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

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Date of decision: 20.09.2023+ **W.P.(C) 10470/2016 and CM APPL. 13216/2018****SHRI PRADYOT K. MISRA**

..... Petitioner

Through: Mr Yashbant Das, Sr. Advocate with
Ms Kavita Jha and Mr Anant Mann,
Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX,

..... Respondent

Through: Mr Sunil Agarwal, Sr. Standing
Counsel with Mr Shivansh B. Pandya
and Mr Utkarsh Tiwari, Advocates.**CORAM:****HON'BLE MR JUSTICE RAJIV SHAKDHER****HON'BLE MR JUSTICE GIRISH KATHPALIA****[Physical Hearing/Hybrid Hearing (as per request)]****RAJIV SHAKDHER, J.: (ORAL)**

1. This writ petition assails three separate orders of even date, i.e., 25.10.2016 passed under Section 143 read with Section 147 of the Income Tax Act, 1961 [in short, "the Act"], concerning Assessment Years (AYs) 2009-10, 2010-11 and 2011-12.

2. The reassessment proceedings were triggered against the petitioner/assessee based broadly on the following two issues, on the ground that no return of income (RoI) had been filed by the petitioner/assessee:

(i) First, the investment made in mutual funds and the interest earned



thereupon had escaped assessment.

(ii) Second, capital gains on investment made in a Joint Development Agreement (JDA) with Odyssa Homes and Commercial Pvt. Ltd. [in short, “Odyssa”] escaped assessment as no RoI had been filed by the petitioner/assessee.

3. The record shows that the petitioner/assessee was furnished with an extract of the reasons to believe recorded by the Assessing Officer (AO) which form the basis for triggering reassessment proceedings. The reasons to believe recorded by the AO reads as follows:

“1. As per individual transaction statement (ITS) for F.Y 2008-09 (A. Y 2009-10), as per CIB information, assessee Sh. Pradyot Kumar Misra has made an investment of Rs. 6,00,000/- in purchase of Mutual funds and as per 26AS information total amount credited to the account of the said assessee is Rs. 68,344/-. On perusal of record and ITD system, it is found that no return for A.Y 2009-10 of the said assessee has been found/entered and as such the amount of Rs. 6,68,344/- is deemed income escaped of assessment u/s 147 explanation 2(a) of I.T. Act, 1961, since no assessment has been done in the said assessment year as per record/ITD system and no return has been found/entered as per record/ITD. Hence, I am satisfied that due to income escaped assessment for no return has been filed in the A.Y 2009-10, it is a fit case to issue notice u/s 148 of I.T. Act, 1961.

2. Information obtained from ACIT, Corporate Circle-1 (2), Bhubaneswar regarding an enquiry of joint venture Development and land sharing with one company M/s Odyssa Home & Commercial (P) Ltd., Plot No-N/3/B-6, IRC Village, Bhubaneshwar,-751024 with the said assessee has confirmed the joint venture Development and land sharing at M/s Odyssa Business Centre, Rasulgarh, Sharing Project at block- 115-117- Land Owner (Pradyot



Kumar Misra) - 4121.74 area in Sq. Feet, wherein the said company has not stated the agreement value and date and block cost/parking which confirmed the application of CBDT instruction F. No-22515812016/ITAI dated 29.02.2016 regarding payment of tax in joint development agreement as capital gain u/s 45(1) r. w.s. 2(47)(v) of Income Tax Act, 1961 r. w.s. 53A of Transfer of Property Act. Since the assessee has not filed any return for A.Y. 2009-10, I have reason to believe that income has escaped assessment including the capital gain, investment made in the joint development agreement with M/s Odyssa Home & Commercial (P) Ltd other than the income escaped assessment as per para 1 above.”

4. It is not in dispute that the petitioner/assessee filed his objections on 18.08.2016. In the objections filed, the petitioner/assessee had raised various issues, both concerning the jurisdiction of the AO to trigger reassessment proceedings, as also with regard to the merits of the case.

4.1 The AO *via* order dated 13.10.2016 rejected the objections. The order rejecting objections was served, as per the petitioner/assessee, on 15.10.2016. Concededly, within 10 days of the receipt of the order rejecting objections, the AO passed the impugned assessment order. As noted above, the impugned assessment order was passed on 25.10.2016.

5. Mr Yashbant Das, learned senior counsel and Ms Kavita Jha, learned counsel have raised several issues concerning the merits of the case, as also issues concerning violations of principles of natural justice.

6. It is asserted on behalf of the petitioner/assessee that up until today, the petitioner/assessee has not been served the copy of the original reasons to believe framed in the matter. Furthermore, it is submitted that petitioner/assessee has also not been served with the copy of the approval



obtained from the specified authority under Section 151 of the Act.

