

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
17 & 18

+

W.P.(C) 1962/2013 & CM No.3741/2013

PRIYA DESH GUPTA

..... Petitioner

Through: Mr Salil Aggarwal and Mr Ashish
Kumar, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent

Through: Mr Zoheb Hossain, Senior Standing
Counsel and Mr Deepak Anand, Junior Standing
Counsel.

AND

+

W.P.(C) 2015/2013 & CM No.3834/2013

ABHA GUPTA

..... Petitioner

Through: Mr Salil Aggarwal and Mr Ashish
Kumar, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent

Through: Mr Zoheb Hossain, Senior Standing
Counsel and Mr Deepak Anand, Junior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

%

16.05.2016

VIBHU BAKHRU, J

1. The Petitioners have filed these petitions assailing separate notices issued under Section 148 of the Income Tax Act, 1961 (hereafter 'the Act') seeking to reopen their respective assessments for Assessment Year (AY) 2007-08. The Petitioners also impugn orders dated 18th March, 2013 rejecting their respective objections against assumption of jurisdiction under Section 147 of the Act.

2. The Petitioners along with other promoter shareholders held 36.63% of the paid-up share capital of M/s Phoenix Lamps Limited (hereafter 'PLL'), a public listed company engaged in the business of manufacturing, selling and marketing of automotive lamps, compact fluorescent lamps and other general lighting lamps. The Petitioners sold their shares in PLL in terms of a warrant subscription and share purchase agreement and the gains therefrom were assessed to tax under the Act as Capital Gains. According to the Revenue, part of the consideration received by the Petitioner – Rs. 38 per share – is non-compete fee and is assessable as business income. This is the principal reason recorded by the Assessing Officer (AO) for believing that the income of the Petitioners for AY 2007-08 had escaped assessment.

3. The Petitioners contend that the entire transaction was examined in detail by the AO during the assessment proceedings which culminated in assessment orders under Section 143(3) of the Act. They submit that in the given facts, the impugned notices are occasioned by a mere change of opinion and AO does not have any fresh tangible material which would provide him a reason to believe that their respective incomes for AY 2007-08 have escaped assessment.

4. Since the material facts and the controversy involved in these two petitions are similar, the same were heard together. For the sake of brevity, the facts relating to W.P. (C) 1962/2013 are noticed hereunder.

4.1 The Petitioner, Smt. Priya Desh Gupta (hereafter 'the Assessee') held 14.68% of the paid-up equity capital of PLL at the material time.

4.2 On 3rd July, 2006, the Assessee alongwith other promoter shareholders, holding an aggregate 36.63% of the shareholding in PLL, entered into a tripartite Warrant Subscription and Share Purchase Agreement (hereafter referred to as 'the WSSPA') with two Mauritian companies, M/s Argon India Ltd. and M/s Argon South Asia Ltd. (hereafter 'the Acquirers'), for sale of their entire shareholding in PLL. In terms of the WSSPA, the

consideration for the shares was fixed at Rs.152 per share. In addition, the shareholders were also entitled to a consideration of Rs.38 per share as non-compete fee. Since the PLL is a public listed company and the shareholding sought to be acquired by the Acquirers was in excess of the specified limit, the Acquirers were obliged to make an open offer in terms of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. In terms of the aforesaid Regulations, the Acquirers furnished a draft Letter of Offer seeking to acquire shares from public at the rate of Rs. 152 per share. By a letter dated, 27th December, 2006, Securities and Exchange Board of India (SEBI) directed the Acquirers to revise the offer price by including the non-compete fee payable to the promoter shareholders; that is, from Rs. 152 per share to Rs. 190 per share.

4.3 Thereafter, on 28th December, 2006, the Assessee as well as other promoter shareholders of PLL entered into a revised agreement (hereafter 'the revised WSSPA') whereby the sale price for each share of PLL payable to the Assessee and other promoter shareholders, was revised to Rs.190 per share; the non-compete fee of Rs. 38 per share was deleted but the covenant not to compete was retained in the revised WSSPA.

