

(2014) 08 DEL CK 0211

In the Delhi High Court

Case No : W.P.(C) 1226/2014 & CM 2558/2014

Deccan Digital Networks Private Limited

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 28-08-2014

Acts Referred:

Foreign Exchange Management Act, 1999 — Section 42(1), 6
Income Tax Act, 1961 — Section 139, 142, 142(1), 143, 147

Citation : (2015) 274 CTR 202

Hon'ble Judges : Siddharth Mridul, J; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Arvind Datar, Sr. Advocate, Tarun Gulati, Kishore Kunal and Amrita Chatterjee, Advocate for the Appellant; Balbir Singh, Abhishek Singh Baghel, Vivek Goyal and R.P. Singh, Advocate for the Respondent

Judgement

Badar Durrez Ahmed, J.—This writ petition challenges the impugned notice dated 13.06.2013 issued u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as the "said Act"). A prayer is also sought for quashing the order dated 19.12.2013, which has been passed by the Assessing Officer rejecting the objections, which the petitioner had raised against the issuance of the notice dated 13.06.2013 and the purported reasons for the "belief" that income had escaped assessment, which were said to have been recorded prior to the issuance of the notice u/s 148 of the said Act. The writ petition also seeks the setting aside of the impugned notice dated 07.02.2014 whereby the Assessing Officer has proceeded with the assessment proceedings pursuant to the rejection of the objections.

2. The main and primary plea of the petitioner is that the notice u/s 148 of the said Act was time-barred. The notice was issued in connection with the assessment year 2006-07. The maximum period of six years within which the notice could have been issued expired on 31.03.2013, whereas the notice was issued on 13.06.2013. It is the case of the petitioner that the initial notice dated 13.06.2013 did not have any reference to Section 149(1)(c) of the said Act but

subsequently when the objection was taken by the petitioner that the impugned notice was time-barred, the respondent had placed reliance on the provisions of Section 149(1)(c) of the said Act in order to justify the issuance of the impugned notice u/s 148 beyond the period of six years. Before we go on with the discussion on the facts of this case it would be appropriate to set out the relevant provisions:-

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.- 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 disclosure within the meaning of the foregoing proviso.

Explanation 2.- For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) Where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required u/s 92E;

(c) where an assessment has been made, but--

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub- section (2) of section 148.

Explanation 4.-- For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April 2012."

"149. (1) No notice u/s 148 shall be issued for the relevant assessment year, -

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

Explanation." In determining income chargeable to tax which has escaped assessment for the purposes of this sub- section, the provisions of Explanation 2

of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice u/s 148 is to be served is a person treated as the agent of a non-resident u/s 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of six years from the end of the relevant assessment year.

Explanation." For the removal of doubts, it is hereby clarified that the provisions of sub-section (1) and (3), as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

3. From the above provisions it is evident that u/s 147 if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess such income. This is, however, subject to the provisions of Sections 148 to 153 of the said Act. Where the assessment/reassessment is sought to be done after the period of four years from the end of the relevant assessment year, further conditions are stipulated, inter alia, under the first proviso to Section 147 of the said Act. One of the conditions being that the assessee had not made a return either u/s 139 or in response to notice under sub-section (1) of Section 142 or Section 148. Another condition is that even if the assessee had made a return he has failed to disclose fully and truly all material facts necessary for his assessment pertaining to that assessment year. But, by virtue of the second proviso to Section 147, these conditions (prescribed in the first proviso) would not apply to a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year. It is also clear that while the first proviso stipulates that no action can be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless the conditions stipulated therein are not satisfied, there is no such time limit stipulated in the second proviso. In other words, if a case falls under the second proviso, action can be taken u/s 147 before and even after the expiry of the period of four years from the end of the relevant assessment year. It must also be noticed that the end points of time for action under both the first and second proviso are not specified in the said proviso. The end points have been specified in section 149. We shall examine that provision but, before we do that, one more provision of Section 147 needs to be noticed. And, that is, Explanation" 2 in Section 147 which stipulates that for the purposes of that Section, where no return of income has been filed by the assessee, despite his total income exceeding the maximum amount which is not chargeable to income tax, it shall be deemed that income chargeable to tax has escaped assessment.

