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

Reserved on: 25th July, 2019
Decided on: 6th August, 2019

W.P. (C) 10897/2015

CHETAN SABHARWAL ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Pawanjit Singh Bindra, Mr. Aniket D. Agrawal and Mr. G.S. Patwalia, Advocates

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 28 (1) ..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue with Mr. Deepak Anand, Junior Standing Counsel and Mr. Piyush Goyal, Advocate.

WITH

\+ **W.P. (C) 10898/2015**

CHETAN SABHARWAL ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Pawanjit Singh Bindra, Mr. Aniket D. Agrawal and Mr. G.S. Patwalia, Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX

CIRCLE 28 (1) ..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue with
Mr. Deepak Anand, Junior Standing Counsel and Mr. Piyush Goyal, Advocate.

WITH

\+ **W.P. (C) 11215/2015**

NITIN SABHARWAL .... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Pawanjit Singh Bindra,
Mr. Aniket D. Agrawal and Mr. G.S. Patwalia, Advocates

Versus

ASSISTANT COMMISSIONER OF INCOME TAX
CIRCLE 28(1) ..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue with
Mr. Deepak Anand, Junior Standing Counsel and Mr. Piyush Goyal, Advocate.

AND

\+ **W.P. (C) 11220/2015**

NITIN SABHARWAL ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Mr. Pawanjit Singh Bindra,
Mr. Aniket D. Agrawal and Mr. G.S. Patwalia, Advocates

Versus

ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE 28(1) ..... Respondent

Through: Mr. Zoheb Hossain, Senior Standing Counsel for Revenue with
Mr. Deepak Anand, Junior Standing Counsel and Mr. Piyush Goyal, Advocate.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE TALWANT SINGH

J U D G M E N T

Dr. S. Muralidhar, J.:

1. These four writ petition arise out of a common set of facts and seek similar reliefs pertaining to the reopening of assessments earlier made for the Assessment Years (AY) 2008-09 and 2009-10 under Sections 147/148 of the Income Tax Act, 1961 (Act). They are accordingly being disposed of by this common judgment.

2. Mr. Chetan Sabharwal has filed two writ petitions - W.P. (C) No.10898/2015 which challenges the notice dated 31st March, 2015 issued by the Respondent/Assistant Commissioner of Income Tax (ACIT) under Section 148 of the Act seeking to reopen the assessment for AY 2008-09 and the consequential order dated 24th September, 2015 disposing of its objections and

W.P. (C) No. 10897/2015 which challenges an identical notice and the order disposing of its objections for the AY 2009-10.

3. Mr. Nitin Sabharwal, the brother of Mr. Chetan Sabharwal, has filed the other two writ petitions. While W.P.(C) 11220/2015 challenges notice dated 31st March, 2015 issued under Section 148 of the Act and the order dated 24th September, 2015 passed by the Respondent ACIT disposing of the objections for AY 2008-09, W.P.(C) No. 11215/2015 seeks similar relief qua the notice and order of the same dates for AY 2009-10.

4. There is one distinguishing feature in the two sets of petitions. While the assessments in the case of Mr. Chetan Sabharwal for the two AYs in question in the first instance by the Assessing Officer (AO) were scrutiny assessments under Section 143 (3) of the Act, as far as Mr. Nitin Sabharwal is concerned, there was no scrutiny assessment for the two AYs. Intimations accepting his returns were sent to him under Section 143 (1) of the Act.

Background facts

5. The background facts are that on 19th October 2007, the two Petitioners i.e. Mr. Chetan Sabharwal and Mr. Nitin Sabharwal, and two other shareholders - Mr. Kabul Chawla and his wife Mrs. Anjali Chawla - entered into a Share Purchase Agreement (SPA) with GYS Real Estate Private Limited (GYS) for sale of 30 lakhs equity shares of M/s. Pawan Impex Private Limited (Pawan Impex) for a consideration of Rs.97.50 crores. 7.5 lakhs equity shares of Pawan

Impex were held by Mr. Chetan Sabharwal and Mr. Nitin Sabharwal. Pursuant thereto each of them received an advance of Rs.27.50 crores (1/4th Shares of the total of Rs.110 crores remitted to all share holders) against the sale of equity shares of Pawan Impex after the pledging of 30% equity shares and furnishing of an irrevocable bank guarantee of Rs.52 Crores.