4.4 The Assessee filed her return of income for AY 2007-08 on 31st

October, 2007 declaring an income of Rs.65,75,85,234/-. In the said return, the Assessee declared long term capital gains of Rs. 62,63,35,779/- and short term capital gains of Rs.46,68,008/- taxable at the lower rate of 10%. The return filed by the Assessee was picked-up for scrutiny. Thereafter, a notice under Section 142(1) of the Act alongwith a questionnaire was issued by the AO on 27th May, 2009. In response to the aforesaid notice, the Assessee provided the necessary documents including Statement of Affairs, Balance Sheet and Profit and Loss Account for financial year 2005-06 and 2006-07 along with Computation of Income and Audit Report for financial year 2006-07.

5. The AO examined the documents furnished by the Assessee and during the course of assessment proceedings, also called upon the Assessee to furnish further information and documents. In response to the queries raised by the AO during the assessment proceedings, the Assessee furnished further information and documents under the cover of letters dated 20th July, 2009, 12th August, 2009 and 31st August, 2009. The documents furnished by the Assessee included WSSPA dated 3rd July, 2006, revised WSSPA dated 28th December, 2006 , SEBI's letter dated 27th December, 2006 as well as a detailed statement indicating the dates of acquisition of shares. The Assessee

also provided statement of shareholding by Stock Holding Corporation of India Ltd., indicating the shares held by the Assessee in PLL.

6. After examining the statements and documents furnished by the Assessee, the AO found that Securities Transaction Tax (STT) had not been paid in respect of sale of shares resulting in short-term capital gains to the extent of Rs.45,51,121/- out of the declared short-term capital gains of Rs.46,68,008/-. He, accordingly, passed an assessment order taxing the aforesaid short-term capital gains of Rs. 45,51,121/- at 30% instead of 10% as claimed by the Assessee.

7. The Assessee received a notice dated 28th March, 2012 issued under Section 148 of the Act for AY 2007-08 (impugned notice). The Assessee requested for reasons for issuance of the said impugned notice and the same were provided during the course of hearing scheduled by the AO. The Assessee has filed her objections to the said reasons which were disposed of by an order dated 18th March, 2013. The said order is also impugned by the Assessee.

Reasons for reopening of assessment

8. The reasons recorded by the AO indicates that he had received

information from CIT(A) X pointing out that as per the WSSPA dated 3rd July, 2006, the consideration payable to the Assessee for her shares of PLL was agreed at Rs.152 per share and in addition Rs.38 per share was to be paid as non-compete fee. The reasons further noted that during the course of assessment proceedings, the Assessee had produced the original WSSPA as well as the Letter of Offer issued by the Acquirers for acquiring a minimum of 20% of the public shareholding at the rate of Rs.190 per share in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The AO noted that the SEBI advisory to revise the offer price for PLL shares to Rs.190 was made only for public shareholders and not for promoter shareholders (including the Assessee). He observed that an incorrect impression was given that the sale consideration for purchase of shares of promoter shareholders including the Assessee was revised upwards from Rs.152 to Rs.190 per share pursuant to the SEBI advisory. Although, the revised WSSPA retained the non-compete clauses, no consideration was ascribed to such provisions.

8.1 The AO concluded that since the revised WSSPA did not ascribe any consideration for the non-compete covenants, it was not a valid contract and was void. He proceeded to refer to provisions of the Indian Contract Act,

1872 and various decisions rendered by the Courts wherein it was held that agreements without consideration are void.

8.2 He, thus, concluded that the revised WSSPA was devoid of any commercial substance and the sole motive for entering into the revised WSSPA was to avoid tax.

8.3 In the aforesaid context, the AO recorded that the non-compete fee calculated at Rs.38 per share payable in terms of WSSPA dated 3rd July, 2006 was taxable as business income under Section 28(va) of the Act.

8.4 The AO further tabulated that 13,60,000 shares of PLL were acquired by the Assessee “during 31st March, 2006” and 1,200 shares were acquired by the Assessee “up to 19th May, 2006”. He held that since the WSSPA was entered into on 3rd July, 2006, these shares were held for a period less than 12 months and, therefore, qualified as short-term capital assets; but, the Assessee had misled the Department into believing that all shares were held by her for more than 12 months by submitting letters claiming that the subject shares were held for more than 12 months.

