

- Chitra Sonawane

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 694 OF 2021

Sodexo India Services Pvt. Ltd.]
 having its office at 1st Floor,]
 Gemstar Commercial Complex,]
 Ramchandra Lane Extension Kanchpada,]
 Formerly known as]
 Sodexo Food Solutions India Pvt. Ltd.] .. Petitioner

Vs.

1. Asst. Commissioner of Income Tax,]
 Circle – 13(2)(1), having his office]
 at Aayakar Bhavan,]
 Maharshi Karve Road, Churchgate,]
 Mumbai – 400 020]
2. Asst. Commissioner of Income-tax,]
 Transfer Pricing – 4(1)(2), having his]
 office at Mittal Court, 22,]
 Nariman Point, Mumbai – 400 021.]
3. Principal Commissioner of Income]
 Tax-13, having his office at]
 Aaykar Bhavan, Maharshi Karve Road,]
 Churchgate, Mumbai – 400 020]
4. Union of India]
 through Ministry of Finance,]
 North Block, New Delhi – 110 001.] .. Respondents

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Mr. V. Sridharan, Senior Advocate a/w Ms. Neha Sharma i/b Mr. Sriram
 Sridharan for the petitioner
 Mr. Akhileshwar Sharma for the respondent – Revenue

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**CORAM : K. R. SHRIRAM &
N.R. BORKAR, J.J.**

DATED : 23rd MARCH, 2022

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ORAL JUDGMENT :- (Per K.R. Shriram, J.)

1. The petitioner has impugned notice dated 30.03.2019 received under Section 148 of the Income Tax Act, 1961 (the Act). After petition was filed, an order dated 30.01.2021 u/s 92-CA(3) of the Act came to be passed. Petition was, therefore, amended pursuant to the liberty granted by this Court on 20.2.2021 by which respondent no.2 re-initiated transfer pricing proceedings which were already concluded pursuant to re-opening of assessment by respondent no.1.
2. Mr. Sridharan submitted that if the Court is going to set aside notice issued under Section 148 of the Act then consequence thereof will be to set aside all revised orders passed by respondent no.2 u/s 92-CA(3). He submitted that there is enough material to set aside notice under Section 148 of the Act and at the same time, if notice u/s 148 goes, there will be a cascading effect and all other orders will also go.
3. Petitioner filed its return of income for the Assessment Year 2012-2013 on 29.11.2012 declaring total income of Rs.9,90,48,280/-. Return was processed u/s 143(1) of the Act on 19.02.2014 accepting the return income of Rs.9,90,48,280/-. Petitioner's case was thereafter taken up for regular assessment and assessment order under Section 143(3) of the Act came to be passed on 28.3.2016. Total income was assessed at Rs.11,11,94,030/-.
4. Petitioner thereafter received impugned notice dated 30.3.2019 u/s 148 of the Act in which, respondent no.1 asserted that he had

reasons to believe that income chargeable to tax for Assessment Year 2012-13 has escaped assessment within the meaning of Section 147 of the Act. Petitioner was provided reasons for reopening alongwith approval received under Section 151 of the Act. Mr. Sridharan further submitted that the reasons recorded clearly indicate that the Assessing Officer who has issued the notice has acted merely on the dictates of the Revenue Audit in issuing the notice. Therefore, the notice itself is bad in law. Mr. Sridharan further submitted that it is settled law that the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and opinion rendered by the audit party in regard to law cannot be the basis for the purpose of such belief. He submitted that evaluation of law must be made directly and solely by the Income Tax officer.

