

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 04.05.2016

+ **W.P.(C) 12325/2015 & CM No. 32738/2015**

UNITECH HOLDINGS LIMITED

..... Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Salil Aggarwal, Mr Prakash Kumar and Mr Madhur.

For the Respondents : Mr Dileep Shivpuri, Senior Standing counsel with Mr Sanjay Kumar.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Unitech Holdings Limited (hereafter 'the Assessee') has filed the present petition under Article 226/227 of the Constitution of India impugning a notice dated 11th December, 2014 issued under Section 148 of the Income Tax Act, 1961 (hereafter 'the Act') initiating re-assessment proceedings for Assessment Year (AY) 2010-11. The Assessee further impugns an order dated 9th November, 2015 disposing of the Assessee's objections to the initiation of re-assessment proceedings.

2. The Assessee is a Non Banking Financial Company (NBFC) and is wholly owned subsidiary of Unitech Limited, a widely held public company, which is engaged in, *inter alia*, the business of construction and development of real estate.

3. The Assessee filed its return of income for AY 2010-11 on 12th October, 2010 declaring an income of Rs.35,22,210/-. The said return was picked up for scrutiny and, thereafter, an assessment order under Section 143(3) of the Act was passed on 26th March, 2013 assessing the Assessee's income at Rs.8,84,66,800/-.

4. Aggrieved by the aforesaid assessment order, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)']. The said appeal was allowed by CIT(A) by an order dated 28th March, 2014 and all additions and disallowances made by the Assessing Officer (hereafter 'AO') were deleted.

5. Thereafter, the Assessee received the impugned notice dated 11th December, 2014 under Section 148 of the Act, *inter alia*, stating that the AO has reason to believe that the Assessee's income chargeable to tax in respect of AY 2010-11 had escaped assessment within the meaning of Section 147 of the Act and proposing to initiate the re-assessment

proceedings. By the said notice, the Assessee was called upon to furnish a return of income for AY 2010-11 within a period of 30 days from the date of service of the said notice.

6. The Assessee requested for the reasons recorded for initiating re-assessment proceedings, which were furnished by the AO under the cover of a letter dated 1st July, 2015. On receipt of the aforesaid reasons, the Assessee filed its objections which were disposed of by the impugned order dated 9th November, 2015.

7. The reasons recorded by the AO for initiation of the re-assessment proceedings indicate that during the assessment proceedings pertaining to the Assessee's holding company, Unitech Limited, it was noticed that Unitech Limited had transferred shares in three joint venture companies, namely, Unitech Developers & Projects Limited, Unitech Hi-Tech Structures Limited and Unitech Realty Projects Limited, to the Assessee. The said shares were transferred at the cost price reflected in the books of M/s Unitech Limited, which was significantly lower than the book value of those shares calculated on the basis of the net worth of the said companies.

8. According to the AO, the book value of the shares of the aforesaid three companies transferred by M/s Unitech Limited on the date of the transfer/sale - as on 31st March, 2010 - was Rs.3,61,40,20,487/- and the said shares were transferred at the cost price of Rs.41,15,79,320/-. The AO alleged that no working of the fair value of the said shares in question was available at the time of sale/transfer for justifying the value at which they were transacted and on the said basis, the AO recorded that *“I have reasons to believe that the difference in the book value of the shares and the cost incurred by the assessee to purchase them is income of the assessee u/s 28(iv) of the Income Tax Act, which has escaped assessment”*.

9. Mr Salil Aggarwal, learned counsel appearing for the Assessee referred to a questionnaire dated 23rd January, 2012 issued by the AO during the course of the assessment proceedings for AY 2010-11, which required the Assessee to furnish several details including: (i) certified copy of the audited Balance Sheet and Profit and Loss Account for the Financial Year 2009-10 along with all Schedules, Annexures, Auditor's Report and Notes to the Accounts; (ii) details of business activities; (iii) evidence of assets purchased/sold during the year above Rs.1,00,000/-;

and details of transactions with parties covered under Section 40A(2)(b) of the Act along with copies of the Accounts.