Reasoning and Conclusions

9. It is apparent from the above that the AO has not referred to any

material, other than what had been examined by the AO in the initial round of assessment proceedings, for forming his belief that the Assessee's income for AY 2007-08 has escaped assessment; his belief is based solely on the basis of material already examined by the AO during the first round of assessment proceedings. A perusal of the reasons recorded by the AO also indicate that the AO had initiated the proceedings for re-assessment, apparently, pursuant to a letter sent by CIT(A) X who had opined that the revised WSSPA was void and the consideration of Rs.38 per share should be attributed to non-compete clauses. This, clearly, is a matter of opinion - and a highly contested one at that - regarding agreements in question, namely WSSPA and the revised WSSPA, which were duly considered by the AO at the time of initial assessment.

10. It is also relevant to note that in the case of another promoter shareholder of PLL, Hulas Rahul Gupta, who is also a party to WSSPA and revised WSSPA, the AO had accepted the sale of shares of PLL at Rs.190 per share. Accordingly, the AO had not been consistent with what he had done in the case of the Assessee; the AO assessed the gains from sale of shares of PLL as capital gains in the hands of Hulas Rahul Gupta.

10.1 The Commissioner of Income Tax (hereafter 'CIT') was of the view

that the assessment made in the case of Hulas Rahul Gupta for AY 2007-08 was erroneous as prejudicial to the interest of the Revenue. He, accordingly, made an order under Section 263 of the Act dated 15th March, 2010 modifying the assessment order and directing the AO to treat a sum of Rs.17,72,17,484/- as business income under Section 28(va) of the Act. The Assessee in that case, Hulas Rahul Gupta, preferred an appeal before the Income Tax Appellate Tribunal (being ITA No. 1577/Del/2010) assailing the order dated 15th March, 2010 passed under Section 263 of the Act.

10.2 In those proceedings before the Tribunal, it was contended on behalf of the Revenue that a reading of the WSSPA indicated that Rs.38 per share was taxable as income from business under Section 28(va) of the Act. The written submission filed on behalf of the Revenue referred to various provisions of the Indian Contract Act, 1872 and claimed that the revised WSSPA was void; these are echoed in the reasons recorded by the AO in the present case. The Assessee, on the other hand, contended that there was no justification for segregating the consideration paid in terms of the revised WSSPA. The Assessee further pointed out that more than 20% of the shares of PLL were acquired by the Acquirers from public at a price of Rs.190 per share and thus, there was no reason to hold that the sale price of shares in the

case of the Assessee was lower. It was further pointed out by the Assessee that there was no grievance that the AO had not examined the relevant agreements and the scope of Section 263 of the Act could not be invoked where two views were possible.

10.3 After hearing the rival contentions, the Tribunal observed that the CIT had passed an order under Section 263 of the Act on the ground that the AO had applied incorrect provisions of law while assessing the income and there was no allegation that proper enquiry had not been held. The Tribunal further rejected the contention advanced on behalf of the Revenue that the revised WSSPA was void as per Sections 10, 25 and 27 of the Indian Contract Act, 1872. It held that the parties were competent to enter into a contract, and fix the price for the subject shares. The Tribunal further noted that it was not the Revenue's case that the shares were sold at a price lower than that available in the market and held that the Revenue did not have the power to hold that the shares were sold by charging a non-compete fee where the revised WSSPA did not reflect so. The Tribunal also rejected the Revenue's contention that the revised WSSPA was a colourable device to avoid tax. The Tribunal finally concluded that the AO had taken one of the possible views and could not be stated to have applied any incorrect

provisions of law. Accordingly, the appeal filed by the Assessee was allowed.

