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*IN THE HIGH COURT OF DELHI AT NEW DELHI

% **Date of decision: December 01, 2011**

+ W.P.(C) 6884/2010

BLB LIMITED ..... Petitioner
Through: Mr. Salil Aggarwal, Adv.

versus

ASSISTANT COMMISSIONER OF INCOME TAX ..... Respondent
Through: Ms. Suruchi Aggarwal,
Sr. Standing Counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

SANJIV KHANNA,J: (ORAL)

The petitioner BLB Ltd. has filed the present writ petition impugning notice under Section 148 dated 01.02.2010 and the order dated 16.9.2010 passed by the Assessing Officer dismissing their objections to the re-opening.

2. Reasons given for re-opening of the assessment for assessment year

2003-04 under Section 147/148 of the Income Tax Act, 1961 (Act, for short) are as under:-

> "The return in this case for the AY 2003-04 was filed on 31.10.2003 declaring on income of Rs.22447176/- at MAT u/s 115JB which was processed u/s 143(1) of the I.T. Act. 1961on 22.03.2004. The case was selected for scrutiny and the asstt. was completed u/s 143(3) of the Act on 30.01.2006 on an income of Rs.22447176/- at MAT u/s 115JB.
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> The perusal of asstt. records for the AY 2003-04 reveals that the assessee claimed and was allowed a deduction of Rs 15807848/- on a/c of non compete fees as revenue expenditure. As the non compete fees given an advantage of enduring benefit to the assessee it was required to be capitalized and added back to the income of the assessee.
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> Section 37 of the Act provides that "any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business is allowable as deduction in computation of the income chargeable under the head "profit and gains of business or profession."
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> In view of above facts of the case, I have reasons to believe that the income to the tune of 15807848/- has escaped assessment owing to the failure on part of assessee to disclose fully and truly material facts necessary for asstt. and hence notice u/s 148 is hereby issued for reopening the asstt. u/s 147 of the I.T Act for the AY 2003-04".

3. As is noticeable from the reasons noted above, the return for the assessment year 2003-04 was filed by the assessee-petitioner on 31.10.2003 declaring income of Rs.2,24,47,176/- under the provisions of Section 115JB. The case was taken up for scrutiny and an assessment order under Section

143(3) of the Act was passed on 30.01.2006. Income was assessed at Rs.2,24,47,176/-.

4. The reasons mentioned above were recorded on 01.02.2010 i.e. after the period of four years from the end of the assessment year. Proviso to Section 147 of the Act is applicable. Failure or omission on the part of petitioner-assessee to disclose fully and truly material facts is a jurisdictional pre-condition which must be satisfied for valid initiation of the reassessment proceedings.

5. The contention of the petitioner is that the issue/question of tax ability of the non-compete fee was specifically examined with reference to the law relevant to assessment year 2003-04 before the original assessment order dated 30.01.2006 was passed.

6. The petitioner assessee has placed on record the letter dated 28.1.2006 written to the Assessing Officer in reply to the queries raised. The relevant portion of the letter dated 28.01.2006 reads:-

> "14. A sum of Rs. 1,98,500/- has been incurred as merger expenses. Complete details of merger expenses incurred by the company are enclosed herewith. It would be seen that the merger expenses have been mostly incurred on fees paid to the professionals and as such, the same is revenue expenditure and may please be allowed.
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> 15. The Company had paid a sum of Rs.1,58,07,858/- in the Profit & Loss Account under the head Non-compete fees

which has been paid to Shri Chand Rattan Bagri, a resident of 4318/3, Ansari Road, Darya Ganj, New Delhi. This is as per the agreement entered into between the Assessee Company and Shri Chand Rattan Bagri on 1st October, 2002. A copy of the agreement is enclosed herewith. There was absolute confusion about the taxability of Non-compete fees in the hands of the recipients for all these years. However, Finance Act, 2002 added clause (va) to section 28 of the Income-tax Act which reads as follows:

"Section 28

(i) to (v) x x x x x x

(va) any sum, whether received or receivable, in cash or kind, under an agreement for –

(a) Not carrying out any activity in relation to any business; or

(b) Not sharing any know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture of processing of goods or provision for services."

This clause was inserted by Finance Act, 2002 and is effective for asstt. year 2003-04 onwards. In this view of the matter, the non-compete fees received by the recipient is of the Income-tax Act. As a natural corollary, the expenditure is allowable as revenue expenditure in the hands of payer".