6. In terms of Article 1.1 read with Article IV of the SPA, the date of completion of the sale transaction (defined under the SPA as 'closing') was to occur upon fulfilment of certain conditions by these two Petitioners and the other shareholders (the sellers). Upon such closing, each of the Petitioners along with the other shareholders was to deliver, *inter alia,* transfer deeds and share certificates including the 30% equity shares originally pledged, to GYS and thereafter the sale transaction would be deemed to complete.

7. It may be noted that the aggregate payment which was agreed to be paid by GYS for the entire shares of Pawan Impex was Rs.195 crores, when this was reduced by a sum of Rs.63.79 crores which was the unsecured loan in the books of Pawan Impex. On the closing date, the consideration received was Rs.195 crores minus Rs.63.79 crores.

8. GYS was paid a further sum of Rs.3 crores on account of the estimated cost of construction. The net sale consideration was arrived at Rs.1,28,20,66,501/- and the proportionate sale consideration for each of the two Petitioners worked out to Rs.32,05,16,625/-. Each of the Petitioners paid Rs.49,20,250/- towards

brokerage/commission/professional fees for obtaining services for sale of 7.5 lakh equity shares. Deducting this from the gross consideration, the net sale consideration in the hands of each of the Petitioners was Rs.31,55,96,376/-.This was shown in the computation of each of their returns as Long Term capital gain (LTCG) and offered for tax in the AY 2009-10.

9. The further facts relevant to the sale of shares of Pawan Impex are that a No Objection Certificate/consent letter was issued by the NOIDA Authority in terms of Article 4 clause 4.2 (a) of the SPA on 22nd May, 2008 approving the change in constitution of Pawan Impex. At the Annual General Meeting (AGM) of Pawan Impex conducted on 29th September 2008, the new Directors were appointed and the previous Directors, viz., the two Petitioners and Mr. Kabul Chawla and Smt. Anjali Chawla ceased to be Directors. This took effect from 23rd June, 2008 as was noted in the Form 20-B dated 30th September, 2008 filed with the Registrar of Companies (ROC). On 17 and 19th November, 2008 the shares of Pawan Impex dematerialised upon a request by GYS and transferred to Religare Securities limited, depository under NSDL, and an associate company of the Religare group. Each of the Petitioners deposited Rs.28 crores and Rs.3,91,50,000/- on 25th and 26th September, 2009 in the capital gain savings bank account in accordance with Section 54F (iv) of the Act.

10. Under a separate SPA the equity shares of M/s.SVIIT Software Pvt. Ltd. (SVIIT Software) held by the two Petitioners and two others - Mr. Kabul

Chawla and Mrs. Anjali Chawla -were agreed to be sold to GYS for an aggregate consideration of Rs.60 crores. As far as the two Petitioners were concerned, each of them held 2.5 lakhs equity share of SVIIT Software. They were paid an advance of Rs.22.50 crores after pledging of 40% of the shares of SVIIT Software. Each of them received Rs.5,62,50,000/- for the respective 2.5 lakhs equity shares. Thereafter GYS also made a further payment of Rs.18.00 crores in terms of Article 3.2 (b) (i) of the SPA. Each of the Petitioners accordingly received Rs.10,12,50,000/- (5,62,50,000 + 4,50,00,000) being 1/4th of Rs.18.00 crores.

11. As far as the SPA concerning the shares of SVIIT Software was concerned, the closing happened in January, 2009. GYS made a payment of Rs.18.99 crores for repayment of the unsecured loan standing in the books of SVIIT Software. Further an amount of Rs.60.00 lakhs was to be paid to GYS on account of estimated cost of construction of building as per terms of SPA and certain other expenses such as brokerage etc. were also deductable. Thus the net consideration receivable from GYS for the sale of 10 lakhs share of SVIIT Software was Rs.40,40,84,770/-. The net proportionate sale consideration for the sale of 2.5 lakhs equity shares owned by each of these Petitioners came to Rs.10,10,21,192/-. Each of the Petitioners paid Rs.15.00 lakhs towards brokerage/commission/professional fee for the sale of the above shares and this was deducted from the gross consideration hereinabove. The net sale consideration of Rs.9,95,21,193/- was shown in the computation of LTCG and offered for tax for the assessment year 2009-10.

