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

\+ W.P.(C) 11862/2022 & CM APPL.35429/2022

ERNST AND YOUNG U.S. LLP ..... Petitioner
Through: Mr.S.Ganesh, Senior Advocate with Ms.Ananya Kapoor, Advocate.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE INTERNATIONAL TAXATION 1(2)(2), DELHI & ANR.
..... Respondents
Through: Mr.Puneet Rai, Sr.Standing Counsel for the Revenue.

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

% Reserved On : 17th August, 2022
Date of Decision : 22nd August, 2022

J U D G M E N T

MANMOHAN, J:

1. Present Writ Petition has been filed challenging the Order dated 14th July, 2022 passed under Section 148A(d) of the Income Tax Act, 1961 ('the Act') for Assessment Year 2018-19.

CONTENTIONS AND SUBMISSIONS ON BEHALF OF THE PETITIONER

2. Learned senior counsel for the Petitioner stated that the Show Cause Notice dated 30th March, 2022 sought to re-open the petitioner's assessment on the ground that the petitioner's return of income did not offer to tax

receipts of professional service charges from S.R. Batliboi & Associates LLP totalling to Rs.1,92,35,080/-. He stated that the Petitioner vide letter dated 13th April, 2022, furnished a detailed reply wherein it was pointed out that the amount received by it from S.R. Batliboi & Co LLP was not taxable in India by reason of Article 15 of Double Taxation Avoidance Agreement ('DTAA') and the said position had been examined and accepted by the Respondent in subsequent assessment year 2019-20. He stated that an order dated 13th April, 2022 under Section148A(d) of the Act was passed by Respondent on the erroneous footing that the Petitioner had not filed a reply to the Show Cause Notice and further stated that the Petitioner had not objected to the re-opening of its assessment.

3. He stated that the Petitioner had filed a writ petition being W.P.(C)7791/2022 and this Court vide its order dated 20th May, 2022 had set aside the order passed under Section 148A(d) as well as the notice under Section 148 of the Act, both dated 13th April, 2022, directing Respondent to pass a fresh reasoned order under Section 148A(d) of the Act after considering the reply dated 13th April, 2022 filed by the Petitioner in accordance with law within eight weeks.

4. He stated that pursuant to the aforesaid order passed by this Court, the Respondent vide the impugned Order dated 14th July, 2022, held that this was a fit case for issue of the notice under Section 148. The relevant portion of the impugned Order dated 14th July, 2022 is reproduced hereinbelow:-

> "*7.6 With regard to above mentioned exception clause,* ***Assessee in its submission dated 14.04.2022, did not provided any relevant documents which can substantiate its claim such as Contract Agreement under which such transactions were carried out, Copy of Original Invoices (not just invoice***

breakup), any documentary evidence to prove detailed nature of services rendered for which payment was received, the mode of rendering services (i.e. whether any employee of the assessee visited India for rendering those services and if visited, then what is the aggregate duration of their stay in India) or whether these services were rendered from outside India, remotely or any confirmation letter from SR Batliboi and Associates LLP, etc.

7.7 Hence, unless assessee establishes, with documentary evidences, about nature of services rendered as well as place of rendering said services and that activities of the assessee do not fall under exception clause of the Article 15 of DTAA, ***prima-facie, transaction of assessee with SR Batliboi and Associates LLP for amount of 1,92,35,080 /- is taxable both under the Act and DTAA.***"

5. Learned senior counsel for the petitioner stated that the Respondent-Revenue completely failed to appreciate that it had itself accepted the Petitioner's claim with regard to professional charges received from S.R. Batliboi & Associates LLP in the present assessment year by making an assessment under Section 143(1) of the Act. In fact, learned senior counsel for the petitioner repeatedly emphasised that an order passed under Section 143(1) of the Act accepting the Income Tax Return filed by the assessee and determining the taxable income of the assessee is an assessment with consequences.

6. He further submitted that in absence of any fresh tangible material or information whatsoever which would indicate that the petitioner's income for assessment year 2018-19 had escaped assessment, no notice under Section 148A(b) of the Act could have been issued.