10. Mr Aggarwal stated that the queries raised by the AO were duly responded to and referred to in the letter dated 20th February, 2013 enclosing therewith various documents including copy of Ledger Account of M/s Unitech Limited, which indicated entries pertaining to purchase of the shares in question, as well as a statement indicating the details of the shares purchased. He laid emphasis on the opening words of the said letter dated 20th February, 2013 which indicated that the said letter was in compliance with the AO's demand for additional information. He contended that it was evident that the Assessee had made full disclosure in respect of the transactions of purchase of the shares in question and the same had been examined by the AO during the assessment proceedings. He contended that in the given circumstances, it was clear that the impugned re-assessment proceedings were initiated only on a change of opinion which was not permissible.

11. Mr. Aggarwal referred to the decisions of the Supreme Court in **CIT v. Kelvinator of India Ltd.:** (2010) 320 ITR 561(SC), and **Commissioner of Income-tax v. Usha International Ltd.:** (2012) 348

ITR 485 (SC) in support of his contention that the proceedings for re-assessment could not be initiated on the ground of change of opinion.

12. Next, Mr Aggarwal contended that there was no tangible material on the basis of which the AO could reasonably form a belief that the income of the Assessee had escaped assessment. He argued that the sale of shares by Unitech Ltd. at their cost price could not possibly lead to an inference that the income of the Assessee, under Section 28(iv) of the Act, had escaped assessment.

13. Countering the arguments advanced by Mr Aggarwal, Mr Dileep Shivpuri, learned Senior Standing Counsel contended that the AO of Unitech became aware that the shares of the three companies in question had been transferred to the Assessee at a value below their book value, during the course of the assessment proceedings relating to that company. He submitted that this fact was not disclosed by the Assessee during the course of its assessment proceedings for AY 2010-11 and was not in knowledge of the AO at the material time. He contended that, therefore, this information would constitute tangible material for re-opening of the assessment.

14. Mr. Shivpuri further submitted that the letter dated 20th February, 2013 relied upon on behalf of the Assessee, only indicated that the Assessee had disclosed the shares purchased by it and the value at which such purchase had been made. However, the fair value of the said shares was not disclosed and, therefore, no opinion could have been formed by the AO in that regard. He contended that in the given circumstances, the question of change of opinion did not arise and the AO could not be faulted for initiation of reassessment proceedings. He also referred to Explanation 1 to Section 147(1) of the Act and on the strength of the same, contended that furnishing of a statement of the shares purchased would not necessarily amount to disclosure within the meaning of first proviso to Section 147(1) of the Act.

15. Mr Shivpuri also referred to the decision of the Supreme Court in **ACIT v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.:** (2007) 291 ITR 500 (SC) and contended that at the stage of initiation of proceedings, the AO was only required to form a *prima facie* opinion that the Assessee's income had escaped assessment and the AO was not required to take a final decision at that stage.

16. Next, he referred to the decision of the Supreme Court in **Income Tax Officer v. Selected Dalurband Coal Co. P. Ltd.:** (1996) 217 ITR

597 (SC) in support of his contention that the veracity or correctness of information received for reopening the assessment would only be determined during the course of the proceedings and not at the stage of initiation of reassessment proceedings. He earnestly contended that the opinion that Assessee's income had escaped assessment was the subjective opinion of the AO and if he had formed such an opinion on the basis of material available, the question whether the said material was sufficient or could lead to such opinion, could not be made the subject matter of enquiry by this court. He emphasised that so long as the AO considered the material to be sufficient to form an opinion, the same could not be questioned and all that was required to be looked into was whether there was any nexus between the material discovered and the AO's opinion. He submitted that, in the present case, the AO had felt that the sale of the shares in question below their respective book values indicated escapement of income and this opinion could not be questioned.

17. At the outset, we must note that the impugned notice under Section 148 of the Act has been issued within a period of four years at the end of the relevant AY and, therefore, the first proviso to Section 147(1) of the Act is not attracted; it is not necessary to establish that the income chargeable to tax had escaped assessment by reason of the failure on the

part of the Assessee to disclose fully and truly all material facts necessary for his assessment. Consequently, Explanation 1 to Section 147(1) of the Act - which provides that the production before the AO of accounts or other evidence from which material evidence could with due diligence have been discovered by the AO would not necessarily amount to disclosure for the purposes of the proviso to Section 147(1) of the Act - is not relevant for the purposes of this petition.