12. On 30th September, 2009 the AGM of the SVIIT Software was conducted noting the cessation of the earlier Directors i.e. Mr. Kabul Chawla, Smt. Anjali Chawla and Mr. Chetan Sabharwal with effect from 17th January, 2009 and the appointment of the new Directors.

13. On 21st April 2010, the two Petitioners largely purchased undivided and undefined half share in a residential property being No. 7, Sikandra Road, New Delhi built on a plot measuring 7.1 acres for an aggregate consideration of Rs.61.00 crores. This property was purchased out of capital gains arising in the hands of the two Petitioners from sale of shares of Pawan Impex and SVIIT Software within a period of two years. Accordingly, each of the Petitioners claimed the benefit of Section 54F of the Act.

14. On 25th September 2008, Mr. Chetan Sabharwal filed his return of income for A.Y.2008-09 declaring a total loss of Rs.90,37,369/-. In the return e-filed in Form ITR-4 the particulars of the tax audit report obtained was filed and in part A-BS at column 3(d)1(A), a sum of Rs.37,64,40,000/- was shown under the head 'sundry creditors' which included a sum of Rs.37,62,50,000/- being a liability in the name of GYS.

15. Return of Mr. Chetan Sabharal was picked up for scrutiny and a notice under Section 143 (2) dated 9th August, 2009 was issued by the ACIT, Circle-25, New Delhi. On 6th August, 2010 a questionnaire was issued by the Assessing Officer (AO) to Mr. Chetan Sabharwal under Section 142 (1) of the

Act where 56 queries were raised, *inter alia*, requiring him to explain the nature of the transaction with GYS and requiring him to file a Memorandum of Association (MOA) and ROC returns for the last five years of the said GYS. On 5th October, 2010 Mr. Chetan Sabharwal replied to these queries.

16. Following this on 30th December, 2010, the AO issued summons under Section 131 of the Act to Pawan Impex, GYS and SVIIT Software. These parties filed their respective replies on 16th December, 2010. More documents were placed on record by Mr. Chetan Sabharwal on 20th December, 2010. On 22nd December 2010, the AO framed an assessment under Section 143(3) of the Act *qua* the return filed by Mr. Chetan Sabharwal. The assessment order was in one page and the material portion is in para 3 which reads as under:

> "After examination of the submissions of the Assessee and discussion with the authorized representative of the Assessee. Assessed at loss of Rs.90,37,369/- under Section143(3) of the Act. Thus, the return as filed was accepted without change."

17. As far as AY 2009-10 is concerned Mr. Chetan Sabharwal filed his return of income declaring a net income of Rs.1,17,21,750/-. The exemption claimed of Rs.31,04,70,241/- and the LTCG of Rs.3,87,14,131/- was shown in the return. This was set off against the short-term capital loss on sale of quoted share and on sale/redemption of mutual funds. It is stated that LTCG of Rs.40,38,40,170/- was declared by Mr. Chetan Sabharwal in the return for AY 2009-10 on sale of equity shares of Pawan Impex and SVIIT Software. Of the aforementioned capital gains a sum of Rs.31,91,50,000/- was deposited in the

capital gain account scheme and therefore reduction to the tune of Rs. 31,04,70,241/- was claimed under Section 54F of the Act.

18. As far as AY 2009-10 is concerned, notice under Section 143 (3) of the Act was issued by the AO on 15th September, 2010. Likewise, a questionnaire was issued on 16th November, 2010 raising various queries, to which Mr. Chetan Sabharwal replied on 2nd November, 2011. On 19th December, 2011, the Assessment order was framed by the AO. It was noted in this assessment order about the Assessee having invested in various mutual funds and about having paid credit card bills. The order noted that the case had been discussed with the Assessee's AR in detail with reference to the various expenses debited in the Profit and Loss (P&L) Account. The computation showed income from the business, income from other sources and finally the assessment was framed at an income of Rs.1,17,21,750/-.There was no discussion as such as regards the LTCG.

