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Kind regards

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FBR unearths Rs 2.34 billion sales tax evasion: ship-breaking industry probed

The Directorate-General of Intelligence and Investigation Inland Revenue (IR) of the Federal Board of Revenue (FBR) unearthed massive sales tax evasion worth Rs2.34 billion by the ship-breaking industry on the import of 503 vessels between July 2007 and June 2012 and launched recovery proceedings in co-ordination with tax departments in Karachi and Quetta.

Sources told on Sunday that since assumption of charge as Director-General by Khawaja Tanveer Ahmed, this is a major breakthrough of the agency, which focused on ship-breaking industry seemed neglected in the past.

The Director-General and his team of investigators thoroughly probed the data of ship-breakers and detected evasion of sales tax and withholding tax. Persistent efforts of the agency enabled the Board to start recovery of billions of rupees from the ship-breaking industry. For the first time, directorate of intelligence IR has simultaneously checked sales tax and income ax record of 28 major ship-breakers of the country.

According to preliminary estimates, sales tax evasion of Rs2.34 billion has been committed by ship-breakers during the said period. The actual recovery may increase as the investigation progresses. In this connection, Khwaja Tanveer has submitted a detailed report to FBR Chairman Ali Arshad Hakim to report about the ongoing tax evasion by the ship-breaking industry.

Details of the case showed that the directorate of intelligence IR had received information that a number of ship-breakers allegedly evaded sales tax by not paying due tax as required under the Sales Tax Act of 1990. The procedure for revenue collection from ship-breakers is provided in Special Procedure Rules where sales tax is leviable on breaking of ships, instead of release at import stage.

The 70.5 percent of the weight (tonnage) of ship /vessel determined at import stage is considered as ship plates. The sales tax liability presently is calculated @ Rs 4848 per ton of ship plate. When the ship/vessel is beached for breaking, the Sales Tax determined on the basis of above calculation is deferred and secured against post dated cheques in the concerned RTOs for subsequent encashment/payment of tax. The ship-breakers claim credit of these payments in their Sales Tax returns.

Reportedly a number of ship-breakers have not cleared their sales tax liability by abusing the self assessment system. The Regional Tax Offices (RTOs) failed to monitor their liability. The procedural loopholes were abused by vast majority of the ship-breakers thus causing loss to the national exchequer.

The directorate repeatedly requested ship-breakers' association to provide import data of their members, but they failed to respond. Accordingly the Collector of Model Customs Collectorate (MCC), Gwadar was requested for obtaining data of ships imported for breaking at Customs House, Gaddani. A team of expert officers was deputed by Karachi Office in the first week of August to collect data in this regard.

Director-General's Karachi Office I&I IR complied and worked on the data of imported ships/vessels for breaking earlier, obtained from MCC Gwadar for the period between July 1, 2007 and June 19, 2012. According to the data; total number of vessels imported during the period was 503. The sales tax liability of various ship-breakers calculated during the period July 2007 to June 2012 is over Rs 20.82 billion, sources said.

During tax period of 2008, the number of ships /vessels imported was 57 during 2008 and their sales tax liability has been worked out at Rs784,865,893. The number of ships/vessels imported in 2009 was 86 and their sales tax liability has been worked out at Rs3,949,969,957. In 2010, the ship-breakers' sales tax liability stood at Rs4,115,496,288. The number of ships /vessels imported up to June this year stood at 130 and their sales tax liability was worked out at Rs7,433,582,676. Thus, a total of 503 ships/vessels were imported between 2008 and June 2012 and the sales tax liability stood at Rs20,822,470,464.

The directorate said that the tax liability calculated was cross-matched by the amount of payment of sales tax made by various ship-breakers during the tax period 2008-2012 available in the Sales tax record and in the CPRN system. The preliminary amount of short payment is worked out at Rs2.34 billion. Ship-breakers concerned are being informed for immediate payment. The legal process for the recovery is being initiated in co-ordination with RTO III, Karachi and RTO, Quetta. The directorate of intelligence IR has also estimated sales tax liability of each ship-breaker. The agency has also submitted names of ship-breakers, NTN, Sales Tax payment as per CPRN, sales tax liability as per Sales Tax Act and difference payable to the tax authorities.