11. We are informed that the Revenue has not preferred an appeal against the aforesaid decision of the Tribunal. It is also relevant to note that the reasons recorded by the AO in the present case is identically worded, in certain material parts, as the written submissions filed on behalf of the Revenue before the Tribunal in the case of Hulas Rahul Gupta. The AO issued the impugned notice after the Revenue had failed in persuading the Income Tax Appellate Tribunal to accept their submissions; the impugned notice dated 28th March, 2012 was issued five days after the pronouncement of the decision by the Income Tax Appellate Tribunal in the aforementioned case of Hulas Rahul Gupta.

12. The queries raised by the AO and the submissions made by the Assessee in response thereto amply bear out that the AO had examined the WSSPA, the revised WSSPA and the letter dated 27th December 2006 issued by SEBI to revise the public offer price for PLL shares from Rs. 152 per share to Rs. 190 per share. In these given facts, there could be no dispute that the AO had examined all relevant facts with regard to the sale price of the shares in question and had made the assessment accordingly.

13. Insofar as the allegations that certain shares were held by the Assessee for a period less than 12 months is concerned, the same is disputed by the Assessee. During the course of proceedings, Mr Salil Aggarwal, learned counsel for the Assessee has handed over a statement of shareholding as enclosed with the Assessee's letter dated 12th August, 2009. This statement clearly discloses various dates on which subject shares were acquired by the Assessee. This indicates that certain shares had been acquired by the Assessee by way of a gift. Undisputedly, for the purposes of considering whether the same were long-term capital assets or not, the date on which the donor acquired the shares is relevant and not the date on which the Assessee acquired the shares in question. In any view of the matter, it is not disputed that the statement of shareholding indicating the dates on which the subject shares were acquired was provided to the AO in response to the queries raised by him. Thus, it cannot be accepted that the AO did not consider the same while making the assessment order. Thus, it is apparent that the present case is one where the issuance of the impugned notice is occasioned by a change of opinion, which given the scope of Section 147-148 of the Act, is impermissible.

14. In this context, it is relevant to refer to the decision of a Full Bench of

this Court in **CIT v. Usha International Ltd.:** (2012) 348 ITR 485 (Delhi)

had held as under:-

“Re-assessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The re-assessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.”

15. Following the aforesaid decision, a Division Bench of this Court in **Maruti Suzuki India Limited v. Deputy Commissioner Of Income Tax:** [2013] 356 ITR 209 (Delhi) had explained that in cases where no query is raised, it must be held that the Assessing Officer had examined the subject matter even though there may not be any discussion in the assessment order. The Court had referred to the decision in ***Usha International*** (*supra*) and observed as under:-

“It is apparent from the above extract that even in cases where no query is raised by the assessing officer in the course of the original assessment proceedings it may yet be held that the assessing officer had examined the subject matter. This is so because the aspect or question in issue may be too apparent and obvious. However, the Full Bench cautioned by stating that such cases would have to be examined individually. It is,

therefore, clear that even where no query is raised by the assessing officer and there is no discussion in the assessment order, it may yet be a case where the assessing officer would be considered to have examined the issue. However, we are not concerned with those type of cases inasmuch as in the present case the assessing officer had clearly raised a specific query with regard to bad debts/advances written off and the petitioner/assessee had given details in respect thereof. It is obvious that since no such addition was made on that count, the assessing officer had considered and examined the position and held in favour of the petitioner/assessee. Therefore, we can safely conclude that, in the facts and circumstances of the present case, the assessing officer had, indeed, examined the issue at the time of the original assessment proceedings and had formed an opinion by not making any addition in respect thereof. Thus, the reopening of the assessment which had been concluded on 13.03.2006, would be nothing but a mere change of opinion.”