19. Turning now to the facts concerning Mr. Nitin Sabharwal, he filed his return of income for AY 2008-09 declaring an income of Rs.1,40,04,720/-. This included interest income earned by him on FDRs in American Express Bank made with advance received from GYS. According to Mr. Nitin Sabharwal since in terms of Article IV of the SPAs, the share purchase culminated only in FY 2008-09 relevant to AY 2009-10, he reflected the capital gain on sale of the equity share in his return in the subsequent AY 2009-10. As far as his return for

AY 2008-09 was concerned, intimation under Section 143(1) of the Act was issued by the AO on 26th October, 2009.

20. For AY 2009-10, Mr. Nitin Sabharwal filed his return of income on 30th September, 2009 declaring a total income of Rs.89,67,577/-. In this return he disclosed his LTCG of Rs.3,87,14,131/- after claiming the set off in the sum of Rs.31,04,70,241/-. In this case too, intimation under Section 143(1) was issued by the AO.

Notices under Section 147/148 of the Act

21. On 31st March, 2015 notice under Section 148 of the Act was issued by the AO to each of the Petitioners separately for the two AY's stating that he had reason to believe that income chargeable to tax for the two AY's had escaped assessment within the meaning of Section 147 of the Act, therefore he proposed to assess/reassess the income. It must be noticed here that this notice was issued after four years after the completion of the respective financial years in which the assessments were complete. This fact is relevant as far as Mr. Chetan Sabharwal is concerned since in his case the assessments for the two AYs were finalized upon scrutiny under Section 143(3) of the Act. However, as already noticed, in the case of Mr. Nitin Sabharwal ,since only intimations were sent under Section 143(1) in respect of the returns filed by him for the two AYs, this aspect is not relevant.

22. Each of the Petitioners applied for inspection of the file which was carried out on 16th April, 2015. Each of the Petitioners on 23rd April, 2015 wrote to the AO stating that return already filed by each of them should be treated as return filed as a response to the notice under Section 148 of the Act. Each of them requested for a copy of the reasons recorded.

Reasons for reopening assessments

23. On 24th April, 2015, the reasons recorded by the AO were served on each of the Petitioners. The reasons read as under:

> "REASONS FOR RE-OPENING OF ASSESSMENT FOR A.Y. 2009-10.
>
> The letter DG/LKO/D/44Nol.204/2011-12 dated 15-10-2015 from the O/o DGIT(Inv.), Lucknow to The Deputy Secretary (Inv .IV) and other correspondence in this regard mentions that the enquiries conducted by the Investigation Unit, NOIDA revealed that Mr. Chetan Sabharwal [PAN-AATPS3048P] and his brother, Mr. Nitin Sabharwal [PAN-ABKPS7284D] jointly purchased one half share of property No.7, Sikandra Road, New Delhi in April 2010.The total consideration for purchase of this property incurred by these two persons was Rs.64,69,25,000/-. The property was purchased through auction made at the directions of the DelhiHigh Court. Enquiries revealed that the major source of investment has come from sale proceeds of shares of M/s Pawan Impex Pvt. Ltd. and M/s SVIIT Software Pvt. Ltd.
>
> Shares of M/s Pawan Impex Pvt. Ltd. and M/s SVIIT Software Pvt. Ltd. were sold by Mr. Chetan Sabharwal and Mr. Nitin Sabharwal to M/s GYS Real Estate Pvt. Ltd. [a Fortis Group Company]. The shares were sold through Share Purchase Agreement dated ·19-10-2007.

Enquiries conducted revealed that a total consideration of Rs.195 crores was to be paid by M/s GYS Real Estate Pvt. Ltd. to the shareholders of M/s Pawan Impex Pvt. Ltd.

Similarly, share purchase agreement was signed in the case of SVIIT Software Pvt. Ltd. Total sale consideration of Rs.60.00 crores was determined. The total long term capital gain derived by Mr. Chetan Sabharwal was worked out to Rs.40,38,40,170/- out of which a sum of Rs.31,91,50,000/- was deposited in the Capital Gains Saving Bank A/c before 30th September 2009 and the deduction u/s 54F of the Income Tax Act, 1961 was claimed. Similarly, Mr. Nitin Sabharwal has shown capital gains of Rs. 40,40,84,770/- out of which Rs. 35,80,97,629/~ was deposited in the Capital Gains Saving Bank A/c before 30th September 2009 and the deduction u/s 54 F of the Income Tax Act, 1961 was claimed. Mr. Chetan Sabharwal and Mr. Nitin Sabharwal have also purchased 1/4th share each in the Property No. 7, Sikandara Road, New Delhi vide sale deed dated 21.04.2010 for Rs.9,33,69,928/- each.