5. Mr. Sharma strongly objected and made valiant effort to justify issuance of notice. He submitted that Transfer Pricing Officer (TPO) has calculated operating profit / operating revenue at 1.55% after considering operating cost as debited to the profit and loss account including depreciation of Rs.2.93 Crores. Whereas, depreciation of Rs. 6.58 Crores, which was debited should have been included for computing assessee's Arm's Length Pricing (ALP) margin, thus resulting in Rs.3.64 Crores to be considered for the purpose of ALP. He submitted that TPO has grossly erred in calculating operating profits to operating revenue and, therefore, revenue audit was justified in raising objections.
6. In our view, Mr. Sharma's objections does not hold water because the reason to believe that income has escaped assessment, cannot be based on borrowed information. The Apex Court in *Indian &*

Eastern Newspaper Society Vs. Commissioner of Income Tax¹ held that opinion of internal audit of Income Tax Department can not be regarded as information within the meaning of Section 147(d) of the Act. Paragraphs 7, 8, 9, 11 and 20 of the said judgment read as under:-

“7. Insofar as the word "information" means instruction or knowledge concerning facts or particulars, there is little difficulty. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its relevance. It requires no further authority to make it significant. Its quintessential value lies in its definitive vitality.

8. But when "information" is regarded as meaning instruction or knowledge as to law, the position is more complex. The controversy between the parties centres around the point whether the instruction or knowledge as to law is circumscribed by any limitation. When we speak of "law", we ordinarily speak of norms or guiding principles having legal effect and legal consequences. To possess legal significance for that purpose, it must be enacted or declared by competent authority. The legal sanction vivifying it imparts to it its force and validity and binding nature. Law may be statutory law or, what is popularly described as, judge made law. In the former case, it proceeds from enactment having its source in competent legislative authority.

Judge made law emanates from a declaration or exposition of the content of a legal principle or the interpretation of a statute, and may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-

1 (1979) 2 Taxman 197 (SC)

judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a court or the order of a tribunal. Such declaration or exposition in itself bears the character of law. In every case, therefore, to be law it must be a creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law. The suggested interpretation of enacted legislation and the elaboration of legal principles in text books and journals do not enjoy the status of law. They are merely opinions and, at best, evidence in regard to the state of the law and in themselves possess no binding effect as law. The forensic submissions of professional lawyers and the seminal activities of legal academics enjoy no higher status. Perhaps the only exception is provided by the writings of publicists in international law, for in the law of nations the distinction between formal and material sources is difficult to maintain.

9. *In that view, therefore, when section 147(b) of the Income-Tax Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source. It is law, we must remember, which, because it issues from a competent legislature or a competent judicial or quasi-judicial authority, influence the source of the assessment and decides any one or more of those matters which determine the assessee's tax liability.*

11. *Under that section, the audit by the Comptroller and Auditor-General is principally intended for the purposes of satisfying him with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue. He is entitled to examine the*

accounts in order to ascertain whether the rules and procedures are being duly observed, and he is required, upon such examination, to submit a report. His powers in respect of the audit of income-tax receipts and refunds are outlined in the Board's Circular No. 14/19/56-II, dated 28-7-1960.[Internal Audit Manual, Vol.II, p.39J. Paragraph 2 of the Circular repeats the provisions of section 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. And paragraph 3 warns that "the audit department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties." Paragraph 4 declares:

"Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure..... It is, however, to forming a general judgment rather than to the detection of individual errors of assessment, etc., that the audit enquiries should be directed.

The detection of individual errors is an incident rather than the object of audit."

Other provisions stress that the primary function of audit in relation to assessments and refunds is the consideration whether the internal procedures are adequate and sufficient. It is not intended that the purpose of audit should go any further. Our attention has been invited to certain provisions of the Internal Audit Manual more specifically defining the functions of internal audit in the Income-Tax Department. While they speak of the need to check all assessments and refunds in the light of the relevant tax laws, the orders of the CIT and the instructions of the CBDT, nothing contained therein can be construed as

conferring on the contents of an internal audit report the status of a declaration of law binding on the ITO. Whether it is the internal audit party of the Income-Tax Department or an audit party of the Comptroller and Auditor-General, they perform essentially administrative or executive functions, and cannot be attributed the powers of judicial supervision over the quasi-judicial acts of income-tax authorities. The Income-Tax Act does not contemplate such power in any internal audit organisation of the Income-Tax Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions. Nor does section 16 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971, envisages such a power for the attainment of the objectives incorporated therein. Neither statute supports the conclusion that an audit party can pronounce on the law, and that such pronouncement amounts to "information" within the meaning of section 147(b) of the Income Tax Act, 1961.