7. More importantly, it is emphasised that the AO violated the established right of the petitioner/assessee to take recourse to an appropriate legal remedy after the order dated 13.10.2016 was passed, whereby his objections to reassessment proceedings were rejected by passing the assessment order post-haste on 25.10.2016.

7.1 In support of this plea, reliance is placed, *inter alia*, on the following judgments:

- (i) ***Allana Cold Storage Ltd. v. ITO***, 287 ITR 1 (Bom.)
- (ii) ***Asian Paints Limited v. DCIT***, 296 ITR 90 (Bom.)
- (iii) ***Samsung India Electronics Pvt. Ltd. v. CIT***, 362 ITR 460 (Del.)

8. Furthermore, it is contended that the entire reassessment proceedings are based on a tax evasion petition [in short, “TEP”] filed by one Mr S.K. Srivastava, who at the relevant point in time was working with the revenue in a senior position.

8.1 In this context, our attention has been drawn to the objections filed by the petitioner/assessee whereby, *inter alia*, the position adopted at that stage by the petitioner/assessee was that since in the reasons to believe there was no reference to the TEP filed by Mr S.K. Srivastava, he would be reserving his right to cross-examine the said person once the respondent/revenue chose to rely upon the contents of the said TEP.

8.2 The submission is that the assessment order relies heavily on the TEP filed by Mr S.K. Srivastava, without according any opportunity whatsoever to the petitioner to rebut the material said to have been produced by him, or granting opportunity to the petitioner/assessee to cross-examine Mr S.K. Srivastava. In support of this plea, our attention has been drawn to



paragraph 27 of the impugned assessment order dated 25.06.2016, concerning AY 2009-10. We may note that identical paragraphs are contained in the assessment orders of even date concerning the other two relevant AYs, i.e., AY 2010-11 and AY 2011-12, as well, at paragraphs 29 and 27, respectively. For the sake of convenience, paragraph 27 of the assessment order concerning AY 2009-10 is extracted hereafter:

“27. As per the statement of the complainant and witness of the revenue Sh. S.K.Srivastava, CIT(A), Noida, recorded on oath under Section 131 of Income Tax Act, 1961 assessee has earned income from illegal business activities, amounting to Rs. 10 lakhs per month after paying off his business partners Ms. Sumana Sen, Sri Abhishar Sharma, Ms. Neeta Neb, Dr. P.R.Panda etc. The views and comments of Sh. S.K.Srivastava have been supported by Sh. D.P.Kar in his statement recorded on oath u/s 131 of Income Tax Act, 1961. Sh. D.P.Kar has stated on oath that Sh. P.K.Mishra had both unaccounted income and unaccounted expenditure throughout his career in Govt. and part of his illegal income was from extracting illegal gratification from tax evaders and money launderers as well as corrupt officers of the department. Furthermore, this fact is also corroborated by one complaint/tax evasion petition which was submitted by Captain Jay Narayan Prasad Nishad, Hon'ble Member of Parliament on 21.03.2013, which indicated that Rs. 50 Lacs paid by Sh. P. K. Mishra and one Sri Timmy Khanna to one assessee Ms. Ashima Neb for some illegal activities and the said amount has already been assessed in hands of the assessee Ms. Ashima Neb for A. Y. 2008-09 by making an addition of Rs.2.75 crores vide assessment order dated 29.03.2016 u/s 143(3)/148/147 of I.T. Act, 1961. The said complaint/tax evasion petition which was submitted by Captain Jay Narayan Prasad Nishad, Hon'ble Member of Parliament on 21.03.2013 also mentioned that Rs. 50 lacs were paid by Sh. P.K.Mishra and Sri Timmy Khanna to Ms. Ashima Neb during A.Y. 2010-11. As the assessee has not cross-examined Sh. S.K.Srivastava, witness of the revenue, despite repeated opportunities, nor has he denied any of the averments of the witness of the revenue on affidavit, the same is therefore, held against the assessee as evidence and the same is admitted as admissible evidence. Thus, an addition of Rs. 10 lakhs per month is being made to the income of the assessee as stated by the complainant/witness of the revenue in his statement recorded on oath. Penalty proceedings u/s



*27l(l)(c) for concealment of income are being initiated separately.
(Addition of Rs. 1,20,00,000/-)”*

9. Besides this, our attention is also drawn to paragraph 28 of the assessment order concerning AY 2009-10, which is indicative of the fact that a substantial addition amounting to Rs.1,20,00,000/- is based on the material relied upon by the AO, to which reference was made in paragraph 27 of the said assessment order.