Mr. Nitin Sabharwal and Mr. Chetan Sabharwal along with the other shareholders (Mr. Kabul Chawla and Smt Anjali Chawla) of Pawan Impex Pvt Ltd have entered into share purchase agreement dated 19th day of October, 2007 with GYS Real Estate Pvt. Ltd which determined the sale of 30,00,000 fully paid up equity shares of Pawan Impex Pvt Ltd for a total consideration of Rs.1,95,00,000/- to GYS Real Estate Pvt. Ltd.

Further, vide share purchase agreement dated 19-10-2007 entered between the equity shareholders of SVIIIT Software Pvt. Ltd. and GYS Real Estate Pvt. Ltd. 10,00,000 equity shares were to be sold.

After enquiries by the Investigation Unit, NOIDA about the value of shares of M/s Pawan Impex Pvt. Ltd. and SVIIT Software Pvt. Ltd. It has been reported that:

"It can be prima facie concluded that the value of shares are overvalued to the extent of Rs.109,80,000/- (in the case of M/s Pawan Impex Pvt. Ltd.) and of Rs. 40,40,28,0001- (in the case of M/s SVIIT Software Pvt. Ltd.) going by the cost of land and building which is much lower than the transaction amount of Rs.195,00,00,000/- in the case of M/s Pawan Impex Pvt. Ltd. plus Rs.60,00,00,000/- in the case of M/s SVIIT Software Pvt. Ltd. "

On further perusal of the information and mentioned above the shares have been overvalued and the capital gains were adjusted in future years and the deductions were also claimed u/s 54 AY 2008-09, relevant to FY 2007-08, when the SPA was made AY 2009-10, relevant to FY 2008-09 considered necessary & 54F deduction claimed;

The implication is as follows:

Share purchase agreement entered in FY 07-08 relevant to AY 08-09. The consideration for the sale of shares has been received majorly in FY 08-09 relevant to A Y 09-10 and deduction u/s 54F was claimed on the same.

With respect to the share transactions, the capital gain earned & deduction on the same claimed. I have the reasons to believe that substantial amount has escaped assessment during the Assessment Years 2008-09 and 2009-10."

24. Each of the Petitioners submitted their objections to the reopening of assessment by letters dated 20th May, 2015. By detailed speaking order dated 24th September 2015, the AO rejected the objections. Thereafter, the present petitions were filed.

The present petitions

25. On 24th November, 2015, while directing notices to be issued in the petition, the Court directed that further proceedings pursuant to the notice dated 31st March, 2015 for each of the AYs would remain stayed. The interim order was made absolute on the following date i.e. 27th April, 2016.

26. Pursuant to the notice issued, counter-affidavits have been filed by the Respondents to which rejoinders have been filed by the Petitioners. It must be noted at this stage that on 1st February, 2018, the following order was passed in the writ petitions filed by Mr. Chetan Sabharwal:

> "Returns for the Assessment Years ('AY') 2008-2009 and 2009-2010 were subject-matter of orders under Section 143(3) of the Income Tax Act, 1961. First question which arises is whether it is a case of examination and change in opinion.
>
> Learned counsel for the petitioner submits that the reopening is after four years and therefore, the question of failure on part of the assessee has to be examined.
>
> Learned counsel for the respondent states that in this case, report was received from the Investigation Wing, Lucknow and, therefore, there was fresh evidence and material, which became the basis for reopening of the assessment. For the AY 2008-2009, income from capital gains from sales of shares was not declared. Income from capital gains arose in the said year and not in the assessment year 2009-2010.
>
> We have merely recorded the submissions made and not commented on merits. Learned counsel would be ready for arguments on the issues raised.

Learned counsel for the respondent would produce original records on the next date of hearing.

Relist on 11.4.2018."

