made proper enquiries, which included eliciting of appropriate documents. after which it completed the scrutiny assessment on 30.03.2012. In this background, when the petitioner received the impugned reassessment notice dated 31.03.2017, it approached the Court. The Revenue's communication setting out "the reasons to believe", which impelled it to re-open the assessment, *inter alia*, states that information was received by the investigation unit on 22.03.2016 which stated that the Settlement Commissions had imposed a penalty having regard to the evasion of customs duty on the illegal import of aircraft, which led to deeper examination and that upon enquiry the assessee stated that the aircraft was used for its business purposes. The investigation wing of the Revenue scrutinised the ITD database and discerned that for the appropriate order, the income claimed by the assessee in its return was nil and that it had claimed ₹52.95 crores as depreciation @ 40%. On the basis of these background facts, the communication under Section 147 of the Act set out the reasons as follows:-

"2. Simultaneously, enquiries were conducted by Directorate of Investigation, Delhi to examine the issue

from income tax angle. In this regard, the assessee company was required to explain the utilization of aircraft for the business purpose and also the details of depreciation claimed on the asset.

3. The observation made by ADIT (Inv.) is as below:-

"The assessee company in its reply had claimed that the aircraft was exclusively used only for business purpose by chairperson/ directors/ executive directors of the assessee company. The flying details of the aircraft Embraer Legacy - 600 EMB-1358J were submitted claiming to be used for business purpose. Further the assessee company in its submission had claimed that the business trips were undertaken by the chairman cum managing Director/ Director/ Executive Directors/ Officers/Associates to the hotels under construction, hotels under operation and to explore new business opportunities for developing destination. However, the analysis of the submission filed by the assessee company shows that the reply filed is general and vague in nature. Nowhere the reply of assessee mentions the business responsibilities of the person who was undertaking these trips. The assessee company has also failed to provide the documentary evidence in support of the claim of the business activities undertaken by these employees during such trips. It has also been submitted that as the aircraft was brought to India in July 2009 and the depreciation on the aircraft was claimed for AY 2010-11 and 2011-12 @ 40%. Hence, the assessee failed to substantiate the utilization of Embraer Legacy- 600 EM-135BJ aircraft for the business

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purpose and claim of depreciation and other expenses on the asset during the F.Y 2009-10."

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6. *Certain new facts have come on record which is as follows:-*

i. In this case penalty was imposed on the issue of custom duty evasion on the purchase of aircraft by Settlement Commission.

ii. The aircraft was purchased by the assessee company in F.Y. 2008-09 and the assessee company has received share capital during A.Y 2008-09 from foreign entity Dubai Venture Group based in Dubai and registered in Cayman Islands.

7. In view of the above mentioned facts and findings, it is evident that the aircraft Embraer Legacy- 600 EM-135BJ was not used for business purpose and the amount of Rs.52,95,54,449/- claimed as depreciation by assessee company is disallowable and has escaped taxation. Hence, I have a reason to believe that income of Rs.52,95,54,449/- as per aforesaid has escaped assessment in the case of assessee relevant to A.Y. 2010-11."

3. Mr. Vohra, learned senior counsel urges that given the statutory mandate that there should be failure on the part of the assessee as a jurisdictional pre-condition by virtue of proviso to Section 147 of the Act, the re-opening of the assessment in this case, is fraught and illegal.

4. It was submitted that all the relevant materials were disclosed to the Revenue in the returns and in the due course of assessment for the

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concerned A.Y. 2010-11, which ultimately crystallized the order under Section 147(3) of the Act, therefore, given the nature of the wording of the proviso to Section 147(1) of the Act, the Revenue could not have re-opened the assessment.

5. Learned counsel for the Revenue, on the other hand, points out that the investigation report as well as the materials which triggered it i.e. the payment of higher customs duty and penalty, led to the report submitted to the Revenue Authorities on 22.03.2016. On the basis of this, the Revenue examined the original returns and found that the depreciation was excessive. Learned counsel relied upon the Explanation 2(c)(iv) to the second proviso to Section 147 of the Act and submitted that in the case of excessive loss or depreciation claims, the proviso has to be appropriately and harmoniously construed, therefore, the reassessment notice was legal.

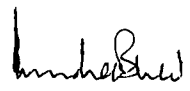
6. Given the factual narrative, there is no doubt that the assessee had disclosed in its returns and perhaps in the relevant documents about the depreciation claims and the justification to it. Nevertheless, the AO had no occasion to examine it. Furthermore, the Court notices that at the relevant time, in the returns, the assessee claimed "nil returns". The two events subsequent to the order of scrutiny the assessment took place; first, the Settlement Commission order, which imposed both penalty and a higher rate of customs duty and second, the investigation report. In view of these facts, clearly there was tangible material pointing out that perhaps the assessee had made an excessive and impermissible claim for depreciation which went adjudicated. This Court in proceedings under Article 226 of the

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Constitution of India has to deal with as to the nature of the disclosure – whether it was fairly made or the details of depreciation were so provided that the Revenue could not, in the circumstances, gone into it at the first stage of the proceedings.

7. *Phool Chand Bajrang Lal vs. Income-Tax Officer and another*; 1993 203 ITR 456 SC is an authority for the proposition that it is not every claim that mere circumstance of finality of a proceeding would *per se* exclude invocation of power to reassessment but that a claim which is false, can be the ground for a valid re-opening of the assessment.

8. Having regard to these facts, the Court is satisfied that no cause of interference with the reassessment notice and further proceedings has been made out. The writ petition is accordingly dismissed along with the pending applications.


S. RAVINDRA BHAT, J


A. K. CHAWLA, J

AUGUST 02, 2018

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