IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 15566 of 2011

CADILA HEALTHCARE LTD - Petitioner(s)

Versus

ASST.COMMISSIONER OF INCOME- TAX(OSD) & 1 - Respondent(s)

Appearance :
MR RK PATEL for Petitioner(s) : 1,
MR MR BHATT, SR. ADV. WITH MRS MAUNA M BHATT for Respondent(s) : 1 - 2.

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date: 14/12/2011

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

Petitioner is a company registered under the Companies Act. It is assessed regularly to tax under the Income Tax Act, 1961 (Act for short). The petitioner has in the present petition, challenged the validity of notice dated 18.3.2011 issued by the Assessing Officer seeking to reopen the assessment previously framed on a scrutiny for the assessment year 2004-05. The petitioner has also challenged the order dated 11.10.2011, by which the petitioner's objections to such reopening of the assessment came to be disposed of.

Brief facts are as follows:

For the assessment year 2004-05, the assessee filed its return of income along with necessary documents including Auditors Reports in prescribed forms. Such return was taken in scrutiny assessment under section 143(3) of the Act.

Such assessment previously framed after scrutiny was sought to be reopened by notice dated 28.10.09 on the ground that book profit under section 115JB of the Act was not computed correctly and further that excess deduction under section 80HHC was allowed. The petitioner approached this Court by filing Special Civil Application No.3580 of 2010 which was allowed by this Court by an order dated 4.5.2010 quashing the notice of reopening dated 28.10.2009.

Once again the Assessing Officer issued a fresh notice dated 18.3.2011 seeking to reopen the assessment of the same year. At the request of the assessee, the reasons recorded by the Assessing Officer for reopening were supplied. The petitioner raised its objections vide communication dated 16.8.11. Such objections, however, were disposed of by the Assessing Officer by his order

dated 11.10.11. At this stage, the petitioner has approached this court raising various grounds challenging the impugned notice for reopening the assessment.

Before adverting to the rival contentions, we may notice that the Assessing Officer had recorded following reasons for reopening the assessment.

> "Assessee filed return of income on 29/10/2004 declaring the total income at Rs.23,54,96,900/-. Order u/s.143(3) was passed on 26/12/2006 at assessed income of Rs.24,19,86,700/-.
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> As per section 40(a)(i) of the IT Act, 1961, if no tax is deducted at source or after deduction, it is not paid on payment of interest, royalty, fees for technical services or other sums payable outside India or to a non resident on which tax is deductible, then no deduction is available on such payments in computing income under the head "Profit & gains of Business or Profession" in the hands of the remitter.
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> It is seen from the assessment records of the assessee company that the company has made following international transactions with associated enterprises:

A.Y.	Particulars of Expenditure	Amount in Rs.
2004-05	Payment for Product registration services availed	51,94,204

> The assessee was liable to deduct TDS on these expenditures as per income tax Act. Failure to deduct TDS attracted the provisions of section 40(a)(i). So, the expenditure of Rs.51,94,204/- was required to be disallowed and added to total income. By not disallowing this amount while making computation of taxable income the assessee has failed to disclose fully and truly all material facts necessary for his assessment for this assessment year.
>
> Therefore, I have reasons to believe that income to the tune of Rs.51,94,204/- has escaped assessment within the meaning of sec.147 of the Act."

Counsel for the petitioner submitted that the assessment previously framed after scrutiny is sought to be reopened beyond the period of four years from the end of relevant assessment year without any material on record to suggest that the income chargeable to tax had escaped assessment for the reasons of the assessee having failed to disclose fully and truly all material facts necessary for the assessment. Counsel for the petitioner submitted that the initial assessment was framed after thorough inquiry. The assessee had disclosed full facts. He drew our attention to the return filed by the assessee and the documents annexed therewith to contend that the petitioner had made full disclosures about the transactions with associated enterprise.

Counsel submitted that even on facts, the Assessing Officer is not correct in contending that the assesseee was required to deduct TDS on payment of Rs.51.94 lacs as suggested by the Assessing Officer.