27. At a subsequent hearing on 11th April, 2018, the Court was informed that while the report received from the Investigation Wing, Lucknow was available but the records relating to first assessment under Section 143(3) of the Act were not. The Court then directed that the said record should be available at the time of hearing.

28. On 25th July, 2019, the files of the Department including the report of the Investigation Wing, Lucknow and the assessment records were made available and were perused by the Court.

Submissions on behalf of the Petitioners

29. Mr. Ajay Vohra, learned Senior Counsel appearing for the Petitioners submitted that the reopening of the assessments in both sets of cases was bad in law. He submitted that the common ground that would apply to both sets of petitions was that in order to justify the reopening of the assessment, there had to be a rational/intelligible nexus between the material relied upon and the reasons to believe that income had escaped assessment. In the present case, the reasons to believe do not demonstrate how income had escaped assessment in the hands of the Petitioners. He placed reliance on the decisions in ***CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC), Madhukar Khosla v. ACIT***

[2014] 367 ITR 165 (Del), Sabharwal Properties Industries Pvt. Ltd. v. ITO [2016] 382 ITR 547 (Del).

30. Mr. Vohra further submitted that the report of the Investigation Wing could not ipso facto constitute 'tangible material' without having any link with the 'reasons to believe'. Reliance was placed on the decisions in ***ACIT v. Dhariya Construction Co. [2010] 328 ITR 515 (SC), Pr. CIT v. RMG Polyvinyl (I) Ltd. [2017] 396 ITR 5 (Del), Pr. CIT v. Meenakshi Overseas (P.) Ltd., [2017] 395 ITR 677 (Del), Mahashay Chunnilal v. DCIT [2014] 362 ITR 314 (Del)*** and ***Prabhu Dayal Rangwala v. CIT [2015] 373 ITR 596 (Del).***

31. Specific to the case of Mr. Chetan Sabharwal, he submitted that the reasons do not state that there was absence or failure on the part of the Assessee to disclose fully and truly all material facts in relation to the assessment of income. In support of this submission, he relied on the decisions in ***ACIT v. ICICI Securities Primary Dealership Ltd. [2012] 348 ITR 299 (SC), CIT v. Mr. Tirath Ram Ahuja [2008] 306 ITR 173 (Del), CIT v. Purolator India Ltd, [2012] 343 ITR 155 (Del), Xerox Modicorp v. DCIT [2013] 350 ITR 308 (Del), Tata Business Support Services v. DCIT [2015] 232 TAXMAN 702 (Bom)***. Reliance was also placed on the decisions in ***Wel Intertrade (P) Ltd. v. ITO [2009] 308 ITR 22 (Del), CIT v. Indian Farmers Fertilizer Cooperative Ltd. [2008] 171 Taxman 379 (Del), Haryana Acrylic Manufacturing Company v. CIT [2009] 308 ITR 38 (Del)*** and ***Atma Ram Properties (P) Ltd. v. DCIT [2012] 343 ITR 141 (Del)***.

32. Mr. Vohra further submitted that re-assessment was initiated on the basis of mere change of opinion and this was impermissible in law. Reliance is placed on the decisions in ***Maruti Suzuki India Ltd. v. DCIT [2013] 356 ITR 209, Mohan Gupta (HUF) v.CIT [2014] 366 ITR 115, Tractebel Industry Engg. v. Asst. Director of Income Tax [2011] 198 Taxman 408 (Del)*** and ***CIT v. Atul Kumar Swami [2014] 362 ITR 693(Del).***

33. Adverting to the merits of the cases, Mr. Vohra submitted that since the sale of shares is completed only during the Financial Year 2008-09 in terms of the SPAs relevant to AY 2009-10. LTCG could be declared only in the return for AY 2009-10. Accordingly, he submitted that there was no question of any failure by Mr. Chetan Sabharwal to disclose any material facts. He questioned the rationale of the AO forming an opinion that income had escaped assessment, when in fact, even assuming the so called over valuation of the shares purchased, the resultant income was in any event disclosed and tax paid thereon. He pointed out that the factum of sale of shares of Pawan Impex and SVIIT Software was not doubted by the AO even in the impugned orders.

