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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P. (C) 1182/2016

ALCATEL-LUCENT INDIA LIMITED Petitioner
Through: Mr. C.S. Aggarwal, Sr. Advocate with
Mr. Prakash Kumar and Ms. Mehvish Khan,
Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-2(1) NEW DELHI Respondent
Through: Mr. P. Roychoudhuri, Sr. Standing
Counsel.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MS. JUSTICE DEEPA SHARMA

% **ORDER**
07.11.2016

The re-assessment proceedings issued under Section 143 and 147 has been questioned by the assessee. The document containing “reasons to believe” for reopening assessment in this case reads as under: -

“Reasons to believe for reopening of assessment u/s 147 in the case of M/S Alcatel Lucent India Ltd. (PAN: AACCA8667N) in AY 2008-09.”

In this case return declaring loss of Rs.28,83,60,630/- was filed on 31.03.2010. The return was processed u/s 143(1) of the IT Act 1961. Thereafter, the assessment u/s 143(3) of the I.T. Act

was made by order dated 26.12.2011 determining total loss of Rs.21,78,43,257/-.

On perusal of records, it is noticed that the assessee had debited an amount of Rs.1,38,62,346/- to the profit and loss account in connection with the merger of the company with other companies and the merger was approved by the Delhi High Court. As per 3CD report deduction u/s 35DD amounting to Rs.27,72,469/- being the 1/5th of the total expenditure has been claimed by the assessee. Thus an amount of Rs.1,38,62,346/- incurred by the assessee and debited to the profit and loss account should have been added back and allowable deduction of Rs.27,72,469/- (1/5th of Rs. 1,38,62,346) should have been allowed to the assessee but while preparing the computation of taxable income an amount of Rs.27,72,469/- was added back and same amount was claimed as deduction u/s 35DD whereas an amount of Rs.1,38,62,346/- has not been added back by the assessee company. However, the assessee company added back only Rs.27,72,469/- instead of Rs. 1,38,62,346/-. Thus an amount of Rs. 1,10,89,877/- has escaped assessment.

Further verification of records, it is observed that the assessee had claimed deduction u/s 10A on ALTI and ADI units amounting to Rs.1,56,81,85,516/- in the computation of taxable income whereas the total deduction u/s 10A should have been allowed to Rs.1,55,75,07,036 (57,29,77,895 + 98,45,29,141) as shown in the computation of taxable income (unit wise). Thus, excess deduction of Rs.1,06,78,480/- u/s 10A was claimed by the assessee. Total deduction u/s 10A on Alcatel Lucent Technologies India Ltd. (ALTI) and Alcatel Development India Pvt. Ltd. (ADI) comes to Rs. 1,55,75,07,036/- instead of Rs.1,56,81,85,516 which is claimed exempted by assessee company. Hence the assessee has not filed fully and truly facts during the course of assessment and an amount of Rs.1,06,78,480/- has escaped assessment.

Further perusal of records, it is noticed that return of income was filed by the assessee at a loss of Rs.28,83,60,630/- which was assessed u/s 143(3) at a loss of Rs.21,78,43,257/-. It is observed that as per computation of taxable income, consolidated profit of all the five units should have been at Rs.59,75,01,112/- instead at a loss of Rs.28,83,60,830/-. Hence, the assessee has not filed fully and truly facts during the course of assessment proceedings and this resulted in under assessment of income of Rs.59,75,01,112/- and over assessment of loss of Rs.21,78,43,257/-. Thus, income to the tune of Rs.81,53,44,369/- has escaped assessment.

In view of the above, I am satisfied that the income to the tune of Rs.83,71,12,726/- has escaped assessment in AY 2008-09 by the reason of the failure on the part of the assessee and to disclosed fully and truly all material facts necessary for the assessment for that assessment year. Therefore, I hereby issue a notice under section 148 of the Income Tax Act, 1961 for the assessment year 2008-09 with the prior approval of Commissioner of Income Tax, Delhi-I, New Delhi.”

The assessee had filed its returns and during the pendency of assessment undergone re-assessment inasmuch as it became part of the new entity which had amalgamated four other companies. The new assessee, therefore, filed the revised return and underwent scrutiny assessment under Section 143 (3). As is evident from re-assessment notice, the Assessing Officer wishes to reopen the concluded scrutiny assessment based upon a satisfaction that income to the tune of ₹83,71,12,726/- had escaped assessment, attributable to the assessee's non-disclosure of material facts.

This Court has considered the contentions of the parties. The petitioner urges that in the absence of any tangible material, the AO

could not have issued a reassessment notice as it virtually amounts to change of opinion. The revenue, on the other hand, relies upon the audit report received by the AO which is the basis for re-assessment notice. It is quite evident that the AO did not receive any objective material warranting reopening of a concluded scrutiny assessment and that the re-assessment was based upon the observations of the audit report which had scrutinized the return for the concerned year on standalone basis. These observations were entirely on the basis of that scrutiny. It is now settled law that audit reports cannot be the sole basis for reopening of assessment (refer *Indian and Eastern Newspaper Society v. CIT*, (1979) 119 ITR 996 (SC), *Xerox Modicorp Ltd. v. DCIT*, (2013) 350 ITR 308 (Del) and *CIT v. Lucas TVS Ltd.*, 249 ITR 306 (SC). In the circumstances, the audit report could not have been the sole basis for reopening the concluded assessment for AY 2008-09. The impugned notice and all further proceedings emanating therefrom are quashed.

The writ petition is allowed in the above terms.

S. RAVINDRA BHAT, J

DEEPA SHARMA, J

NOVEMBER 07, 2016

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