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

\+ **W.P.(C) 11541/2017 & CM Appl.No.47020/2017 (stay)**

VEDANTA LTD. (SUCCESSOR OF STERLITE INDUSTRIES (INDIA) LIMITED) ..... Petitioner

Through: Mr.Sachit Jolly and Mr.Aarush Bhatia, Advocates.

versus

ASST. COMMISSIONER OF INCOME TAX, CIRCLE-26 (1), NEW DELHI ..... Respondent

Through: Ms.Vibhooti Malhotra, Senior Standing Counsel.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE TALWANT SINGH**

**O R D E R**

**% 20.08.2019**

**Dr. S. Muralidhar J.**:

1. This is a writ petition challenging the notice dated 31st March, 2017, issued by the Respondent, Assistant Commissioner of Income Tax, Circle-26 (1), New Delhi (hereafter, the Assessing Officer) (AO) seeking to reopen the assessment of the Petitioner for Assessment Year (AY) 2010-2011 under Section 147 of the Income Tax Act, 1961 (the Act).

2. The background facts as stated in the petition are that the erstwhile Sterlite Industries (India) Ltd., which stands amalgamated with Sesa Sterlite Ltd., and now known as Vedanta Ltd., was incorporated in 1975. During the relevant AY, the Petitioner was engaged in the business of manufacturing of

copper and other non-ferrous metals, phosphoric acids, sulphuric acid etc, in the AY 2010-2011. The return of income was filed on 8th October, 2010 and was, thereafter, revised on 31st March, 2012. The Petitioner was required to file its audited accounts, tax audit report and Form 3CEB, containing details of the international transactions entered into between the Petitioner and its affiliates. These were duly filed with its return.

3. According to the Petitioner, in the audited accounts filed before the AO, it made disclosures in respect of consultancy and management fees paid to Vedanta Resources PLC (VR PLC). This was in the sum of Rs.23.71 crores. Likewise, in the Form 3CEB, disclosure was made regarding the aforementioned sum paid to VRPLC. Also, in Schedule M and Schedule V of the tax audit report, details of payments made to VR PLC towards long-term incentive plan, management fees and Corporate Guarantee Commission were duly disclosed. Note 4 below the said Schedules reads as under:

> "4. The Company has accounted for management consultancy fees of Rs.142,248,300/- equivalent to USD 3 million payable to Non resident Company during the year under review. The Company has submitted that the payment is not in the nature of fees for technical services chargeable to tax under the provisions of the Act. The obligation to deduct tax source arises, according to the Company, only when the payment is chargeable to tax under the provision of the Act. Accordingly, the Company has not deducted tax at source from the above management consultancy fees. "

4. The case of the Petitioner was referred by the AO to the Transfer Pricing Officer (TPO) on 26th February, 2013, after obtaining approval from the jurisdictional Commissioner.

5. By an order dated 28th January, 2014, the TPO made certain Transfer Pricing (TP) (adjustments) to the income of the Petitioner. The TPO noted that the management and consultancy services had been rendered by VRPLC to the Petitioner. This was indicated in a tabular form by the TPO in the aforementioned order.

6. On 6th November, 2013, a notice was issued by the AO to the Petitioner calling upon it to furnish details which included the following:

> "7. Disallowance u/s. 40 (a) (ia) last year, allowed this year of Rs.60,95,322/-.
>
> 8. As seen from annexure L certain amounts were paid without TDS u/s. 194J and 194C. Please submit the details.
>
> 10. Please submit the details of commission expenses paid unit wise and details of TDS done along with the ledger copy. "

7. The Petitioner replied to the aforementioned queries on 12th December, 2013 and 14th March, 2014. In the assessment order dated 2nd May, 2014, passed under Section 143(3) of the Act, the AO made a note of the above transactions.

8. The final Assessment Order dated 2nd May, 2014, was challenged by the Petitioner by filing W.P. (C) No. 15937/2014 in the High Court of Madras. The said High Court stayed the recovery of the demand, subject to payment of 15% of the total tax demand, by an order dated 20th June, 2014. The said petition is stated to be pending.

9. By way of the notice dated 14th March, 2017, the Deputy Commissioner of Income Tax (International Taxation) (Madurai) [ DCIT (IT)] initiated proceedings against the Petitioner under Section 201(1)/(1A) of the Act for AYs 2010-2011 and 2011-2012. These proceedings culminated in two separate orders dated 31st March, 2017, holding the Petitioner to be an Assessee in default for failure to withhold tax under Section 195 of the Act in respect of the management and consultancy services received by the Petitioner.

10. The Petitioner challenged the said orders of the DCIT (IT), Madurai, in the Madurai bench of the Madras High Court by Writ Petition (MD) Nos. 8269-70/2017. By orders dated 27th April, 2017 and 16th June, 2017, the Madurai Bench of the Madras High Court stayed the recovery of the demand. The said writ petitions are stated to be pending.

11. On the same date that the DCIT (IT) issued the above orders i.e. 31st March, 2017, the impugned notice was issued to the Petitioner by the AO under Section 148 of the Act seeking to reopen the assessment for AY 2010-2011. The Petitioner states that it received the said notice on 1st April, 2017.