18. Now, turning to the facts of the present case, it cannot be disputed that the transaction of purchase of the shares of the three joint venture companies were subject matter of enquiry by the AO. The questionnaire dated 23rd January, 2012 specifically called upon the Assessee to disclose several details including transactions with related parties along with the copies of the relevant accounts. Indisputably, details of such transaction had been furnished along with the Ledger Accounts of various parties and that included the Ledger Account of Unitech Limited in the books of the Assessee. A bare perusal of the Ledger Accounts produced by the Assessee indicates that the transaction relating to purchase of the shares in question is reflected in those accounts. It is also apparent that the AO had made enquiries and had called upon the Assessee to furnish further

information in response to which the Assessee had filed the letter dated 20th February, 2013. The relevant extract of which is reproduced below:-

"In response to your additional requirements, enclosed please find following documents/information as required.

XXXX XXXX XXXX XXXX
XXXX

- 2) Copy of Ledger A/c of M/s Unitech Ltd in the books of the assessee company for the F/Y 2007-08, 2008-09 and 2009-10. Annex-2

In this regard, most humbly it is submitted that the assessee company is a Non-Banking Finance Company (NBFC Company) and is investment arm of Unitech Ltd. Unitech Ltd being 100% holding company of the assessee company, transferred some investments related with some of the companies to the assessee company as on 30.03.10 & 31.03.10. The detail of such transfers is although reflected in the ledger a/c of Unitech Ltd which is enclosed here-in-above and is further specified as per the detail enclosed herewith. Annex-3

Further to above, it is brought to your kind notice that at the end of the F/y 2009-10, the assessee company became the 100% holding company of Bengal Unitech Universal Townscape Ltd and it is therefore advances of Rs. 39.11 Cr was transferred to the assessee company from Unitech Ltd and ledger A/c of Unitech Ltd in the books of the assessee company was credited accordingly. Simultaneously Share Capital of this company was transferred to the assessee company on the same day."

19. Annexure 3 to the aforementioned letter dated 20th February, 2013 indicated the details of transfer of investment as on 30th March, 2010 and 31st March, 2010 and is reproduced below:-

ANNEXURE - 3		
DETAILS OF TRANSFER OF INVESTMENT AS ON 30.03.2010 & 31.03.2010		
30.03.2010	Unitech Amusement Parks Limited	250000000
	Unitech Sai Private Limited	138600000
		388600000
31.03.2010	Unitech Hitech Structures Limited	308320
	Unitech Developers & Projects Limited	11103990
	Unitech Realty Private Limited	400167010
		411579320

20. It is apparent from the above that the transaction dated 31st March, 2010 relating to transfer of investments in the three companies aggregating to Rs.41,15,79,320/- was a subject matter of enquiry by the AO. The AO having enquired into the transaction of sale and purchase, and having examined the values at which the transactions had taken place had not raised any further issue with regard to the transactions in question. It plainly follows from the above that AO had satisfied himself as to the entire transaction of purchase of shares including the

consideration thereof which was duly reflected in the statement furnished by the Assessee. Although the working relating to the books value of the shares - assuming that that is relevant - is not available, it must be presumed that the AO had satisfied himself as to the value of the transaction and also that the same were held as investments by the Assessee. This is so because the transaction itself had been enquired into and the value at which the shares are transferred as well as the nature of those assets in the hands of the Assessee – whether held as investments or as stock in trade - were plainly the most important aspects of the transaction. Thus, it must be accepted that the AO, after application of mind, had accepted that the shares in question were acquired by Assessee from M/s Unitech Limited at their cost price and were held as investments by the Assessee. It has been held in a number of decisions that once it is shown that the AO had enquired into the transactions, it must be assumed that he had examined the relevant aspects even though the same have not been expressly referred to in the assessment order. In ***Usha International Ltd.*** (*supra*), a Full Bench of this Court observed that there may be cases where the AO may not have raised any written queries but the issue may be so obvious and apparent that it would be contrary and opposed to human conduct to assume that the same had not been considered by the AO.

21. In this view, we are unable to accept that AO had not formed an opinion as to various aspects of the transaction in question, including its value insofar as it is relevant for assessing the Assessee's income. Consequently, we must accept the contention that the impugned notices have been occasioned by a change of opinion. It is trite that a mere change of opinion cannot constitute a reason for re-opening the assessment. This has been authoritatively held by the Supreme Court in ***Kelvinator of India Limited*** (*supra*) in the following words:-

"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, reopening 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 reopen the assessment. Therefore, post-1st April, 1989, power to reopen 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 reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be

based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening 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 reopen, 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 reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."