This clearly indicated that ship-breakers during 2007-2012 have abused facility of deferred payment of sales tax and have not deposited due tax.

Accordingly, an exercise is being conducted to ascertain the actual sales tax liability of ship-breaking units and data was retrieved in August 2012 from MCC Gwadar. The total sales tax liability of ship-breaking units from 2007 to June, 2012 is calculated at Rs20 billion which is in the process of cross verification from the sales tax payment record of concerned units. So far evasion of Rs2.4 billion has been determined.

The directorate of intelligence IR further said that the supplies / sales of ship-breakers are liable to withholding of tax under Section 153 of the Income Tax Ordinance, 2001. The list of purchasers of supplies made by the ship-breakers obtained from sales tax returns and their withholding statement under Section 153 of the Income Tax Ordinance 2001 are also being examined. This exercise will verify whether the buyers of ship-breakers which were liable for tax deduction under Section 153 have made their due deductions or not.

Reportedly no withholding is made on the plea that tax is charged at import stage and when the imported goods are sold in the same condition as imported, no further tax is to be charged in terms with the provisions of Section 153(5)(a) of the Income Tax Ordinance 2001. The plea is not correct as the plates sold after ship-breaking are not in the same form as were at the time of import. Clarification in this regard has also been issued by FBR. The recovery on this account is also being determined, sources said.

The directorate of intelligence IR intends to investigate the evasion of withholding tax cases thoroughly, sources at the directorate of intelligence IR said. – *Courtesy Business Recorder*

Customs duty collection in fiscal year 2012: only five items made 48.2 percent contribution

Only five items, ie, vehicles, petroleum products, edible oil, mechanical and electrical machinery contributed 48.2 percent to collection of total customs duty during 2011-12. According to the latest customs data of the Federal Board of Revenue released here on Saturday, there is a considerable degree of concentration on collection of customs duty on few items; only five items ie vehicles, petroleum products, edible oils, mechanical machinery and electrical machinery contributed 48.2% of the total collection during 2011-12.

Similarly, 58.2% of the total collection of customs duty has been realised from 10 major commodities groups (Pakistan Customs Tariff chapters). As per FBR data, the automobile (Chapter: 87) is the top revenue spinner of customs duty which constituted 19% of the total customs duty during 2011-12. The collection of duty on automobile grew by 53.4% during 2011-12 due to growth of 37.2% in the value of dutiable imports. The customs duty mainly emanated from motor cars (Chapter: 87.03) which are subject to tariff peaks. Dutiable imports of motor car etc has considerably improved by 51.4% which has vastly improved the collection from Rs.18.4 billion in 2010-11 to Rs. 33.5 billion in 2011-12. The commendable performance of customs duty from automobile sector has improved its share of 14.5% during 2010-11 to 19% in 2011-12.

As per FBR data, the petroleum products have been the second major source of customs duty. Some of the major petroleum items like crude oil, furnace oil, motor spirit, jp-1 etc are exempt from customs duty. Overall imports of petroleum products (CH: 27) grew substantially by 31.1% while dutiable imports have recorded negative growth of 15.3%. The decline in dutiable imports has resulted in drop of customs duty of POL products by 18%. The customs duty from petroleum products mainly depend on the level of contribution by High Speed Diesel Oil (HSD). In fact, the value of imports of HSD has come down considerably by 17.2% and its collection has also recorded decrease by 19%. In fact, the imported quantity of HSD has dropped by 14% which has largely affected its collection. The decline in the collection of HSD has lowered the share of petroleum products from 11% in 2010-11 to around 7% in 2011-12.

Edible oils are the third major source of revenue generation regarding customs duty. Edible oils are subject to specific customs duty rates. During 2011-12, a growth of 6.7% in the collection of customs duty from edible was recorded as compared to FY: 2010-11. The major contribution in the collection of customs duty comes from the import of palm oil. The collection from palm olien has significantly dropped from Rs.9.8 billion during 2010-11 to Rs. 6.3 billion in 2011-12 due to decline in the imported quantity by 35%. This decline has largely compensated by R.B.D palm oil, FBR"s data said.