7. This letter is specifically referred to and mentioned in para 2.4(ii) and (iii) of the writ petition. The respondent in the counter affidavit has not specifically dealt with the said averment. However, during the course of arguments it was submitted that this letter dated 28.01.2006 though available in the Department's file, might have been subsequently introduced and placed

on record. It was submitted that the questionnaire in response to which this letter was written, is not available on record and, therefore, the suspicion is not unfounded and has merit.

8. In order to satisfy ourselves whether the said allegation is correct, we have examined the original records. We find that an audit objection was raised that the Assessing Officer had wrongly allowed/treated the non-compete fee as revenue expenditure and that the same should have treated as capital expenditure. In response to the said audit objection, the Assessing Officer has written a detailed letter dated 12.12.2006 in which he had stated as under:-

> "The issue raised by the audit party in this case has been discussed at length by AO while completing the assessment. The brief facts of the audit objection raised are that the assessee company has debited expenses of Rs. 1,58,07,848/- under the head non-compete fees during the year under consideration treating the same as revenue expenditure. The assessee was specifically asked why the above said expenses should not be disallowed by treating the same as capital expenditure. In response, the counsel of the assessee company vide letter dated 30.01.2006 submitted as under:
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> That this non-compete fee has been paid to Shri Chand Rattan Bagri s/o Late Shri Babu Lal Bagri r/o 4718/3, Ansari Road, Darya Ganj, New Delhi. This is as per agreement entered into between the assessee company and Shri Chand Rattan Bagri 01.10.2002. A copy of agreement already filed.
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> He further submitted that a receipt of non-compete fee in the hands of a recipient is now taxable as a revenue receipt

under the head Profit & Gains of Business and Profession as per newly inserted clause (va) of section 28 of the Income Tax Act which reads as follows:

"(va) any sum, whether received or receivable, in cash or kind, under an agreement for –

a) Not carrying out any activity in relation to any business; or

b) Not sharing any know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature or information or technique likely to assist in the manufacture of processing of goods or provision for services;"

9. We have not reproduced the entire contents of the reply of the Assessing Officer in response to the audit objection, as what has been reproduced above is sufficient. It is apparent from the aforesaid reply by the Assessing Officer that this issue was specifically considered and examined at the time of original assessment. It may also be noted that the letter dated 28.01.2006 is referred to in the assessment order, though in respect of another issue and not with regard to the issue in question.

10. On the question of change of opinion, the law is well settled. Decision of this Court in the case of ***Commissioner of Income Tax v. Kelvinator of India Ltd***., (2002) 256 ITR 1 has been upheld by the Supreme Court (2010) 320 ITR 561 (SC). The Supreme Court has lucidly explained and elucidated the scope and jurisdictional pre-conditions which should be satisfied when proceedings under Section 147/148 are initiated. It has been

held:-

> 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 pre-conditions 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."

11. Thus, if in the course of original assessment proceedings, the Assessing Officer has considered and examined a particular aspect, the said aspect cannot be made a ground to reopen and initiate reassessment proceedings. The assessing authority cannot have a fresh look and reopen an assessment on the ground of change of opinion. The facts noticed above, clearly show that in the original assessment proceedings, the Assessing Officer had considered and examined whether or not the non-compete fee payment was of capital or revenue nature. The Assessing Officer accepted the stand of the assessee and treated the non-compete fee as a revenue expenditure. The re-assessment proceedings cannot, therefore, be initiated on the ground that the Assessing Officer was legally wrong and had misapplied and wrongly understood the law/legal position.

12. In the present case, it is noticeable that the assessee had disclosed fully and truly all material facts relevant for the assessment. The reasons recorded above do not disclose or state that there was failure or omission to disclose fully and truly all material facts. There is no indication and it is not alleged that there was some material or information available on record when reasons to reopen were recorded, to show that the assessee had concealed or

had not disclosed fully and truly all material facts. The material facts were on record and had been disclosed by the asssesee. The factual matrix above indicates that the Revenue verily believes that the Assessing Officer had drawn a wrong legal inference and a conclusion, which it is submitted is incorrect. In these circumstances, it has to be held that the re-assessment proceedings have not been validly initiated as the condition of the proviso to Section 147 is not satisfied.

13. Revenue had the option, but did not take recourse to Section 263 of the Act, inspite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be correct, when jurisdiction under Section 263 is invoked.

14. In view of the said discussion, we allow and issue a writ of certiorari quashing the Notice under Section 148 dated 01.02.2010 and the order dated 16.9.2010 passed by the Assessing Officer. Writ petition is disposed of. No costs.

SANJIV KHANNA, J.

R.V.EASWAR, J.

DECEMBER 01, 2011/mm