10. In sum, the contention advanced on behalf of the petitioner/assessee is that this is a case of vendetta. The AO not only infringed the principles of natural justice insofar as the petitioner/assessee is concerned, but also failed to appreciate the objections taken by the petitioner on the merits of the case. Insofar as the two issues culled out in the beginning of our narration are concerned, to which we have made a reference in paragraph 2 of this order, our attention was drawn to the following assertions made by the petitioner/assessee in the objections filed with the AO:

“Re: Issue (i) –Investment in Mutual funds and interest income earned during the relevant assessment year

In the reasons recorded, on the basis of information obtained from Central Information Branch (“CIB”) it has been alleged that the assessee has made an investment of Rs.6,00,000 in mutual funds during the previous year, relevant to the assessment year under consideration. Further, on the basis of information reflecting in Form 26AS, it has been alleged that the assessee has also earned an interest income of Rs.68,344 and since no return has been filed for the relevant assessment year, such income has, thus, allegedly escaped assessment.

It is, at the outset, respectfully submitted that assessee had made an investment of Rs.3,00,000 in Reliance Equity Advantage Fund-Equity on 08.08.2007, i.e., in the preceding assessment year 2008-09, and not in the relevant assessment year under consideration. In the reasons recorded, however, it has been alleged that investment of Rs.6,00,00 was made in the mutual funds (as against the correct figure of Rs.3,00,000) and that too in the relevant assessment year under



consideration. It may be pertinent to mention that on 08.08.2007, the assessee had invested Rs.3,00,000 in the New Fund offer of Reliance Equity Advantage Fund-Equity, of which 29,339.853 units were allotted to the assessee on the same date, i.e. on 08.08.2007. Being so, it appears that the same transaction of Rs.3 lacs has been reported twice by CIB.

Be as it may, the above investment was, as submitted above, not made during the relevant assessment year under consideration and pertains to the preceding assessment year. Since, the transaction does not relate to the year under consideration, the question of reporting the said transactions during the year under consideration, therefore, does not arise.

The same is also evident from the notice dated 20.06.2016 issued to the assessee under section 142(1) of the Act wherein the assessee has been directed to file, inter-alia, details of investment made in mutual fund (as tabulated in the notice) and any capital gain/dividend income earned thereon. On perusal of the information tabulated in the aforesaid notice, it is apparent from the column designated as "transaction date" that the aforesaid transaction of purchase of mutual fund has been effected on 08.08.2007, as already explained supra.

Without prejudice, it is further submitted that no income has been earned by the assessee on the investments so made, either in the preceding year or during the relevant assessment year under consideration. That apart, it is pertinent to mention here that the aforesaid Fund is a growth fund on which, it is submitted that no income could be earned until the same has been redeemed by the assessee. Accordingly, since no redemption has been made by the assessee during the relevant assessment year, there is no question of earning any income on the said growth fund.

As regards income amounting to Rs.68,344 reflecting in Form 26AS, it is submitted that assessee had earned interest income amounting to Rs.70,859/- on savings bank account from ICICI Bank and PNB Bank and Fixed deposits. The said amount of Rs.70,859/- was duly declared in the return of income filed by the assessee. Though according to the Department, the assessee has not filed original return of income, still the assessee has already

included the above interest income in his total income and declared the same in the return of income filed, vide letter dated 25.06.2016, in response to notice issued under section 148 of the Act. It is, therefore, submitted that there cannot be any escapement of income to that extent also.

Considering the aforesaid factual situation, it will kindly be appreciated that there is no failure on part of the assessee in disclosing material facts with respect to the aforesaid issues. The



assessee, on the contrary, had appropriately and fully disclosed, wherever required, the entire details of income earned by the assessee during the relevant assessment year and there is no escapement of income, as alleged in the reasons recorded for reopening the assessment.

In the aforesaid facts and circumstances, reassessment proceedings initiated on the aforesaid issues, merely on the basis of information received from CIB, without any independent application of mind, is wholly without jurisdiction, illegal, bad in law and calls for being dropped.

Re: Issue (ii) – Alleged capital gain in investment made in Joint development agreement

On perusal of the reasons recorded and also, the information provided vide letter dated 03.08.2016, it is noticed that reassessment proceedings have, inter-alia, been initiated to bring to tax capital gains, which purportedly escaped taxation in assessment year 2009-10.....”

11. On the other hand, Mr Sunil Agarwal, learned senior standing counsel, who appears on behalf of the respondent/revenue, has relied upon the assessment order in defence of the respondent/revenue’s case.

