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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.08.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.6768 of 2013

Cairn India Ltd.,
(Formerly known as Cairn Energy India
Private Limited)
Represented by its Authorised Signatory,
Mr.Navin Jain,
3rd & 4th Floor, Vipul Plaza,
Suncity, Sector-54,
Gurgaon - 122 002,
Haryana.

...Petitioner

Vs

Deputy Director of Income Tax,
(International Taxation)
Room No.703, IInd Floor,
Annexe Building, Aaykar Bhawan,
121, Mahatma Gandhi Road,
Chennai - 600 034.

...Respondent

PRAYER : Writ Petition filed Under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records of the respondent in respect of PAN No.AAACC3097L and quash the impugned Notice u/s 148 of the Income Tax Act, 1961 dated 30.03.2011 and the consequential Order dated 12.03.2013 passed by the respondent.

For Petitioner	: Mr.C.S.Agarwal Senior counsel Assisted by Mr.M.V.Swaroop
For Respondent	: M/s.Hema Murali Krishnan Senior Standing counsel [For Income Tax]

O R D E R

The writ petition is filed, questioning the legal validity of the notice issued under Section 148 of the Income Tax Act, 1961 [hereinafter referred to as the 'Act'] dated 30.03.2011 and



the consequential order dated 12.03.2013 passed by the respondent, disposing of the objections filed by the writ petitioner.

2. The petitioner's predecessor was a company incorporated in New South Wales, Australia was a subsidiary of Cairn Energy PLC based in Edinburgh and is engaged in the business of exploration and production of oil and gas in India since 1996. By an order of the Bombay High Court dated June 22nd, 2010 in Company Petition No.155 of 2010, the petitioner took over the Indian Business of Cairn Energy India Private Limited and thus, competent to file the present writ petition on behalf of its predecessor.

3. The petitioner company had filed its return of income for the Assessment Year 2004-05 under Section 139(1) of the Act on 28.10.2004, declaring a total income of Rs.49,16,89,883/- as per the normal provisions and taxable book profit of Rs.1,90,55,64,209/- under Section 115JB of the Act. The return of income was processed under Section 143(1) of the Act on 24.02.2005, accepting the returned income. The case was selected for scrutiny by issuance of notice dated 20.04.2005 under Section 143(2) of the Act and during the course of such proceedings, the return of income was thoroughly examined on all aspects to determine the total income for the Assessment Year 2004-05 in question. The Assessing Officer passed the final assessment order under Section 143(3) of the Act in proceedings dated 28.12.2006. The total income of the petitioner under the normal provisions of the Act was determined at Rs.109,59,99,910/- and the book profit of Rs.197,37,88,456/- was determined under the provisions of Section 115JB of the Act. The case was referred to Transfer Pricing Officer for determination of Arm's Length Price of the international transactions entered into by the petitioner with the associated enterprises. Thus, the assessment proceedings in all respects were completed under the normal provisions as well as regarding the international transactions.

4. The learned Senior counsel appearing on behalf of the writ petitioner made a submission that it is a case of change of opinion as the materials, informations, books of accounts as required were submitted during the course of assessment proceedings and the petitioner has not suppressed any material facts. The materials furnished for scrutiny and the discussions as well as the consideration deliberated in the original assessment order are taken for the purpose of reopening of assessment by forming another opinion and thus, the case on hand is change of opinion.

5. The notice under Section 148 of the Act was issued on



30.03.2011, admittedly, beyond the period of four years but within six years. The petitioner requested for furnishing reasons in vide letter dated 23.04.2011 and the respondent furnished the reasons in proceedings dated 18.02.2013. The petitioners filed their objections on 04.03.2013 and the said objections were disposed of by the respondent in order dated 12.03.2013, which is impugned in the present writ petition.

6. The learned Senior counsel for the petitioner drawn the attention of this Court with reference to the particulars produced by the petitioner company during the scrutiny proceedings as well as in the assessment order. The assessment order dated 28.12.2006 would reveal that the Assessing Officer has considered Site Restoration Cost, Software Purchase and Maintenance and Club membership and facility fees incurred during the year. Relying on the said findings made in the original assessment order, the learned Senior counsel reiterated that the very same reasons are furnished for the purpose of reopening of assessment. Therefore, the initiation of proceedings is nothing, but change of opinion.

