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

Decided on: 16.11.2018

\+ **W.P.(C) 12277/2018, C.M. APPL.47539/2018**

FIS GLOBAL BUSINESS SOLUTIONS INDIA PVT. LTD.

..... Petitioner

Through : Sh. Piyush Kaushik and Sh. Tanveer Zaki, Advocates.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX-3, NEW DELHI & ANR. ..... Respondents

Through : Sh. Sanjay Kumar, Advocate.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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1. Issue notice. Sh. Sanjay Kumar, Advocate accepts notice. With parties' consent, the writ petition was heard finally.

2. The assessee in its writ petition challenges a notice issued under Section 148 of the *Income Tax Act* (hereafter "the Act") for Assessment Year 2011-12, complaining that the original return [which had declared ₹49,67,00,907/- and subsequently revised to ₹49,23,54,662/-] was assessed under scrutiny under Section 143(3) read with Section 144C of the Act on 31.12.2015, at ₹ 61,92,17,179/-. The impugned reassessment notice in this case was issued on 31.03.2018; subsequently, the Assessing Officer [hereafter referred to as "the AO"] furnished the "reasons for reopening the case....." to the assessee. Those reasons *inter alia* states as follows :

*"**Reasons for reopening the case of M/s. FIS Global Business Solutions (India) Pvt. Ltd. (PAN-AAACH2815H) for the FY 2010-11 relevant to AY 2011-12:***

1. Brief details of the Assessee:

The assessee company is engaged in the business of software development and outsourcing services. The assessee company filed its retum of income on 291 L2111 declaring total income at Rs. 49,67,00,970/-. Subsequently. the assessee company revised its return of income on 22.03.2013 declaring total income at Rs.49,23,54,6621-. The assessment u/s 143(3) was completed on 31.12.2015 at an income of Rs. 61,92,17,1791-.

2. Income escaping assessment:

An audit objection was received in this office in which it was stated that in the computation of income the assessee claimed and was allowed deduction of Rs.1,37,73,528/- on account of Forex gain on Certegy (Interest Income). Forex gain on interest income, being revenue nature was not an allowable deduction.

The issue is considered and on perusal of the assessment folder pertaining to2011-12 it was noticed that in the computation of income, the assessee has deducted Rs.,37,73,528/- on account of Forex gain on certegy. Further, of Rs. 1,37 ,73,52gl-. Rs. 1,40,50,4221- was an account of Foreign Exchange fluctuation gain on loan balance receivable from Certegy and Rs. 2,76,894/- was on account of Foreign Exchange fluctuation loss on Interest income on loan advanced to Certegy.

Foreign Exchange fluctuation loss of Rs. 2,76,8941- on Interest income on loan advanced to Certegy is an allowable expense being revenue in nature.

The issue of Foreign Exchange fluctuation gain of Rs.1,40,50.422/- on loan balance receivable from Certegy needs to be view in the light of applicable Accounting Standards issued by The Institute of Chartered Accountants of India (ICAI). In this respect it is imperative to note that Accounting Standard II titled 'Effects of Changes in Exchange Rates' acknowledges that forex gain is to be recorded as income. The relevant portion of the AS 11 issued by the ICAI which is applicable in this case is being reproduce below for the ready reference:

> *'Recognition of Exchange Diffrences*
> *13. Exchange differences arising on the settlement of monetary items or on reporting enterprise's monetary items at rates different from those at which they were initially recorded during the period, or reported in previous financial statements, should be recognised as income or cts expenses in the period in which they arise, with the exception of exchange differences dealt with in accordance with paragraph 15.'*

The aforesaid ASII was relied upon by the Hon'ble Supreme Court in Commissioner of Income Tax, Delhi vs. woodward Governer India pvt. Ltd. (2009) 13 SCC I;(2009) 312 ITR 254 (SC) I wherein the Hon'ble Court observed that under the said accounting standard "exchange differences arising on foreign currency transactions have to be recognised as income or as expense in the period in which they arise, except as stated in para 10 and para II which deals with exchange differences arising on the payment of liabilities incurred for" the purpose of acquiring fixed assets, which topic falls under section 43A of the 1961 Act!'

Further, the Hon'ble Supreme court in Sutlej cotton Mills Ltd. vs CIT [(1979) I 16 ITR 1 (SC)I observed as under:

> *'The law may, therefore, now be taken to be well settled that where profit or loss arises to an assessee on account*

of appreciation or depreciation in the value of foreign currency held by it, on conversion into another currency, such profit or loss would ordinarily be a trading profit or loss if the foreign currency is held by the assessee on revenue account or as a trading asset or as a part of circulating capital embarked in the business. But, if on the other hand, the foreign currency is held as a capital asset or as fixed capital, such profit or loss would be of capital nature.'

There is, thus. a clear requirement that the forex gain be recorded specifically as income in the financial statements. However, a perusal on the same reveals that the assessee has failed to make fair disclosure in terms of the requirements of AS 1 I and as such concealed information from the at the time of assessment.

On the above facts, I have reasons to believe that an income amounting to Rs.1,40,50,4221- has escaped assessment. In view of the above, the provisions of clause (c) of explanation 2 of section 147 are applicable to the facts of this case and this is a fit case to be reopened u/s 147 of the Act for reassessment. In this case a return of income was filed for the year under consideration and regular assessment u/s 143(3) was made on 31.12.2015. Since 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s 747 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above. I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed all the material facts necessary for his assessment for the year under

consideration. Attention in this regard is drawn to Explanation 1 to Section 147 of the Act which is being reproduced for ready reference.