20. *Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income-Tax Department are co-extensive with that of receipt audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual Vol.2, we hold that the opinion of an internal audit party of the Income-tax Department on a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961."*

7. The Division Bench of this Court in ***Ananta Landmark (P) Ltd. Vs. Deputy Commissioner of Income-tax, Central Circle 5(3), Mumbai***² has also, following *Indian & Eastern Newspaper Society* (Supra), held that true evaluation has to be made directly and

2 (2021) 131 taxmann.com 52 (Bombay)

solely by Income Tax Officer and the reasons for reopening of that by the Assessing Officer alone who is receiving the notice and he can not act merely on the dictates of any other person in issuing notice.

8. In *Hamilton Housewares (P) Ltd. Vs. Deputy Commissioner of Income Tax*³, this Court while quashing the notice issued u/s 148 of the Act reiterated settled position of law that the decision to reopen assessment must be on the basis of the belief found by the Assessing Officer. It must be open for the audit party to bring relevant aspect to the notice of the Assessing Officer. But thereafter it must be the independent decision of the Assessing Officer to reopen assessment upon formation of his belief that income chargeable to tax had escaped assessment. The Court had relied upon another Judgment of this Court in the matter of *Commissioner of Income Tax Vs. Rajan N. Aswani*⁴. Paragraph 11 of the said judgment reads thus;

“11. There is one more ground on which the impugned notice must be quashed. We may recall, the counsel for the petitioner had argued that the Assessing Officer was acting at the behest of the audit party. Such a ground was not taken in the petition. However, we had permitted the petitioner to raise the same in the rejoinder and provided sufficient time to the revenue to respond. This being a pure question of examination of contemporaneous documents, we had requested the counsel for the revenue to make available for our perusal the original file of the department, which he had so done. The perusal of the file would clearly show that the audit party had brought to the notice of the Assessing Officer the possibility of invoking Section 2(22) (e) of the Act in relation to the loan transaction in question.

3 (2019) 104 taxmann.com 128 (Bombay)

4 (2018) 91 taxmann.com 313/403 ITR 30

The Assessing Officer under a detailed reply dated 9th June, 2015 had opposed any such invocation of Section 2(22)(e) of the Act. He had given reasons why in his opinion Section 2(22) (e) of the Act was inapplicable. Despite this, upon further insistence by the audit party, impugned notice came to be issued. It is well settled through series of judgments that the decision to reopen the assessment must be on the basis of the belief found by the Assessing Officer. It may be open for the audit party to bring the relevant aspect to the notice of the Assessing Officer. However, thereafter it must be the independent decision of the Assessing Officer to reopen the assessment upon formation of his belief that income chargeable to tax had escaped assessment. Reference in this respect can be made to a decision of this Court in case of Commissioner of Income-Tax Vs. Ranjan N. Aswani (2018) 91 taxmann.com 313/403 ITR 30.”

8. In the circumstances, in our view also notice issued u/s 148 of the Act, can not be sustained.

9. Petition is allowed in terms of prayer clauses (a) and (aa) which read as under :-

“(a) that this Hon’ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the notice under section 148 of the Act dated 30th March 2019 (Ex.’N’), the notice under section 143(2) of the Act dated 04th June, 2019 (Ex.’P’), the notice under Section 92CA(2) read with section 92D(3) of the Act dated 21st November 2019 (Ex.’S’) and the order dated 29th December 2020 rejecting the objections of the Petitioner (Ex.’W’) and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned notice under section 148 of the Act dated 30th March 2019 (Ex.’N’), the notice under section

143(2) of the Act dated 04th June, 2019 (Ex.'P'), the notice under section 92CA(2) read with section 92D(3) of the Act dated 21st November 2019 (Ex.'S') and the order dated 29th December 2020 rejecting the objections of the petitioner (Ex.'W').

(aa) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the passing of the order under section 92CA(3) of the Act dated 30th January 2021 (Ex.'X') and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned order under section 92CA(3) of the Act dated 30th January 2021 (Ex.'X')."

10. Petition disposed with no order as to costs.

(N.R. BORKAR, J.)

(K.R. SHRIRAM, J.)