7. The learned Senior counsel for the petitioner is of an opinion that in order to satisfy the statutory requirement of 'reason to believe', the Assessing Officer must have tangible material on record for reopening of assessment. In the present case, the very same informations and materials furnished by the petitioner during the course of original assessment proceedings are taken into consideration for the purpose of reopening of assessment and perusal of the reasons furnished, would reveal that there is no fresh materials on record for the purpose of continuance of the reopening proceedings. Thus, the exercise made by the respondent for reopening under Section 147 of the Act lacks jurisdiction.

8. The learned Senior counsel for the petitioner relied on several judgments to establish that the cases, where change of opinion is a ground for reopening, the Courts have set aside the initiation of 147 / 148 proceedings. When the case on hand is also a case, where there is no tangible material on record for reopening of assessment, the order impugned is liable to be set aside.

9. As far as the judgments relied on by the petitioner are not in dispute as the principles in this regard are settled. With reference to Section 147 of the Income Tax Act, if the assessing Officer has 'reason to believe' that the income chargeable to tax escaped assessment, then he is empowered to institute reopening proceedings. The 'reason to believe' must have live link with the reasons furnished for the purpose of reopening. If the reason furnished is the change of opinion,

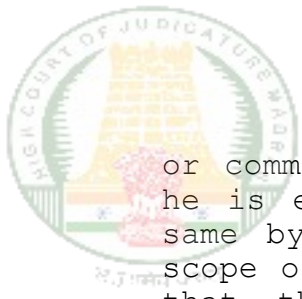


then the proceedings are liable to be set aside. This being the settled principles, the judgments cited by the petitioner are not in dispute with reference to the principles laid down by the Constitutional Courts. However, whether the 'reason to believe' is established in a particular case, is to be considered by the Court based on the facts furnished. In other words, the facts established in a particular case would be relevant for the purpose of arriving a conclusion, whether such case is falling within the ambit of change of opinion or not. Therefore, the consideration with reference to the facts furnished are to be looked into for forming an opinion.

10. The learned Senior counsel for the petitioner reiterated that the reasons furnished by the respondent are not fresh materials and the same materials, which were considered and findings are also available in the original assessment order. This being so, there is no reason whatsoever for reopening of assessment and thus, the order impugned is liable to be set aside.

11. The learned Senior Standing counsel for the respondent objected the contentions raised on behalf of the petitioner by stating that the materials produced by the petitioner / assessee are not in dispute. However, in the present case, the TDS deduction of four person made by the assessee is improper and the TDS must be on the higher rate and therefore, the Assessing Officer raised the question, whether the TDS deducted must be on the higher rate or on the lower rate with reference to the business transactions undertaken by the petitioner / assessee. This being the reason for reopening of assessment under Explanation 1 to Section 147 of the Act, the Assessing Officer should be allowed to adjudicate the said issue on merits and the petitioner has to submit their defense during the course of reopening proceedings and under these circumstances, the contention of the petitioner that it is change of opinion is incorrect and unacceptable.

12. The learned Senior Standing counsel for the respondent has reiterated that the subjects adjudicated by the Assessing Officer in the original assessment order may be the subject for reopening of assessment. Explanation 1 to Section 147 contemplates Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso. Therefore, the mere production of books of accounts or other evidences by the assessee may not be sufficient to set aside the reopening proceedings. If the Assessing Officer has 'reason to believe' that some issues, which all are not adjudicated and from and out of such omission



or commission income chargeable to tax escaped assessment, then he is empowered to reopen the assessment and proceed with the same by affording opportunity to the assessee. This being the scope of Section 147, there is no reason to arrive a conclusion that the reopening proceedings are initiated on change of opinion.

13. Considering the arguments as advanced by the respective learned Senior counsel for the petitioner and the learned Senior Standing counsel for the respondent, the question arises, whether the initiation of reopening of assessment in the present case is change of opinion or the Assessing Officer has 'reason to believe'.

14. It is not in dispute that the case on hand is beyond four years, but within six years. Further, it is not in dispute that from and out of the materials already scrutinised by the assessment officer, the reopening proceedings are initiated. The assessment order passed by the competent authority would reveal that the subject dealt with for reopening of assessment, were also considered during the original assessment proceedings. However, it is contended that under Explanation 1 to Section 147, even in case, where the assessee produced the account books or other evidences during the course of original assessment proceedings, the said materials also can be a reason for reopening of assessment, if some new informations or further materials are culled out from the original materials.