12. It must be noted here that the said notice under Section 148 was issued by the ACIT Circle-1, Panaji, Goa and subsequently, the jurisdiction of the Petitioner came to be transferred to that of the present Respondent in New Delhi. Thereafter, the Respondent issued a notice dated 24th November, 2017, again asking the Petitioner to file its return of income. By a letter dated 1st December, 2017, the Petitioner filed its return of income declaring

the income as reported in its revised return filed on 31st March, 2012.

13. The Petitioner then sought and was provided with the reasons for reopening of the assessment, the relevant portion of which read thus:

"Reasons recorded for reopening income tax assessment
U/s. 147 of I.T.Act. 1961

The assessee filed its return of income for AY 2010-11 on 08.10.2010 declaring total income of Rs.3,15,87,44,760/- which was revised by filing revised return on 18.10.2010 showing income of Rs.3,24,66,48,940/- under normal provision. The assessment was completed on 02.05.2014 u/s. 143(3) & Sec. 92CA r.w.s. 144Cof LT. Act, 1961, assessing the total income of the assessee at Rs.729,30,12,330 under normal provisions & Rs.760,03,73,643/- u/s. 115JB of the LT. Act, 1961.

2. Order u/s. 201(1) & (1A) of the LT. Act, 1961 dt. 31.03.2017 was passed by DCIT (International Taxation) Madurai in which the DCIT (International Taxation) Madurai has stated that assessee has not deducted TDS in respect of the following remittances, for the detailed reasons discussed in the body of the said order(was liable to do so) :-

| F.Y | Amount | Description | Recipient | Nature |
|---|---|---|---|---|
| 2009-10 | Rs.22,91,15,590/- | Consultancy Fees | Ms Vedanta Resources Pic, UK | FTS |

The assessee is clearly in default for the non-deduction of TDS u/s. 201(1)/1A of the I.T. Act, 1961 for above referred remittance, thereby the said payment/remittance made is not allowable u/s: 40(a)(i) of the I. T. Act, 1961, and which is to be added to the total income of the assessee and brought to tax.

> In view of the above facts, it is abundantly clear that there is failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessments for the AY 20110-11. Therefore, I have reason to believe that income chargeable to tax amounting to Rs.22,91,15,590/- has escaped the assessment, within meaning of provision of section 147 of the Income Tax Act, 1961. Accordingly, assessment for A.Y. 2010-11 is proposed to be reopened by issuing notice u/s 148 of the I.T. Act, 1961.
>
> Asst. Commissioner of Income Tax
> Circle-1(1), Panaji"

14. The Petitioner by letter dated 4th December, 2017, raised objections to the reopening of the assessment. These objections were rejected by the Respondent by an order dated 'NIL' received by the Petitioner on 6th December, 2018.

15. Thereafter, the present Petition was filed. On 22nd December, 2017, while directing notice to be issued in the petition, this Court passed the following order:

> "W.P. (C) No. 11541/2017 & CM No. 47020/2017
>
> Issue notice returnable on 7th March, 2018.
>
> Learned counsel for the petitioner has stated that the issue involved in the two writ petitions before the Madras High Court relates to (i) jurisdiction of the Assessing Officer, who had passed the order under Section 143 (3) of the Income Tax Act, 1961 and (ii) whether the order passed under Section 201/201(A) was passed within the limitation period.
>
> The submission is that this is a case of change of opinion and secondly the conditions stipulated in the proviso are not satisfied as the reopening is after four years. It is stated that in

> the first round the question of international transactions, which would include the transaction recorded in the reasons for re-opening, were examined. The question of failure to deduct TDS, cannot be made subject matter of re-assessment, as jurisdictional preconditions are not satisfied.
>
> Counter affidavit would be filed within four weeks. Rejoinder, if any, within four weeks after service of the counter affidavit.
>
> The respondents would ensure that the original records, including the records of the Assessing Officer, who had recorded reasons, are available at the time of hearing.
>
> Re-assessment proceedings can continue, but no final order would be passed till the next date of hearing.
>
> Copy of this order will be given dasti to the learned counsel for the parties under signature of the Court Master."

16. In the counter-affidavit filed in response to the present petition, the stand taken by the Respondent is that in view of the order of the DCIT International transaction passed on 31st March, 2017 holding the Assessee to be an Assessee in default for non-deduction of TDS under Section 201(1)/(1A) of the Act for remittance of the management consultancy fee, the said payment/remittance was not allowable as a deduction under Section 40 (a) (i) of the Act, and therefore, there was failure on part of the Assessee to disclose fully and truly all material facts necessary for its assessment for AY 2010-2011.