16. A similar view was expressed by the Supreme Court in **CIT v. Kelvinator of India Ltd.:** [2010] 320 ITR 561 (SC), wherein it authoritatively held that a mere change of opinion cannot be a reason to re-open assessments. The relevant extract from the said decision is as under:-

“6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st

April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

17. In **Andhra Bank Ltd v. Commissioner of Income-tax**: [1997] 225 ITR 447 (SC), the Supreme Court held that once the Income Tax Officer had passed an order after taking into account the relevant facts, it was not open for his successor to re-open the assessment at a later point of time. The relevant extract of the said decision reads as under:-

“The facts stated above clearly disclose that the Income-tax Officer allowed the change in the method of accounting for the assessment years concerned herein knowingly. It was not a case of an inadvertent mistake which was discovered later on after completion of the assessment or oversight. Once it is found that the change in the method of accounting was knowingly allowed by the Income-tax Officer after taking into account all the relevant facts it is not permissible for the Income-tax Officer, or his successor, to reopen the assessment at a later point of time under section 147(b) of the Income-tax Act unless any information comes from an extraneous source. Further, we fail to see what is the “information” available to the Income-tax Officer in this case on the basis of which he is seeking to reopen the assessments under clause (b) of section 147. We find none. Indeed, this appears to be a case of mere change of opinion. The principles enunciated in Kalyanji Mavji’s case [1976] 102 ITR 287 (SC) cannot save the impugned action of the Income-tax Officer.”

18. Mr Zoheb Hossain, the learned counsel appearing for the Revenue contended that the Petitioners had failed to fully and truly disclose the relevant material. In our view, the said contention is not relevant as the impugned notice was issued within a period of four years from the end of the relevant assessment year and, therefore, the proviso to Section 147(1) of the Act is not attracted.

19. Next, Mr Hossain contended that in terms of clause 20 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, public offer price for acquiring shares from public would necessarily also include the consideration for a restrictive covenant agreed with the sellers, which

triggers the obligation to make an open offer. He argued that the aforesaid Regulations were framed pursuant to suggestions made by Justice Bhagwati Committee for protection of minority shareholders. He contended that the price of Rs.190 per share was fixed by SEBI taking into account the non-compete fee. Be that as it may, in our view the aforesaid contentions are not relevant as the issue at hand is not whether the assessment made by AO was erroneous or not. The only question to be considered is whether the AO had formed an opinion on the basis of all relevant facts. In the facts of the present case, it is clear that the AO had made the assessment order after taking into account all the relevant facts and, therefore, it is not open for his successor to now re-open the said assessment without any further tangible material giving rise to a reasonable belief that the Assessee's income has escaped assessment.

20. For the aforesaid reasons, W.P.(C) 1962/2013 is liable to be allowed.

21. The material facts relating to W.P.(C) 2015/2013 are also similar. In that case the Petitioner, Abha Gupta held 2.35% of the shareholding of PLL at the material time. She too had entered into the agreements alongwith other promoter shareholders – WSSPA and revised WSSPA - for sale of her shareholding in PLL to the Acquirers. She filed her return of income for AY

2007-08 declaring income of Rs.10,63,49,534/-. As in the case of Priya Desh Gupta above, her return was also picked up for scrutiny and she also provided all relevant documents including WSSPA and revised WSSPA to the AO; who after examining the relevant facts passed an assessment order under Section 143(3) of the Act on 5th October, 2009 accepting the income declared by her.

22. A notice under Section 148 of the Act was issued to Abha Gupta on 21st March, 2012 calling upon her to file her return of income for AY 2007-08. In response to the aforesaid notice, the Petitioner filed her return declaring the income as originally declared by her. She also requested for reasons to believe for issuance of notice under Section 148 of the Act which was provided to her on 25th October, 2012. The reasons recorded in this case are almost identical to the reasons as recorded in the case of Priya Desh Gupta except that in this case, there is no allegation that any of the subject shares held by the Petitioner were short-term capital assets.

23. The Petitioner objected to the reasons which were disposed of on 18th March, 2013 in terms similar to those as in the case of Priya Desh Gupta.

24. For the reasons as stated above, this petition (W.P.(C) 2015/2013) is

also liable to be allowed.

25. In view of the aforesaid, the notice dated 28th March, 2012 impugned in W.P.(C) 1962/2013 and the notice dated 21st March, 2012 impugned in W.P.(C) 2015/2013 are set aside. The re-assessment proceedings commenced pursuant to the aforesaid impugned notices are quashed.

26. The petitions are allowed. The pending applications also stand disposed of. However, in the circumstances, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

MAY 16, 2016
RK