34. Mr. Vohra further placed before the Court documents relating to the re-opening of assessment in the case of GYS. GYS had also filed three writ petitions in which, notices were issued by this Court on 2nd March, 2016 and in the interim, it was directed that the orders may be passed in the assessment proceedings by the AO which would be subject to the outcome of the writ petition. In the re-assessment proceedings, the income originally declared in the

initial returns was accepted as such in the case of GYS and on 30th August, 2016 the writ petitions were dismissed as withdrawn. According to Mr. Vohra, this is another reason why there was no purpose to be served in the re-opening of the assessments in the case of the Petitioners, since all these transactions were inter related and the explanation offered in the case of GYS has already been accepted by the Revenue.

35. Mr. Vohra also placed reliance on the recent judgment of the High Court of Bombay at Goa dated 9th July, 2019, in W.P.(C) No.141/2015 and batch (***Sesa Sterlite Ltd. v. The Assistant Commissioner Income Tax***) where again the challenge to re-opening of the assessments under Section 147/148 of the Act based on the report of a Commission of Inquiry was rejected. He submitted that the investigation report in the present case per-se could not constitute relevant material for reopening the assessments unless the reasons disclosed the live link in the report and reasons to believe that income had escaped assessment.

Submissions on behalf of the Revenue

36. Mr. Zoheb Hossain, learned Senior Standing counsel for the Revenue, at the outset submitted that the cases of Mr. Chetan Sabharwal are different from that of Mr. Nitin Sabharwal. In the case of Mr. Nitin Sabharwal, since the initial assessments were accepted as such by sending him intimations under Section 143 (1) of the Act, the proviso to Section 147 of the Act could not be attracted. He placed reliance on the decision in ***DCIT v. Zuari Estate Development and Investment Company (2015) 15 SCC 248*** and ***CIT v. Rajesh Jhaveri Stock***

Brokers Pvt. Ltd. (2008) 14 SCC 208, to contend that insofar as the earlier assessments in the case of Mr. Nitin Sabharwal was not under Section 143(3) of the Act but the return was accepted under section 143(1) of the Act, there was no question of a notice under Section 147/148 of the Act constituting a 'change of opinion'. Further, in his cases the mere fact that there was investigation report which was made available to the Revenue subsequent to the completion of the assessments was in itself sufficient for formation of an opinion that income had escaped assessment.

37. As far as both cases were concerned, Mr. Hossain maintained that at the present stage the Court only had to be satisfied prima-facie that there was sufficient material for reopening of the assessment. Referring to the assessment orders passed by the AO under Section 143 (3) of the Act in the cases of Mr. Chetan Sabharwal, Mr. Hossain pointed out that there is absolutely no discussion in the orders themselves on the aspects now highlighted in the reasons for reopening of the assessments. He placed reliance on the decision in ***Income Tax Officer Ward No. 16(2) v. Tecspan India Pvt. Ltd. (2016) 6 SCC 685***.

38. As far as the scope of the present proceedings are concerned, he placed reliance on the decision in ***M/s. Phool Chand Bajrangi Lal v. ITO (1993) 4 SCC 77***and submitted that the fresh information in the form of the investigation report clearly demonstrated that the initial disclosure regarding the price of shares was not true and complete and the said report therefore formed a real

basis for re-assessment. Reliance was also placed on the decision in ***Income Tax Officer, Calcutta v. Selected Dalurband Coal Co. Pvt. Ltd. (1997) 10 SCC 68*** in support of the contention that the report of the investigation could occasion a reasonable belief that the income had escaped assessment. He submitted that at this stage, the Court would not go into the merits of the matter beyond being satisfied that there was sufficient basis for the reopening of the assessment.

39. As far as non-stating of the exact words regarding failure by the Assessees to make a full disclosure of all materials, he submitted that reasons to believe had to be read as a whole and it cannot be a mere incantation of the words in the statute as that would render the exercise meaningless. According to him, if read as a whole, there was sufficient indication in the reasons to believe that indeed the true and correct material particulars have not been disclosed by the assessee. Reliance was also placed on the decisions of this Court in ***Unitech Wireless Pvt. Ltd. v. ACIT (2014) 362 ITR 417 (Del)***, ***Raymond Woolen Mills v. ITO (2008) 14 SCC 218*** and ***AGR Investment Ltd. v. Addl. Commissioner of Income Tax (2011) 333 ITR 146 (Del).***