4. Now, let us examine Section 149 of the said Act. As would be evident from the

above extract, this section prescribes the time limits for notices to be issued u/s 148. The wordings of the section make it clear that there is complete bar to the issuance of a notice u/s 148 unless and until the conditions stipulated in clauses (a), (b) or (c) of Section 149(1) of the said Act are satisfied. It is evident from the above provision that if the notice u/s 148 is to be issued beyond the period of four years but not more than six years then it is required to be shown that the income chargeable to tax which has escaped assessment is or is likely to be Rs. 1 lakh or more for that year. This is, of course, coupled with the requirement of the first proviso to Section 147 of the said Act. Insofar as the period of limitation extending up to sixteen years, as stipulated u/s 149(1)(c), is concerned, it would have to be further shown that the income which is said to have escaped assessment was in relation to any asset (including financial interest in any entity) located outside India. We may note that the explanation after sub-section (1) of Section 149 makes Explanation" 2 to 147 applicable for the purpose of Section 149 also.

5. It is clear that if the extended period of sixteen years provided in Section 149(1)(c) is to be invoked, the pre-condition is that income which is said to have escaped assessment must have relation to any asset (including financial interest in any entity) located outside India. This is also the same pre-condition stipulated in the second proviso to Section 147. In this context, it must be remembered that unless the second proviso to Section 147 applies, all cases beyond four years of the end of the relevant assessment year would have to satisfy the pre-conditions in the first proviso read with Section 149(1)(a) and (b)

6. In this backdrop, let us now return to the facts of the case. When the notice u/s 148 of the said Act was issued to the petitioner, the petitioner at the threshold sent a response dated 10.07.2013 wherein it was clearly stated as under:-

"At the outset, it is submitted that the Notice has been issued without jurisdiction and is barred by limitation applicable u/s 149 of the Act. The Notice has been issued on 13.06.2013 for the AY 2006-07 which is beyond the period 6 years prescribed for the purpose of issuing a Notice u/s 148 of the Act. We are an Indian Company and have no foreign assets or income and the Notice is therefore, clearly beyond limitation and liable to be withdrawn.

Further, in any event and without prejudice to the aforementioned, it is also pointed out that during the FY 2005-06, we did not undertake any activity and as such, did not have any income, for the purpose of the Act. Therefore, on the face of it, there could be no reason to believe for initiating re-assessment proceedings in the present case. In this regard, attached herewith and marked as Annexure-1 is our financial statement showing that there was no income during the FY 2005-06.

Accordingly, in the light of the above, it is requested that the Notice may kindly be withdrawn forthwith and the re- assessment proceedings may kindly be dropped."

(underlining added)

7. A similar letter was also sent on 12.08.2013 reiterating the stand of the petitioner that the notice was time barred. Along with the said letter dated 12.08.2013 the petitioner filed its nil return of income under protest. Thereafter, the Assessing Officer sent a letter dated 21.10.2013 to the petitioner which contained the purported reasons which had been recorded prior to the issuance of notice u/s 148. The said letter reads as under:-

"To,

M/s Deccan Digital Networks Pvt. Ltd.

13, Abul Fazal Road, Bengal Market,

New Delhi-110001.

Sir,

Sub: Notice u/s 148 read with Sec. 149(1)(c) of the I.T.Act 1961 for Assessment Year 2006-2007 - reg.

Please refer to the above subject.

Notice u/s 148 read with Sec. 149(1)(c) of the I.T.Act, 1961 was issued in your case for A.Y. 2006-2007 on 13th June 2013.

In response to the same you filed return of income for A.Y. 2006-2007 (Under protest) on 12.08.2013. Alongwith return of income letter dated 12.08.2013 was also filed. On going through the return of income it was observed that the return of income was not accompanied with balance sheet, profit and loss account and audit report. The deficiency was brought into your notice by letter dated 16.09.2013 of this office. In response to this, vide letter dated 08.10.2013 it was stated that alongwith letter dated 10.07.2013 the assessee company had submitted the balance sheet, profit and loss account for the subject assessment year. It was also stated by letter dated 08.10.2013 that the balance sheet, profit and loss account were not audited.

Now since you had complied with the provisions of section 148, I am giving the reasons recorded before issue of notice u/s 148/148 which are as follows.