The dutiable imports of mechanical machinery (CH: 84) has grown modestly by 6.8% while collection of customs duty from this item grew by 6.2%. On the other hand collection of customs duty from electrical machinery has increased by 4.2% while its dutiable imports improved by 12.7%. This mismatch is mainly due to only 2% growth in the collection of import of mobile phones while its value of import grew by 9.9%. Moreover, decline in the collection of motor heaters and board, console, disc etc have also contributed to lesser collection due to decline in dutiable imports, the FBR said.

The collection of plastic items has declined by 0.3% due to low growth of 1.3% in its dutiable imports during 2011-12. As far as iron and steel (Ch: 72) is concerned, the collection recorded a low growth of 3.2% against 11.8% growth in dutiable imports. This conspicuous mismatch mainly caused by higher dutiable imports of flat-rolled products of iron or non alloy (PCT 72.08) by 66.9% during 2011-12 and its collection grew only by 19%. The remaining three major revenue spinners of customs duty have recorded negative growth in 2011-12 as a result of declined in their dutiable imports, the FBR concluded.

The FBR said that the customs duty is levied on dutiable imports and contributing significantly to the national exchequer. In fact, it has contributed around 12% to federal tax receipts during 2011-12. Apart from tariff peaks, there have been 8 slabs of customs duty rates applicable during 2011-12 i.e. 0%, 5%, 10%, 15%, 20%, 25%, 30% and 35%. Apart from these slabs, there are tariff peaks applied on automobile and alcoholic beverages. There is an escalated tariff in Pakistan i.e. 0-5% applied on primary goods, 10-15% on intermediate goods and 20% & above on finished goods. Dutiable imports constitute around 40% of the total imports during 2011-12. This reflects that 60% of the total imports have been duty free during 2011-12 mainly through SROs. This phenomenon can also be viewed in the context of 16% growth in the value of total imports during 2011-12 while dutiable imports grew by only 6%. The gross and net collection of customs duty has been Rs 225.4 billion and Rs 216.9 billion respectively during 2011-12. The difference between the gross and net collection is the refund/rebate payment. In fact, Rs.8.5 billion has been paid back as refunds/rebates during 2011-12 against the same payments in the corresponding period last year. The net collection of customs duty fetched a growth of 17.3%. The target allocated to the customs duty for 2011-12 was Rs 215 billion which was surpassed by 0.9%.

It is encouraging that receipts of customs duty exhibited a double digit monthly growth throughout the year except July, 2012 where lesser dutiable imports of mechanical machinery and petroleum products affected the collection, the FBR stated. – *Courtesy Business Recorder*

September tax collection may exceed Rs 200 billion

The Federal Board of Revenue is committed to surpassing the collection figure of Rs 200 billion in September 2012 after amassing Rs 112 billion and Rs 128 billion in July and August 2012, respectively. Sources told here on Saturday that the FBR has directed the Large Taxpayer Units (LTUs) and Regional Tax Offices (RTOs) to give revenue collection estimates of sales tax, income tax, federal excise duty and withholding tax for September 2012.

It would enable the Board to work out the revenue estimates for current month. According to FBR's estimates, the FBR would be able to collect over and above Rs 200 billion during September 2012, which seemed to be a gigantic task for the tax machinery. Around 20 percent of the total revenue collection target of 2012-13 has to be collected during the first quarter of 2012-13. During July-September (2012-13), the revenue collection target is 20 percent of the annual target of Rs 2,381 billion. To meet target of Rs 2,381 billion in 2012-13, a 27 percent growth would be required as compared to corresponding period last fiscal.

Sources said that the sales tax, withholding tax and Federal Excise Duty (FED) collection at the import stage would be reflected under the performance of Large Taxpayer Units (LTUs) and Regional Tax Offices (RTOs) instead of Model Customs Collectorates (MCC) operating as withholding agents for collection these taxes.

Sources stated that the FBR under an interim arrangement had given target of sales tax collection, withholding tax and FED at the import stage to the MCCs in recent past. The rationale behind the policy decision was that the MCCs engaged in the collection of taxes at the import stage should also be given target, which would work for improving revenue collection. Moreover, the collection of these levies would reflect the performance of the MCCs.