15. Reopening of assessment proceedings are made on numerous occasions. The scope of reopening of assessment under Section 147 of the Act is undoubtedly wider enough to cover various circumstances, if the Assessing Officer has 'reason to believe' that any income chargeable to tax has escaped assessment for any assessment year. However, this Court has to consider, whether such reopening and the reasons furnished for reopening of assessment have live link with the materials.

16. It is necessary to draw a distinction between the final assessment order and the order, disposing of the objections by the competent authority with reference to the objections filed by the assessee. The final order must satisfy the subjective satisfaction. However, no such subjective satisfaction is required regarding the order passed, disposing of the objections. The reopening of proceedings once initiated and notice issued and the subsequent procedures are contemplated through the judgment of the Hon'ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd., vs. Income Tax Officer [(2002) 125 Taxman 963(SC)]. The Income Tax Act states that opportunity is to be provided to the assessee. The manner, in which, such opportunity is to be provided were directed by the



Hon'ble Supreme Court of India in the case of GKN Driveshafts (cited supra). Thus, in between procedures contemplated through a judgment is to be complied with in its spirit for the purpose of compliance of principles of natural justice. However, such in between procedures cannot be construed as a conclusive proceedings as after disposing of the objections, the Assessing officer has to provide further opportunity to the assessee for the purpose of continuing the reopening proceedings and for passing final reassessment orders. This exactly is the reason, why objective satisfaction is sufficient in respect of the order passed, disposing of the objections. However, while passing the final assessment / reassessment order, subjective satisfaction of the competent authority is mandatory. Thus, the order, disposing of the objections or reopening of assessment at no circumstances be compared with the final assessment / reassessment order, which is to be passed after complete adjudication of the facts and the circumstances raised by the parties.

17. In respect of the writ petition on hand, notice under Section 148 was issued on 30.03.2011. The reasons were furnished to the assessee, objections received and the said objections were disposed of. The reasons stated in proceedings dated 18.02.2013 states as follows:

"In the instant case, the return of income was filed on 28.10.2004 declaring a total income of Rs.49,16,89,883 as per the normal provisions of income tax and taxable book profit of Rs.190,55,64,209 as per section 115 JB. The case was selected for scrutiny and assessment was completed u/s 143(3) on 28.12.2006 on a total income of Rs.109,59,99,910 and computing the book profit at Rs.197,37,88,456. The assessment order was rectified u/s 154 of the income tax reducing the total income to 108,74,01,200. Subsequently, the assessment was set aside vide the order of the DIT (IT) dated 12.03.2009 with the direction to recompute the total income of the assessee in as much as the assessment order dated 28.12.2006 in which deduction u/s 80 IB was erroneous and West Asia Maritime case, is in the nature of royalty. Therefore, the assessee has deducted lesser tax from the payment to the Non-Residents.

In this context, it may be noted that the CBDT instruction No 1862 which was clarified that provision of services by a foreign company would be outside the purview of section 44D or section 115A was issued in the context of services like imparting of training and carrying out drilling operations. The services in the subject case are different which do not fall within the ambit of section 44BB of the Act. Reference can be made



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to the judgement of the Hon'ble Uttarakhand High Court in CIT and Another vs ONGC Ltd (309 ITR 244). The principle evolving from the ruling of the Hon'ble Authority of Advance Ruling in No P/6 OF 1995, (234 ITR 371) also stipulates that there is wide range of income falling under Section 44BB which do not fall under Section 44D.

Providers of such technical service are therefore are not entitled to lower deduction of tax and proportional disallowance under Section 40(a)(i) is called for. However, the expenses so claimed have been allowed fully in the assessment. These excess deduction has resulted in escapement of income chargeable to tax within the many of section 147 of the Income Tax Act. Further although order u/s 143 (3) was passed in this case, it falls within the ambit of explanation 1 to section 147 of the Income Tax Act."