12. According to him, although the trigger for reopening the assessment proceedings were the two issues referred to hereinabove, i.e., investment in mutual funds and the execution of the Joint Development Agreement, during the course of the proceedings, the AO obtained material which formed correctly, in his view, the basis for passing the impugned assessment order. Therefore, the contention of Mr Agarwal is that no interference is called for with the impugned assessment order by this court while exercising jurisdiction under Article 226.

13. Having heard the learned counsel for the parties, we are in agreement with Mr Agarwal to the extent that while exercising power under Article 226 of the Constitution, the court would neither examine the merits of the case



not enter the quagmire concerning the inadequacy of the material available to the AO while triggering reassessment proceedings.

13.1 That said, what we are concerned with and we must say deeply, is the manner in which the AO has proceeded in the matter.

14. Mr Agarwal cannot but accept the position that the reassessment proceedings were triggered against the petitioner/assessee on account of the TEP filed by Mr S.K. Srivastava. Mr S.K. Srivastava, as noticed above, was holding a senior position at the relevant point in time in the revenue.

15. The AO in framing the assessment order has accepted contents of the TEP as gospel truth, and has not subjected it to the usual rigour of putting the material to the petitioner and eliciting his answers with regard to the same. The timeline alluded to hereinabove by us would show that the objection to the reopening were rejected on 13.10.2016 by the AO, who then within 10 to 12 days i.e., 25.10.2016, proceeded to pass the impugned assessment order.

16. As indicated above, the substantial part of the addition is based on the complaint made by Mr S.K. Srivastava. Admittedly, this material was not put to the petitioner. The petitioner/assessee had no opportunity therefore to rebut the material and place his version before the AO. The objection taken by the petitioner that there ought to have been a hiatus of four (4) weeks between the date when the objection preferred by him were rejected and the assessment order was passed does not seem to have been appreciated by the AO. The AO seems to have proceeded on the basis that at the relevant point in time, the judgments which, in essence, expanded the scope of principle enunciated in by the Supreme Court in **GKN Driveshafts (India) Ltd. v. ITO**, 259 ITR 19 (SC), did not pertain to the jurisdictional High Court i.e.



this court. Therefore, according to the AO, the period between 13.10.2016 (date when the objections preferred by the petitioner were rejected) and 25.10.2016 (when the impugned assessment order was passed) was sufficient.

17. We may note that in a later judgment of a coordinate bench of this court rendered in W.P. (C) 2892/2013, titled ***Samsung India Electronics Pvt Ltd. v Deputy Commissioner of Income-Tax, Circle-7(1) & Ors***, this court categorically held that if objections of the assessee are rejected, then the AO should accord at least three weeks to the assessee to enable him to approach the court before taking up reassessment proceedings. This judgment was passed on 08.11.2013, which was a date well before the date when the objections preferred by the petitioner were dismissed. Therefore, clearly even this court by the time the objections were rejected in the instant case, had provided a minimum hiatus of three weeks between the date when the objections are rejected and an assessment order is passed.

18. We may however note that it is accepted by Mr Das and Ms Jha that the judgment rendered by this court in ***Samsung India Electronics'*** case was perhaps not cited before the AO. But according to us that by itself would not be a sufficient cause to side step to principle of hiatus which was declared by the other High Courts, and judgments of those High Courts were concededly cited before the AO.

19. Merely because the judgment in ***Samsung India Electronics'*** case was not cited before the AO would not absolve him from adhering to the principles which was enunciated by other constitutional courts i.e., the Bombay High Court in ***Allana Cold Storage Ltd.***'s case and ***Asian Paints Limited'*** s case, as long as there was no conflicting judgement of the



jurisdictional court, i.e., this court.

20. We may note that in fact this very principle has also been enunciated by the Gujarat High Court in *Garden Finance Ltd. v. ACIT*, 268 ITR 48 (Guj.).

21. We are informed by the counsel for the petitioner that there is no reason to disbelieve that this judgment was cited before the AO. This is evident upon perusal of page 294 of the case file.

22. What is also concerning is that the respondent/revenue had triggered an enquiry conducted by the Vigilance Team against Mr S.K. Srivastava, which, amongst others, included the petitioner/assessee. Clearly, there was every reason for the AO to examine very carefully the TEP filed by Mr Srivastava, as he would have carried an animus against the petitioner/assessee.

22. Thus, for the foregoing reasons, we are of the view that the impugned assessment order cannot be sustained, as there has been a grave infraction of principles of natural justice.

23. Accordingly, the impugned assessment order is set aside.

24. The respondent/revenue will take next steps in the matter, albeit as per law.

25. This writ petition is disposed of, in the aforesaid terms.

25.1 Pending application shall also stand closed.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

SEPTEMBER 20, 2023 / tr