Now, the FBR has again given the targets of the sales tax, withholding tax and FED collected at the import stages to the

RTOs/LTUs. The withholding agents ie MCCs would collect the SED, sales tax and withholding tax at the import stages and communicate the same to the relevant RTO/LTU for reflecting the collection in their respective head of accounts. Thus, the target of these taxes would now be assigned to the RTOs/LTUs and the same would be responsible for achieving the targets. – *Courtesy Business Recorder*

Hollande outlines sweeping new taxes for recovery

France"s Socialist President Francois Hollande Sunday pledged 30 billion euros in new taxes and savings to balance the budget and fund a turnaround in two years and rejected criticism of dragging his feet.

Hollande, whose popularity ratings have taken a dive less than four months after he took office amid mounting discontent over the flagging economy and job cuts, also said a 75-percent wealth tax on incomes over one million euros ($1.28 million) would not be diluted. “The course is the recovery of France,” he said in a television interview on the TF1 channel. “I have to set the course and the rhythm” to combat “high joblessness, falling competitiveness and serious deficits,” he said. “My mission is a recovery plan and the timeframe is two years.”

“The government has not lost time,” he added. “It has reacted swiftly.”

Hollande - who has famously said he does not “like the rich” - said 10 billion dollars would come from additional taxes on households “especially the well-heeled”, 10 billion more from businesses and 10 billion from savings in government spending. It would be the biggest hike in three decades.

“We will not spend one euro more in 2013 than what we did in 2012”, he said.

He also vowed to curb unemployment, currently pegged at over three million, in a year"s time.

Hit by the eurozone debt crisis, France"s economy just avoided entering a recession in the second quarter. Amid a decline in his popularity, Hollande has had the onerous task of preparing a 2013 budget that must save more than 30 billion euros to meet European Union deficit reduction rules. – *Courtesy Business Recorder*

C.No.4(3)ST-L&P/2011/119307-R Islamabad, the 5th July, 2012

<u>SALES TAX GENERAL ORDER NO. 37/2012</u>

Subject: **<u>Amendment in STGO 16/2007 dated 13-09-2007 – allowing facility of zero-rating on supply of Gas by SSGCL.</u>**

In exercise of powers conferred by clause (d) of section 4 of the Sales Tax Act, 1990, the Federal Board of Revenue is pleased to make the following further amendments in its Sales Tax General Order No. 16 of 2007 dated 13th September, 2007, namely:–

In the aforesaid General Order, in the table, against serial numbers 586 and 587 in column (1), in column (2), for the words “Renfro Crescent” the words “Cresox (PVT) Limited (Formerly “Renfro Crescent”) shall be **<u>substituted</u>**;

2012 PTR 1505 (H.C. Del.)

HIGH COURT OF NEW DELHI

Badar Durrez Ahmed and Siddharth Mridul, JJ.

Qualcomm Incorporated
v.
Assistant Director of Income Tax

FACTS/HELD

1. **S. 147: In addition To allegation, there must be finding of failure to disclose material facts**

2. For AY 2003-04 the AO reopened the assessment after 4 years from the end of the AY on the ground that the assessee had not fully and truly disclosed the fact that it had a permanent establishment (PE) in India and that it was subject to the higher rate of tax of 20% on the gross royalty. The assessee filed a Writ Petition pointing out that the AO had reopened the assessment earlier on the same point and that he had passed an assessment order after being satisfied with the assessee's submissions that it had no PE. HELD by the High Court quashing the reassessment proceedings:

> Though in the recorded reasons, the AO alleged that there was no full and true disclosure by the assessee, in the objections order, there is no finding, even prima facie, how the assessee failed to disclose fully and truly all material facts with regard to the allegation of the existence of the PE. It is evident that the question of the assessee having a PE in India had been gone into in the first round. Once that aspect of the matter had been gone into in the earlier round, it was not open to the AO to reagitate it in the second round without any other / fresh material. No such other or fresh material has even been alleged in the reasons in the second round. Re-opening of assessments cannot be done merely on the basis of change of opinion.

Writ petition allowed.