18. The reasons stated above reveals that deduction under Section 80IB was erroneous and West Asia Maritime case, is in the nature of royalty. Therefore, the assessee has deducted lesser tax from the payment to the Non-Residents. Therefore, the books of accounts, informations, materials produced by the assessee may be taken into consideration for reopening of assessment. However, the Assessing Officer could able to cull out that the TDS deducted there at the lower rate and the said issue was not adjudicated by the Assessing authority. Thus, the Assessing Officer has 'reason to believe' for reopening of assessment in order to ascertain the TDS is to be on higher rate or on lower rate. In view of the fact that the said issue was not considered by the Original Assessing authority and subsequently, noticed by the competent authority, the reopening of assessment is made in accordance with the requirements as contemplated under Section 147 of the Income Tax Act. Section 147 Explanation 2(c) enumerates where an assessment has been made, but - (i) income chargeable to tax has been underassessed; or (ii) such income has been assessed at too low a rate; or (iii) such income has been made the subject of excessive relief under this Act; or (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed. Therefore, even in cases, where the new informations, materials are gathered from and out of the account books and other evidences produced by the assessee during the course of the original assessment, then also, reopening of assessment is possible, if such cases are falling under any of the clauses as contemplated under Section 147 of the Act.

19. The circumstances as contemplated, providing wider scope for reopening of assessment, at no circumstances be narrowed down by the Court to cripple the powers of the Assessing



authority conferred under the Act. Numerous circumstances are contemplated, in view of the fact that the original assessment order was passed based on the return of income filed by the assessee. The Assessing authority may not have considered all the intricacies involved in such business or other transactions. Undoubtedly, the business and trading activities are being carried out in a calculated manner by the traders. The intricacies involved may be traced out even at later point of time. Such being the possible circumstances, the very purpose and object of Section 147 of the Act for reopening of assessment, if the income chargeable to tax escaped assessment cannot be narrowed down, so as to dilute the very object of the Act.

20. However, on reopening of assessment, the assessee gets an opportunity to defend its case in the manner known to law. Thus, there is no substantial prejudice is caused except that the assessment is reopened. However, if such reopenings are made within the scope of Section 147, then the authority must be allowed to continue the reopening proceedings and conclude the same by providing opportunity to the assessee to defend their case.

21. In the present case, the petitioner has submitted its objections elaborately on 04th March 2013 and the said objections were disposed of by the respondent by issuing an order dated 12.03.2013. While disposing of the objections, the respondent had considered the objections filed by the petitioner and rejected the objections on the ground that for the Assessment Year 2003-04, ADIT, International Taxation, Chennai, issued a Notice under Section 148 on similar ground that claim of the assessee as regards payment made towards geological studies, seismic data acquiring and processing and chartered hire charges would not fall for consideration under Section 44BB of the Act to go for TDA at the rate of 4%. On the contrary, the services fell within the definition of "fee for technical services".

22. When the Assessing Officer could able to trace out the material from and out of the materials submitted by the assessee, such new informations or materials undoubtedly would provide the Assessing Officer for 'reason to believe' to reopen the assessment. This being the factum established, this Court is of the considered opinion that the respondent could able to establish that the Assessing Officer has 'reason to believe' for reopening of assessment. The other intricacies raised by the assessee on merits are to be adjudicated elaborately with reference to the original documents and evidences to be made available before the authority. Such an elaborate adjudication on merits need not be entertained by the High Court in a writ proceedings under Article 226 of the Constitution of India.



23. The scope of judicial review under Article 226 of the Constitution of India is to scrutinize the processes, through which, a decision is taken by the competent authority in consonance with the provisions of the law, but not the decision itself. When the decision is reasoned and in the present case, the reopening is based on certain materials on record, then further adjudications are to be done before the authority based on the materials available on record. The sufficiency of the reasons need not be gone into by the High Court in a writ proceedings. Thus, the petitioner is bound to co-operate for the completion of the reopening proceedings initiated under Section 147/148 of the Act and the respondent is directed to conclude the assessment / reassessment proceedings as expeditiously as possible by following the procedures as contemplated.

24. Accordingly, the writ petition stands dismissed. No costs.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

Kak

To

The Deputy Director of Income Tax,
(International Taxation)
Room No.703, IIInd Floor,
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Chennai - 600 034.

+1cc to M/s.Hema Muralikrishnan, Advocate, S.R.No.41714/2021

W.P.No.6768 of 2013

SSV(CO)
RGA(16/09/2021)