Counsel vehemently contended that the entire issue has cropped up on the insistence of the Audit Party. He submitted that mere opinion of the audit party cannot form a basis for the Assessing

Officer to believe that the income chargeable to tax has escaped assessment. In this regard, counsel relied on the following decisions :

(i) **CIT v. Lucas T.V.S. Ltd.,** 249 ITR 306 in which the Apex Court upheld the the decision of the High Court in which the High Court had quashed the reopening proceedings wherein apart from the information furnished by the audit party, the Income Tax Officer had no other information for reopening the assessment.

(ii) **Agricultural Produce Market Committee v. ITO**, (2011) 15 Taxmann.com. 170(Gujarat) wherein Division Bench of this Court was pleased to quash the notice for reopening where the only basis was the revenue audit objection as regards the eligibility of the assessee for exemption.

(iii) **Adani Exports v. Deputy C.I.T.**, 240 ITR 224 wherein Division Bench of this Court held as under:

"It is true that satisfaction of the assessing officer for the purpose of reopening is subjective in character and the scope of judicial review is limited.When the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficiency of the material to reach such belief is not open to be scrutinised. However, it is always open to question existence of such belief on the ground that what has been stated is not correct state of affairs existing on record. Undoubtedly, in the face of record, burden lies, and heavily lies, on the petitioner who challenges it. If the petitioner is able to demonstrate that in fact the assessing officer did not have any reason to believe or did not hold such belief in good faith or the belief which is projected in papers is not belief held by him in fact, the exercise of authority conferred on such person would be ultra vires the provisions of law and would be abuse of such authority. As the aforesaid decision of the Supreme Court indicates that though audit objection may serve as information, the basis of which the ITO can act, ultimate action must depend directly and solely on the formation of belief by the ITO on his own where such information passed on to him by the audit that income has escaped assessment. In the present case, by scrupulously analysing the audit objection in great detail, the assessing officer has demonstrably shown to have held the belief prior to the issuance of notice as well as after the issuance of notice that the original assessment was not erroneous and so far as he was concerned, he did not believe at any time that income has escaped assessment on account of erroneous computation of benefit u/s 80HHC. He has been consistent in his submission of his report to the superior officers. The mere fact that as a subordinate officer he added the suggestion that if his view is not accepted, remedial actions may be taken cannot be said to be belief held by him. He has no authority to surrender or abdicate his function to his superiors, nor the superiors can arrogate to themselves authority. It needs hardly to be stated that in such circumstances conclusion is irresistible that thebelief that income has escaped assessment was not held at all by the officer having jurisdiction to issue notice and recording under the office note on 8.2.97 that he has reason to believe is a mere pretence to give validity to the exercise of power. In other words, it was a colourable exercise of jurisdiction by the assessing officer by recording reasons for holding a belief which in fact demonstrably he did not held that income of assessee has escaped assessment due to erroneous computation of deduction u/s 80HHC, for the reasons stated by the audit. The reason is not far to seek."

On the other hand, learned counsel Shri Bhatt appearing for the Revenue opposed the petition contending that the petitioner had not made full and true disclosures in the return filed. Relying on the explanation to section 147, counsel submitted that mere indication that any tax was

required to be deducted at source in the return would not absolve the assessee from disclosing other relevant aspects.

Counsel further submitted that the Assessing Officer, on the basis of what is pointed out by the audit party, can still form his own opinion with respect to escapement of income and merely because it was pointed out by the Audit party would not render his opinion invalid or the notice illegal. In this regard, counsel relied on the decision of **C.I.T. v. P.V.S.Beedies Pvt. Ltd.,** 237 ITR 13 and in the case of **Indian & Eastern NewspaperSociety v. C.I.T.** 119 ITR 996.

Having thus heard the learned counsel for the parties, we are not required to go into several contentions put forth by both sides. This is so, because on the available material on record, we are inclined to hold that the Assessing Officer could not have reopened the assessment by issuing the impugned notice.