7. He also submitted that the Revenue in assessee's own case in Assessment Year 2019-20 had accepted Petitioner's claim under Article 15

of DTAA in a scrutiny assessment and, therefore, in the present proceedings relating to the assessment year 2018-19, it would have been lawful and permissible for the Respondent to depart from the order passed and view taken in assessment year 2019-20, only if the Respondent had some concrete material which clearly indicated that, for the purpose of Article 15 of DTAA, the factual position in the Petitioner's case in assessment year 2018-19 is different from that in assessment year 2019-20.

SUBMISSION ON BEHALF OF THE RESPONDENT

8. *Per contra*, learned senior standing counsel for the Respondent-Revenue, who appeared on advance notice, stated that if the benefit of Article 15 of DTAA is satisfied in a particular assessment year does not mean that the said benefit would be available to the assessee in all subsequent years. He stated that for getting the benefit of Article 15 of DTAA in a particular assessment year, the petitioner would have to satisfy that the services rendered in the said assessment year were similar/identical to the services rendered in the assessment year in which the petitioner was given the benefit of Article 15 of DTAA – which the petitioner had failed to satisfy.

COURT'S REASONING

WHEN THE ORIGINAL PROCEEDING HAS BEEN COMPLETED UNDER SECTION 143(1), THERE IS NO NEED FOR FRESH TANGIBLE MATERIAL FOR REOPENING THE ASSESSMENT SINCE THERE IS A DISTINCTION BETWEEN 'INTIMATION' AND 'ASSESSMENT' UNDER SECTIONS 143(1) AND 143(3) OF THE ACT.

9. The Supreme Court and this Court have repeatedly held that when the original proceeding has been completed under Section 143(1), there is no

need for fresh tangible material for reopening the assessment and the doctrine of change of opinion does not arise since under Section 143(1) an intimation is issued and no opinion is formed by way of the said order.

10. The Supreme Court in ***Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Private Limited, (2008) 14 SCC 208***, has held that there is a distinction between 'intimation' and 'assessment' under Sections 143(1) and 143(3) of the Act. The relevant portion of the said judgment is reproduced hereinbelow:-

> *"15. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(l)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in Apogee International Limited v. Union of India.*
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> *16. It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them? The reply is an emphatic "no". The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By*

such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

11. This Court in ***Indu Lata Rangwala v. DCIT, (2016) SCC Online Del 3006*** has also held as under:-

"*35.1 The upshot of the above discussion is that where the return initially filed is processed under Section 143 (1) of the Act, and an intimation is sent to an Assessee, it is not an 'assessment' in the strict sense of the term for the purposes of Section 147 of the Act. In other words, in such event, there is no occasion for the AO to form an opinion after examining the documents enclosed with the return whether in the form of balance sheet, audited accounts, tax audit report etc.*

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35.7 ..... where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment."

12. Consequently, the order passed under Section 143(1) of the Act is not an assessment for the purposes of Section 147 of the Act. Further, it is not necessary in such a case for the Assessing Officer to come across some fresh tangible material to form a belief that income has escaped assessment.

PETITIONER DID NOT PLACE ON RECORD ANY DOCUMENTS TO SHOW THAT THE SERVICES RENDERED BY THE PETITIONER DURING ASSESSMENT YEAR 2018-19 WERE IDENTICAL/SIMILAR TO THE SERVICES RENDERED TO M/S BATLIBOI & ASSOCIATES LLP IN THE ASSESSMENT YEAR 2019-20.

13. The scrutiny assessment for assessment year 2019-20 also offers no assistance to the petitioner, as the petitioner did not place on record any documents such as Contract Agreement under which such transactions were carried out, copy of original invoices (not just invoice breakup) to show that the services rendered by the petitioner during assessment year 2018-19 were identical/similar to the services rendered to M/s Batliboi & Associates LLP in the assessment year 2019-20.

14. Needless to state that if petitioner is able to satisfy the Assessing Officer that the services rendered in the present assessment were similar/identical to the services rendered in the assessment year 2019-20, the re-assessment proceedings would be closed.

15. Consequently, at this stage, this Court finds no infirmity in the impugned order passed by the Assessing Officer. Accordingly, the present writ petition and application are dismissed.

MANMOHAN, J

MANMEET PRITAM SINGH ARORA, J

AUGUST 22, 2022
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