"Explanation I - Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to a disclosure within the meaning of the proviso."
The expression 'necessarily' means inevitably or as a matter of compelling inference. The obligation to disclose primary facts lies on the assessee. The assessee has to disclose fully and truly all material facts. The import of Explanation I was noticed in a judgement 3 Info tech Ltd. v. Assistant Commissioner of Income Tax (2010) 329 ITR 257 (Bom) in the following observations:

> *" ... In other words. an assessee cannot rest content merely with the production of account books or other evidence during the course of the assessment proceedings and challenge the reopening of the assessment on the ground that if the Assessing Officer were to initiate a line of enquiry he could with due diligence have arrived at material evidence. The primary obligation to disclose is on the assessee and the burden of making a full and true disclosure of material facts does not shift to the Assessing Officer. The assessee has to disclose fully and truly all material facts. Producing voluminous records before the Assessing Officer does not absolve the assessee of the obligation to disclose and the assessee, therefore, cannot be heard to say that if the Assessing officer were to conduct a further enquiry. he would come into possession of material evidence with the exercise of due diligence. An assessee cannot throw reams of paper at the Assessing Officer and rest content in the belief that the officer better beware or ignore the hidden crevices in the pointed material at his peril. .. "*

Full and true disclosures must mean what the statute says. These disclosures cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with the Assessing Officer. The assessee must act with candour and the disclosure must be full and true. A full disclosure is a disclosure of all material facts which does not contain any hidden material or suppression of fact. A true disclosure is a disclosure which is truthful in all respects. Just as the power of the Revenue to reopen an assessment beyond a period of four years is restricted by the conditions precedent spelt out in the proviso to Section 747, equally an assessee who seeks the benefit of the proviso to Section 147 must make a full and true disclosure of all primary facts. The assessee in the present case has wrongly claimed deduction of Rs. 1.40,50.4221- on a/c of Forex Gain on Certegy which is not an allowable expense. All the necessary facts on the basis of which the claims to a deduction are founded must be disclosed. As the assesse failed to do so, reopening of the assessment is to be done on the ground that assessee has not disclosed fully and truly all material facts necessary for the assessment. ·"

3. It is urged that the Revenue is doing no more than re-visiting the merits of the original scrutiny assessment which it was especially barred from conducting afresh. Learned counsel relied upon the previous Division Bench's judgment in *Carlton Overseas Pvt. Ltd. v. Income Tax officer & Ors.*, (2009) 318 ITR 295 and *Torrent Power S.E.C. Ltd. v. Assistant Commissioner of Income-Tax* (2017) 392 ITR 330 (Guj), to contend that the rulings in *Commissioner of Income Tax v. Kelvinator of India Ltd.,* 320 ITR 561 authorises review of the completed scrutiny only and only if tangible material is made available to the revenue. It is emphasised that these rulings of *Carlton* and *Torrent (supra)* have stated that a subsequent audit objection or audit reports of the Income Tax Department does not constitute objective material.

4. Learned counsel for the Revenue argued that the re-assessment notice in this case is valid and that, the amount claimed on account of forex gain, could not have been an allowable expenditure, being revenue in nature. It was further stated that an accounting standard AS 11 required disclosure of such gains, as a revenue item and not as one falling in the capital stream.

5. *Carlton (supra)* emphasises that reliance by the Revenue upon an audit report, cannot be considered as tangible material. The relevant extracts of that decision are as follows:

> *"8. Ms. Prem Lata Bansal, learned counsel appearing for the Revenue has contended that audit party can on factual basis ask for reassessment and which has, therefore, been done in the present case. It is, however, admitted by her that a mere change of opinion does not permit action under section 147/148 of the Act.*
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> *9. We find that the arguments on behalf of the petitioner are well founded and it must succeed. The audit report merely gives an opinion with regard to the non-availability of the deduction both under section 80-IA was not deducted from the profits of the business while computing deduction under section 80HHC. Clearly, therefore, there was no new or fresh material before the Assessing Officer except the opinion of the Revenue audit party.*
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> *10. Since it is settled law that mere change of opinion cannot form the basis for issuing of a notice under section 147/148 of the Act, therefore, we do not propose to burden out judgment with the said judgments. In fact, as stated above, counsel for the Revenue does not dispute this principle of law."*

6. This Court is of the opinion that *Carlton (supra)* concludes the issue in the present case; the audit objection merely is an information. As reiterated in *Kelvinator (supra)* by the Supreme Court, change of opinion is

impermissible. The Revenue was clearly barred by provisions of Section 147/148 of the Act.

7. In the present case, the reassessment notice is solely based on an audit opinion. Having regard to the fact that the assessee's challenge to the previous year's re-assessment orders was successful - in *FIS Global Business Solutions India Pvt. Ltd. v. ACIT* 2018 (408) ITR 75 (Del), the reassessment proceedings are unsustainable.

8. In view of the above discussion, the impugned re-assessment notice dated 31.03.2018, cannot be sustained. It is hereby quashed; all consequential proceedings issued and conducted pursuant to the said re-assessment notice are also hereby quashed.

9. The writ petition is disposed of in the above terms. Pending application also stands disposed of.

S. RAVINDRA BHAT
(JUDGE)

PRATEEK JALAN
(JUDGE)

NOVEMBER 16, 2018