"A report or coordination meeting of CBI, ED and Income Tax Department, sharing of information in the case of 2G related companies/ entities alongwith the show cause notice issued to M/s. Deccan Digital Networks Pvt. Ltd. and Shri Sumesh sawhney Director of M/s. Deccan Digital Networks Pvt. Ltd., 13, Abul Fazal Road, Bengali Market, New Delhi-1, by the Special Director of Enforcement was received through Dy. Director of Income Tax (Investigation), Unit-1(2); New Delhi in the above mentioned case pertaining to this Ward for taking appropriate action, as per the report the facts mentioned in the show cause notice / complaint are as under:

Copy of form FCGPR filed by M/s. Deccan Digital Networks Pvt. Ltd. (DDNPL) to RBI inter alia reveals that:

- i. M/s. Deccan Digital Networks Pvt. Ltd. is a recently formed company and activities are to hold investments. There was no description of NIC code.
- ii. On 21.03.2006, a sum of Rs.11,828/- crore was received by Deccan from. M/s. Global Communication Services Holdings Ltd. (GCSHL), Mauritius and on the same day i.e., 21.03.2006, 11828440 equity shares were allotted to GCSHL Mauritius.
- iii. There was delay in reporting to RBI about receipt of FIX/ in submissions of form FCGPR within 30 days from the date of receipt of funds/date, of issue of shares to the foreign investor (GCSHL, Mauritius) (11828440 shares were issued on 21.03.2006 for Rs.11,82,84,400/-). That DDNPL intimated receipt of FDI/ issue of shares on 22.08.2006 i.e., after stipulated time limit.

Therefore, there is contravention of the provisions of Para 9(1) (A) & (B) of schedule 1 of Regulation 5(1) of the Foreign Exchange Management (Transfer or issue of security by a person resident outside India) Regulations, 2000 read with sub-section (3)(b) of section 6 of the Foreign Exchange Management Act (FEMA), 1999 and also read with section 42(1) of the FEMA, 1999, for having failed to submit a report to the Reserve Bank of India, in respect of receipt of the amount of consideration to the tune of Rs.11.82/- crore of India, in respect of 11828440 equity shares issued against FDI of Rs.11.82/- crore (Rs.11,82,84,440/-) within the stipulated period of 30 days from the date of the receipt of the amount of consideration and issuance of equity.

On perusal of records, it is found that the assessee company has not filed its return of income for the assessment year 2006-2007.

In view of the above facts and circumstances of the case and as per the provisions of Section 149(1)(c) of the I.T. Act, notice u/s 148 is to be issued for reopening the case of M/s. Deccan Digital Networks Pvt. Ltd. for the assessment year 2006-07.

In view of the above,. I have reason to believe that the assessee company during the financial year 2005-2006 relevant to assessment year 2006-2007 has escaped assessment. Therefore, the approval of the Addl. CIT, Range-10, New Delhi is solicited as per provisions of Section 151(2) of the I.T.Act"

As the reasons for issue of notice u/s 148 have been furnished to you, you are required to furnish following details.

11. Please furnish name and address with confirmation of the persons from which equity share capital Non-convertible, Redeemable preference share capital of Rs.1639.59 crore has been received.

12. Please furnish documentary evidence of investment of Rs.1684.89 crores.

13. Please furnish confirmed copy of accounts sundry creditors of Rs. 2.32 crores.
14. Please furnish documentary evidence of claim of preliminary expenses of Rs.2.32 crore.
15. Please furnish complete bank statement with narrations.
16. A perusal of profit and loss account for the period ending 31.03.2006 reveals that you had claimed loss of Rs.23268723/-., Since no return of income for A.Y. 2006-2007 has been filed please explain, as to how the loss had been accounted in the return of imameraledioz A.Y .2007-2008 if any.
17. Please furnish proof of tilling of income tax return for A.Y. 2007-2008, 2008-2009, 2009- 2010 with audit report of M/s. Deccan Digital. Networks Pvt. Ltd.
18. Please furnish proof of income tax return of directors for A.Y. 2006-2007, 2007-2008, and 2009-2010.
19. Please furnish name and address of directors with details of change if any, during the period relevant to A.Y. 2006-2007 and later on.
20. Please furnish computation of income for 2006-2007.

Your reply should reach this office within seven days of the receipt of the receipt of this letter, statutory notice u/s 142(1) are enclosed herewith fixing the date of hearing on 28.10.2013.