22. The aforesaid view has been reiterated in several decisions thereafter. Thus the impugned notice is liable to be set aside for this reason alone. However, for the sake of completeness, it would be necessary to address the issue, whether the AO had any tangible material for forming a belief that Assessee's income had escaped assessment.

23. It is well established that the AO's belief that an Assessee's income has escaped assessment is a matter of his subjective opinion and a Court

would not supplant its view over that of the AO. However, the question whether the material could reasonably lead to a belief that an Assessee's income had escaped assessment would certainly be open for examination. This is an essential safeguard which is built in the language of Section 147 of the Act. As explained in **ITO v. Lakhmani Mewal Das: (1976) 103 ITR 437 (SC)**, the words used in Section 147 of the Act are 'reason to believe' and not 'reason to suspect'. Clearly, the tangible material available with the AO should be such as to reasonably lead the AO to believe that Assessee's income had escaped assessment. Even though such opinion may be his subjective opinion, nonetheless, it cannot be arbitrary or whimsical and must be one which a person could reasonably form on the basis of some tangible material. In ***Rajesh Jhaveri Stock Brokers Pvt. Ltd.*** (*supra*), the Supreme Court has explained that “*the word 'reason' in the phrase 'reason to believe' would mean cause or justification*”. Thus, the AO must have cause or justification to believe that the income had escaped assessment. Thus, even though, the AO is not required to finally conclude at the stage of issuance of notice under Section 148 of the Act that the Assessee's income has escaped assessment, nonetheless, he must - on the basis of material in his possession - reasonably form a belief that the Assessee's income had escaped assessment.

24. In **Lakhmani Mewal Das** (*supra*), the Court had explained that the material available with the AO must have a live link with formation of belief that the Assessee's income had escaped assessment.

25. Applying the aforesaid principles, in the facts of the present case, it is difficult to accept that the sale of shares by Unitech Limited at its cost price which is lower than the book value of the shares would result in income (equivalent to the difference between the book value of the shares and the cost price at which they were sold) in the hands of the Assessee. The shares of the three companies in question are held as investments by the Assessee and duly reflected by the Assessee as such. No objection has been raised by the AO in this regard. In the circumstances, we find it difficult to comprehend as to how the acquisition of investments by the Assessee could lead to an inference that the Assessee had earned income under Section 28(iv) of the Act - value of any benefit or perquisite arising from business or profession - chargeable under the head profits and gains of business or profession.

26. The reliance placed by Mr Shivpuri on the decision of the Supreme Court in **Selected Dalurband Coal Co. P. Ltd.** (*supra*) is also misplaced. In that case, the AO was in the possession of a letter of the Chief Mining Officer which indicated that a joint inspection of the Assessee's mines

have been undertaken by the officers of the Mining Department and the representatives of the assessee (in that case) and it was found that 1,36,390 metric tonne of excess coal had been raised and 387 metric tonne of surface coal was short. The State of West Bengal had, thus, decided to charge royalty on the excess raising and the shortage in surface coal which were, apparently, not reflected in the books. Clearly, the fact that coal in excess of the declared quantity had been raised and 387 metric tonne of surface coal was short would lead to an inescapable conclusion that coal had been sold outside the books and income resulting therefrom had escaped assessment. Thus, plainly, the material available with the AO had a logical link with the AO's belief that the assessee's income had escaped assessment. It is, in that context, that the Supreme Court held that the fact whether allegations made in the letter of the Chief Mining Officer were correct or not would be a subject matter of the proceedings. However, the letter gave a reasonably specific estimate of excessive coal mining resulting in a belief that the Assessee's income had escaped assessment. In that case, the nexus between material available with the AO and the belief that the Assessee's income had escaped assessment was clearly established. This is not so, in the present case.

27. Mr Shivpuri's contention that AO's opinion is not amenable to judicial review and thus the material on which such opinion is formed also cannot be made a subject matter of enquiry, is without merit. Whilst, we agree that the AO's belief that income of an assessee has escaped assessment is a matter of his subjective satisfaction, the question whether such belief could be reasonably formed and whether the material available with the AO could possibly lead to such belief can certainly be enquired into.

28. In view of the aforesaid, the impugned notice and the proceedings initiated pursuant thereof are quashed. The petition is allowed. The pending application also stands disposed of. However, the parties are left to bear their own costs.

VIBHU BAKHRU, J

S.MURALIDHAR, J

MAY 04, 2016
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