17. The above order passed by the DCIT (IT) is characterised by Respondent as 'fresh information, specific in nature and reliable in character relating to the concluded assessment which exposes the paucity of the Assessee's

statement during the original assessment' and that this forms a 'legitimate basis for reopening the assessment.' It is further contended that the mere disclosure of the said transaction at the time of the oral assessment cannot be said to be a disclosure of the 'true' and 'full' facts of the case. Reliance is placed on the decisions in ***Commissioner of the Income Tax v. Velocient Technologies Ltd. (2015) 376 ITR 131*** and ***New Delhi Television Ltd. vs Deputy Commissioner of Income Tax (2017) 84 taxman.com 136 (Del).***

18. Mr. Sachit Jolly, learned counsel appearing for the Petitioner refers to the above facts of the Assessee having made full disclosure of its payment of management consultancy fees to VR PLC in its audited accounts and in the audit report. He also refers to the fact that specific queries were raised by the AO during the course of the assessment proceedings under Section 143 (3) of the Act on this aspect. He submits that this was not a case of failure on the part of the Assessee to make a full and true disclosure of all the material facts. He placed reliance on the decision in ***Commissioner of Income Tax, Calcutta v. Burlop Dealers Limited, (1971) 79 ITR 609 (SC)***.

19. Ms. Vibhooti Malhotra, learned senior standing counsel for the Revenue on the other hand referred to the decision in ***Honda SIEL Power Products Limited vs. Deputy Commissioner of Income Tax (2011) SCC OnLine (Del) 804*** and urged that merely because the material evidence was embedded which the Assessing Officer could have uncovered but did not, is not a good ground to invalidate a notice for re-assessment.

20. The reasons for reopening of the assessment in the present case, make it clear that what triggered the reopening of the assessment was the order dated 31st March, 2017 passed by the DCIT (IT) Madurai holding the Assessee to be an Assessee in default for not deducting TDS from the above payment made to the VR PLC towards management and consultancy fees.

21. The admitted position is that the proviso to Section 147 of the Act would stand attracted in the present case since the reopening was after four years and after the initial assessment was under Section 143 (3) of the Act. The only question that then arises is whether this was sufficient for the AO to have reason to believe that income had escaped assessment on account of the failure of the Assessee to make a full and true disclosure of all material facts relevant for the assessment.

22. From the narration of the facts, which have not been disputed by the Respondent, it appears that the above transaction regarding payment by the Petitioner of the management consultancy fees to VR PLC was indeed disclosed by the Petitioner, not only in the accounts but also in the audit report.

23. It is also seen that the reference was made by the AO to the TPO after forming an initial opinion about the need for such a step in terms of Section 92 B of the Act. Without noticing that it was an international transaction, it is unlikely that the AO would have made a reference to the TPO. Further, the TPO himself appears to have discussed this aspect in his order and this led the AO to again dealing with it in the assessment order. Therefore, this

was clearly not a case where there was any failure on the part of the Assessee to make a disclosure of all the material particulars.

24. It is sought to be contended that although the transaction may have been disclosed, the failure by the Assessee to deduct TDS was not disclosed. In this context, what needs to be noticed is note 4 appended to the audit report where the Assessee offered an explanation for non-deduction of TDS. As explained by the Supreme Court in ***CIT v Burlop Dealers Ltd. (1971) 79 ITR 609***, once the Assessee has placed all the material facts necessary for the assessment before the AO, he is under no obligation to instruct the AO about what the AO should do on the basis of such facts. The Supreme Court in that case observed as under:

> "We are of the view that under Section 34(1) if the Assessee has disclosed primary facts relevant to the assessment, he is under no obligation to instruct the Income-tax Officer about the interference which the Income-tax Officer may raise from those facts. The terms of the *Explanation* to Section 34(1) also do not impose a more onerous obligation. Mere production of the books of account or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure within the meaning of Section 34(1), but where on the evidence and the materials produced the Income-tax Officer could have reached conclusion other than the one which he has reached, a proceeding under Section 34(1)(a) will not lie merely on the ground that the Income-tax Officer has raised an inference which he may later regard as erroneous."

25. In this context, the following observations in ***Calcutta Discount Company Ltd. v. ITO (1961) 41 ITR 191 (SC)*** are also relevant:

> "The words used are 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year'. It postulates a duty on every Assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an Assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the Assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

26. As far as the decision in ***Honda Siel Power Products Ltd. v DCIT*** (*supra*) is concerned, the Court notices that in the said case, the stand of the Assessee about making a full and true disclosure of material facts was found to be 'illusionary and ambiguous'. In para 10 of the judgement, this Court noted that "the Petitioner had admitted and accepted that he had not given details with regard to proportionate expenses relatable to tax free or exempt income...". It is in those circumstances that the Court came to the conclusion that the reopening of the assessment could not be held to be bad in law.

27. In the present case, the Court is satisfied that there was no omission or failure on the part of the Petitioner to disclose all material facts relevant to the original assessment proceedings under Section 143(3) of the Act. Accordingly, in terms of the proviso to Section 147 of the Act, the assumption of the jurisdiction by the AO for reopening the assessment was bad in law.

28. Consequently, the impugned notice dated 31st March 2017 and the consequential order rejecting the objections of the Petitioner are hereby set aside.

29. The writ petition is allowed in above terms, but in the circumstances, with no orders as to costs. The pending application is disposed of.

**S. MURALIDHAR, J.**

**TALWANT SINGH, J.**

**AUGUST 20, 2019**
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