The petitioner has been contending that the Assessing Officer had no independent reason to hold a belief that income chargeable to tax has escaped assessment. It is only at the insistence of the audit party that he had issued notice for reopening. In the petition, it is averred that "*the issue on which the case of the petitioner has been reopened is based on the objection raised by the audit party. It is a matter of record that the Audit Party had raised an objection in regard to non deduction of tax under section 195 of the Income-tax Act, 1961 in respect of international transactions with associated enterprises in regard to payment for product registration services availed amounting to Rs.51,94,204/- and based on the same opined that the said expenditure was liable to be disallowed under section 40(1)(i) of the Act. The petitioner respectfully submits that since this objection had been raised on the basis of the information available on the assessment records of the petitioner's case for the A.Y. 2004-05, it clearly establishes that there was no default on the part of the petitioner in fully and truly disclosing the primary facts.*"

Since the specific case of the petitioner was that the Assessing Officer had acted at the behest of the Audit Party and held no independent opinion on its own with respect to the income escaping assessment, we had called for the original records pertaining to the files of the assessee from the Revenue Department. Learned counsel Shri Bhatt after detailed search, made available a copy of the letter dated 21.5.2009 from one Ritu Singh Sharma, Asstt. Commissioner of Income-tax, in charge of this case at the relevant time addressed to the Senior Audit Officer. In the said letter, she has stated that the audit party has observed that for the amount in question TDS was required to be deducted. Thereupon, details were called for. She concluded that looking to the Board's circular dated 8th August 1995, TDS was not required to be deducted. Taking note of the explanation of the assessee she stated as under:

> "In view of the above explanation, there was no under assessment in the assessee company's case in both the assessment years i.e. A.Y.2004-05 & A.Y. 2005-06.
>
> Further, basis requirement of deducting tax u/s.195 is that whether payment of sum to an non-resident is chargeable to tax under the provisions of the Act or not. TDS liability u/s.195 arises only when income is credited to account of payee or on actual payment of same.
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> Therefore, as the above mentioned expenditure is in the nature of reimbursement of expenses no TDS is required to be deducted in view of Board's circular No.715 dt. Aug 8,1995."

Under the circumstances, it clearly emerges from the record that the Assessing Officer was of the opinion that no part of the income of the assessee has escaped assessment. In fact, after the audit party brought the relevant aspects to the notice of the AO, she held correspondence with the assessee. Taking into account the assessee's explanation regarding non-requirement of TDS collection and ultimately accepted the explanation concluding that in view of the Board's circular, tax was not required to be deducted at source. No income had therefore escaped assessment. Despite such opinion of the Assessing Officer, when ultimately the impugned notice came to be issued the only conclusion we can reach is that the Assessing Officer had acted at the behest of and on the insistence of the audit party. It is well settled that it is only the Assessing Officer whose opinion with respect to the income escaping assessment would be relevant for the purpose of reopening of closed assessment. It is, of course true, as held by the decisions of the Apex Court in the case of P.V.S.Beedies Pvt. Ltd. (supra) and Indian & Eastern Newspaper Society (supra), if the audit party brings certain aspects to the notice of the Assessing Officer and thereupon, the Assessing Officer forms his own belief, it may still be a valid basis for reopening assessment. However, in the other line of judgment noted by us, it has clearly been held that mere opinion of the Audit Party cannot form the basis for the Assessing Officer to reopen the closed assessment that too beyond four years from the end of relevant assessment year.

In the present case, the Assessing Officer had categorically come to the conclusion that the objection of the audit party is not valid and that the assessee's explanation with respect to non-requirement of collection of TDS was required to be accepted. In that view of the matter, we have no hesitation in striking down the notice for reopening. Consequently, the order rejecting the objections of the petitioners must also go. In the result, the petition is allowed. The impugned notice is quashed. The petition stands disposed of accordingly.

(Akil Kureshi J.)

(Ms.Sonia Gokani, J.)