Yours faithfully

(Bason Sanyal)

Income Tax Officer

Ward 10(1), New Delhi "

8. Thereafter, the petitioner submitted its objections dated 27.11.2013. In the said objections the petitioner reiterated its stand that the notice u/s 148 was barred by limitation. The stand taken by the petitioner was as under:-

"a) The Notice u/s 148 is barred by Limitation: The Notice is clearly time barred and is beyond the period of limitation prescribed under the Act, having been issued beyond the period of six years from the end of the relevant assessment year as prescribed u/s 149(1)(b) of the Act. The assessee is an Indian company and has no foreign assets or foreign income, and Section 149(1)(c) of the Act has no application to the facts of the case. As the company does not have any foreign assets, there is no question of any escapement of income in relation to foreign assets to justify the reliance on this provision. This position was made explicitly clear in the letter dated 08.10.2013 but there is no response to this issue in the letter dated 21.10.2013. It is submitted that while the notice has been justified by placing reliance on Section 149(1)(c) when the issue of

Limitation was pointed out by us, it is clear that the reasons recorded made no reference to any foreign asset or foreign income. It can clearly be inferred that the issue of foreign assets and foreign income has been raised subsequently only to get over the plea of limitation and is a clear after thought and does not constitute a reasons for issuing the Notice. In view of the aforesaid, the notice u/s 148 is clearly time barred and should be withdrawn forthwith."

(underlining added)

9. It is evident from the above extract that the petitioner had taken the specific stand that it was an Indian company and that it has no foreign asset and no foreign income and that Section 149(1)(c) of the said Act had no application in the facts of the case. It was urged that as the company did not have any foreign asset there was no question of any escapement of income in relation to a foreign asset and that the reliance of the department on the provisions of the Section 149(1)(c) of the said Act was misplaced.

10. This was succeeded by the order dated 19.12.2013 which is impugned before us whereby the objections including the objection with regard to time bar were rejected by the Assessing Officer. The point of time bar was "considered " by the Assessing Officer in the said letter dated 19.12.2013 in the following manner:-

"1. The notice u/s 148 is barred by limitation:-

At the first instance I would like to draw your kind attention that this point has already been raised by you by your letter dated 10.07.2013, 08.10.2013 and appropriate reply has been furnished to you vide this office letter dated 16.09.2013 (copy of letter enclosed again). It has been informed that notice was issued u/s 149(1)(c) of the Act. As per provisions of Sec 149(1)(c) notice could be issued for 16 years. For your convenience and a ready reference relevant part of Sec 149(1)(c) is reproduced herewith.

"149(1)(c)- No notice u/s 148 shall be issued for the relevant assessment year, if four years, but not more than 16 years have elapsed from the end of the relevant assessment years unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment."

On the basis of above the objection raised may please be treated as settled."

(underlining added)

11. Since there is a reference to the Assessing Officer's earlier letter of 16.09.2013 in the above-mentioned extract, it would be pertinent to see as to what has been said in that letter by the Assessing Officer with regard to the plea of bar of limitation raised by the petitioner. In the letter dated 16.09.2013 this is exactly what the Assessing Officer had stated:-

"Your query that the notice u/s 148 has been issued after lapse of statutory time I would like to draw your kind attention to Sec-149(1)(c) of the I.T. Act, 1961.

For a ready reference the section is quoted herewith.

"149(1)(c)- No notice u/s 148 shall be issued for the relevant assessment year, if four years, but not more than 16 years have elapsed from the end of the relevant assessment years unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment" "

12. It is, therefore, clear from both the letter dated 16.09.2013 as well as the impugned order dated 19.12.2013 that there is no reasoning indicated as to how Section 149(1)(c) has been invoked other than simply re-producing the contents of Section 149(1)(c). Furthermore, neither the letter dated 16.09.2013 nor the impugned order dated 19.12.2013 nor the counter affidavit filed by the respondent before this court controvert the statement made by the petitioner that it has no asset located outside India. Therefore, the question of deriving an income from any such asset also does not arise. In these circumstances, it will have to be accepted that the petitioner does not have any asset outside India and, therefore, the question of the petitioner having any income in relation to such an asset would not arise. The very condition precedent for issuing a notice u/s 148 read with Section 149(1)(c) invoking the extended period of limitation of sixteen years is that the income which has escaped assessment must have relation to any asset located outside India. This pre-condition is not satisfied. Therefore, there is a complete bar to the issuance of such a notice beyond the period of four years.

13. In view of the foregoing discussion, the impugned notice dated 13.06.2013, the impugned order dated 19.12.2013 and all proceedings pursuant to the notice dated 13.06.2013 are set aside. We are, however, making it clear that this order has been made on the basis of the reasons as recorded and in the context of the plea of limitation.

14. The writ petition is accordingly allowed. There shall be no order as to costs.