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

Decided on: 19th February, 2019

+ W.P.(C) 11511/2016

IHHR HOSPITALITY PVT. LTD.

..... Petitioner

Through: Mr.Mayank Nagi, Advocate

versus

ADDITIONAL COMMISSIONER OF
INCOME TAX

..... Respondent

Through: Mr.Sanjay Kumar, Standing Counsel

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

S. RAVINDRA BHAT, J. (OPEN COURT)

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1. The assessee challenges a notice under Section 148 of the Income Tax Act, 1961, in respect of an assessment completed for A.Y. 2011-2012 complaining that the Revenue/respondent exceeded the liberty granted by the statute, and that invocation of power was not based upon any fresh or tangible material but re-appreciation of the existing material which was available in the course of the original scrutiny assessment.

2. The assessee is into the hospitality business. During the relevant assessment year it had filed a return on 30.09.2011 declaring ₹76,94,77,310/- as losses. Its case was selected for scrutiny under Section 143(3) and the assessment framed on 17.02.2014. The AO accepted the total losses of ₹76,94,77,310/-. During the course of the scrutiny

assessment, queries were addressed to the assessee with respect to certain amounts claimed towards misappropriation and alleged losses, which was sought to be adjusted in the taxable income. The AO issued these letters on 15.05.2013, which was replied on 06.09.2013 and further on 13.09.2013 and 26.09.2013. Similar letters were addressed with respect to other details such as employee wise salary, reconciliation of tax deduction with income, details of interest proceeds etc. During the course of the proceedings the AO indeed, on 20.01.2014, recorded as follows:

“Shri Arun Magon, CA attended and discussed the case. He is requested to furnish the following details:

- (i) Note on nature of fraud*
- (ii) Details of secured loan*
- (iii) Agreement of management fee & Tech fee*
- (iv) Clarification on the auditor comments on nonphysical verification of a fixed assets.*

Adj. to 05.02.2014.”

Again hearing was conducted on 05.02.2014 and whereby the AO recorded that all necessary details have been furnished. In this background, scrutiny assessment was completed on 17.02.2014.

3. The “reasons to believe” recorded by the AO in respect of the impugned reassessment notice, in the present case, reads as follows:

“M/s IHHR Hospitality Pvt. Ltd.

A.Y. 2011-12

Reasons recorded for issue of notice u/s 148 of the IT Act, 1961

In this case, the assessee filed its return of income on 30.09.2011 declaring total loss of Rs.76,94,77,310/-.

Subsequently, the case was selected for scrutiny assessment and the assessment u/s 143(3) was completed on 17.02.2014 accepting the total loss of Rs.76,94,77,310/- as claimed by the assessee in return of income.

Further, on perusal of the assessment record it came to the notice of the undersigned that the assessee in its P&L A/c has made a provision of Rs. 4221.29 lakh (Rs. 1675.50 lakh relating to fixed assets, Rs. 2113.39 lakh relating to loan and advances and Rs. 432.40 lakh relating to overstatement of expenditure) on account of misappropriation. However, the assessee has adjusted the amount of Rs.432.40 lakh for taxation under income from other source on a/c of overstatement of expenses. However, the balance provision for Rs.37,38,89,000/- (Rs.42,21,29,000-43240000) has not been offered for taxation. Since the provision was an unascertained liability as well as capital expenses, the same should have been disallowed and added back to the total income of the assessee, being inadmissible expenses. But, the assessee has not disallowed the same in its computation of income. Therefore, Rs.37,38,89,000/- has escaped assessment for the A.Y. 2011-12. I have reasons to believe that the assessee has failed to disclose fully and truly all material and facts necessary for the assessment for the AY. 2011-12.

Based on the above facts and circumstance of the case, I have reasons to believe that the income of the assessee to the extent of Rs. 37,38,89,000/- (Rs.42,21,29,000-43240000) which was chargeable to tax has escaped assessment for the AY 2011-12 on account of failure on part of assessee to disclose fully and truly all material facts necessary for the assessment.

Issue notice u/s 148 of the Income Tax 1961.”

4. It is contended that the Revenue could not have validly sought recourse to the power to reassess under Section 147/148. Learned counsel argues that even though notice was issued during four year period,

nevertheless it was not based upon any allegation of withholding of material facts or documents, which could have been possibly the only ground for valid reassessment. Learned counsel cited *Commissioner of Income Tax vs. Kelvinator of India Ltd.* 320 ITR 561 (SC) in this regard and submitted that in the absence of tangible material with the Revenue, the reassessment is in the present case unsustainable and requires to be quashed.

5. Learned counsel for the Revenue submitted that lack of discussion in the AO's scrutiny order meant that he had not properly applied his mind to the circumstances. The AO, therefore, acted within its rights in concluding that the assessee had not offered the amounts in question [₹42.21 crore] for taxation and in these circumstances, the reassessment notice should not be interfered with.

6. It is far too well settled that any notice under Section 147/148 is to be premised on fresh or tangible material – made available with the Revenue within the time granted or within the extended time under Section 147. The only other circumstance when it can seek recourse to the reassessment power is if material documents, having significance on the reassessment, are withheld or improperly disclosed. The duty of the AO, it has been repeatedly emphasised from the decision of the Supreme Court in *Calcutta Discount Co.Ltd. vs. Income Tax Officer, Companies District-I, Calcutta* (1961) 41 ITR 191 is to truly assess the income disclosed by the assessee. The corresponding duty or the responsibility of the assessee is to disclose all material facts. Once that duty is discharged, the inability of the AO to carry out the task assigned to him by the statute properly does not authorize a second opinion, based upon which the AO can issue reassessment notice.

7. In the present case, it is plain that the reassessment notice was based upon a second opinion or revisiting of the same facts by a subsequent Assessing Officer and no more. For these reasons, the reassessment notice has to be quashed.

8. The writ petition has to succeed. The reassessment notice and all further proceedings are hereby quashed.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

FEBRUARY 19, 2019

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