Analysis and reasons

40. To begin with, this Court underscores the difference in the two sets of cases on the aspect of 'change of opinion'. As far as the case of Mr. Nitin Sabharwal is concerned, as already highlighted, his returns for the two AYs in question were accepted as such and intimation was sent to him under Section 143 (1) of

the Act. Consequently, there was no occasion for the AO to form any opinion in the first place. Therefore, there was no question of change of opinion in his cases as far as the notice under Section 147/148 of the Act is concerned. His position has been sufficiently explained in the decision in ***CIT v. Rajesh Jhaveri Stock Brokers (supra)*** which is followed in ***DCIT v. Zuari Estate Development & Investment Company***. This has also been highlighted by this Court in ***Indu Lata Rangwala v. CIT (2016)384 ITR 337***.

41. As far as the case of Mr. Chetan Sabharwal is concerned, the original assessment orders for both AYs under Section 143(3) of the Act do not give any indication on the AO having formed any opinion whatsoever on the basis of which the reopening has been ordered. In this context the following observations in ***Income Tax Officer Ward No. 16 (2) v. Techspan India Pvt. Ltd.*** are relevant.

> "18. Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address, itself to a given aspect sought to be examined in the reassessment proceedings."

42. Consequently, even in the cases of Mr. Chetan Sabharwal in view of the fact that the original assessment orders are totally silent on this aspect of the matter, it cannot be said that the reason to believe constitutes a 'change of opinion'.

43. At this juncture it must be stated that on a perusal of the report of the investigation which was produced before this Court, it appears *prima facie* that there was sufficient material to justify the reopening of the assessment in both sets of cases. Further, upon reading the reasons to believe as a whole the 'live link' between the material in the form of the investigation report and the formation of belief that income that has escaped assessment is *prima facie* discernable. The Court hastens to add that this is a *prima facie* view which is all that is necessary at this stage.

44. The Court in this context would like to refer to the following observations of the Supreme Court in ***ITO v. Selected Dalurband Coal Limited*** *(supra)* where it was considering the effect of a letter of the Chief Mining Officer which emerged after the conclusion of the assessments:

> "After hearing the learned Counsel for the parties at length, we are of the opinion that we cannot say that the letter aforesaid does not constitute relevant material or that on that basis, the Income-tax officer could not have reasonably formed the requisite belief. The letter shows that a joint inspection was conducted in the colliery of the respondent on January 9, 1967 by the officers of the Mining Department in the presence of the representatives of the assessee and according to the opinion of officers of the Mining Department;

there was under reporting of the raising figure to the extend indicated in the said letter. The report is made by Government Department and that too after conducting a Joint inspection. It gives a reasonably specific estimate of the excessive coal mining said to have been done by the respondent over and above the figure disclosed by it in its returns. Whether the facts stated in the letter are true or not is not the concern at this stage. It may well be that the assessee may be able to establish that the fact stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since, we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on we do not and we ought not to express any opinion on merits.*"*

45. Unlike in other writ petitions where a similar challenge is made to the reopening of assessments by issuing notice under Section 148 of the Act, where the Court invariably directs as an interim measure that the re-assessment proceedings may go on but no final order should be passed during the pendency of the petition, in the present case the Court ordered a total stay of further proceedings pursuant to the impugned notices dated 31st March 2015. This in effect meant that the re-assessment proceedings before the AO did not progress.

46. With the Court disinclined to interfere at this stage for the reasons explained above, it would be open to the two Petitioners to advance all the arguments made by them in these petitions, except the point that the reopening

constitutes a change of opinion, before the AO. This would include the point urged by Mr. Chetan Sabharwal that the reopening is bad in law because the reasons do not expressly state that there was a failure on his part to disclose fully and truly all material facts in relation to his assessment.

47. Consequently, this Court would not like to further dwell on the other points urged before this Court on behalf of the Petitioners or express a view one way or the other on them except to hold that at this stage the Court, *prima facie*, finds no merit in the contention that there is no live nexus between the material relied upon and the reasons to believe that income has escaped assessment in both sets of cases.

48. The writ petitions are accordingly dismissed. The interim orders are vacated.

S. MURALIDHAR, J.

TALWANT SINGH, J.

August 06, 2019
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