W.P.(C) 7959/2010.
Decided on: 29th August, 2012.
Present at hearing: Percy Pardiwala, Sr Advocate with Nishant Thakkar, Salil Kapoor and Ankit Gupta, for Petitioner. Sanjeev Sabharwal with Puneet Gupta and Gyatri Verma, for Respondent.

JUDGMENT

Badar Durrez Ahmed, J.–

1. This writ petition has been filed seeking quashing of the notice dated 30.03.2010 purportedly issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') as also the order dated 27.10.2010 passed by the Assessing Officer on the objections preferred on behalf of the petitioner.

2. We may point out, at the outset, that this is the second occasion on which a notice under Section 148 of the said Act has been issued by the Assessing Officer to the petitioner in respect of the assessment year 2003-04. It is also an admitted position that the notice dated 30.03.2010 has been issued beyond the period of four years from the end of the assessment year 2003-04 and, therefore, the conditions stipulated in the proviso to Section 147 of the said Act would be applicable.

3. The point on which the purported notice under Section 148 of the said Act has been issued is that the petitioner had not fully and truly disclosed the fact that the petitioner has a permanent establishment (PE) in India. It is the case of the revenue that inasmuch as, according to the revenue, the petitioner/ assessee has a permanent establishment in India, the petitioner would be subjected to the higher rate of tax of 20% on the gross amount of royalty. According to the petitioner, even if the petitioner has a permanent establishment in India, it would still not be subjected to the higher rate of tax of 20%. However, it is the contention of the petitioner that that it does not have a permanent establishment in India and, therefore, in any event, it could only be subjected to the rate of tax of 15%. The entire controversy in the present writ petition centres on the point as to whether the petitioner has or does not have a permanent establishment in India. Moreover, the conditions stipulated in the proviso to Section 147 of the said Act, have to be fulfilled before the petitioner could be subjected to the proceedings under Section 147. It was, therefore, contended on behalf of the petitioner that before the proviso to Section 147 could be invoked, the respondents should have a clear case that the petitioner had failed to disclose fully and truly all material facts necessary for its assessment and as a result whereof, income chargeable to tax has escaped assessment in the said assessment year. It was contended by the learned counsel for the petitioner that the revenue has not been able to indicate as to how the petitioner failed to disclose fully and truly all material facts necessary for the assessment. The failure to

fully and truly disclose all material facts has to be connected with the question of the petitioner having a permanent establishment in India.

4. Before we examine this aspect of the matter, it would be necessary to set out the steps which have taken place leading to the issuance of the notice under Section 148 on 30.03.2010. Initially, the petitioner had not filed any return in respect of the assessment year 2003-04. The petitioner's claim was that it was not liable to pay any income tax in India. However, the stand of the revenue was that the petitioner was liable to pay income tax on the royalty that it received. Consequently, the Assessing Officer issued a notice under Section 148 of the said Act on 29.03.2007. The reasons for the issuance of the said notice under Section 148 of the said Act were also provided to the petitioner. In the said reasons dated 29.03.2007, it was, *inter alia*, alleged that the petitioner had full-fledged research and development centres in India. It was also alleged that many of the technological developments were undertaken at these development centres located in India and the products were patented by the petitioner and were exploited commercially worldwide including in India. On the basis of this, it was the revenue's case that the petitioner was earning royalties from patenting the technological innovations in the field of communication technology and that the petitioner was conducting its core business of research and development from the centres located in India. It was, therefore, contended on behalf of the revenue that the locations in India constituted the business connection as well as the permanent establishment of the petitioner in India.

5. The said notice under Section 148 dated 29.03.2007 and the reasons therefor were objected to by the petitioner in view of the petitioner's objections dated 14.09.2007. In the said objections, the petitioner submitted that it did not have research and development centres in India nor did the petitioner conduct any research and development in India. It was pointed out that two related Indian companies conduct research and development on behalf of a subsidiary of the petitioner. The said subsidiary did not generate licencing revenue. However, the said subsidiary paid the related Indian companies arm's length service fees for research and development services performed in India. It was further mentioned that the related Indian companies were being assessed to income tax separately before the respective jurisdictional officer in India. It was, therefore, contended on behalf of the petitioner that it had no other business connection or permanent establishment in India insofar as the assessment year 2003-04 is concerned. It was also contended that under the double taxation avoidance agreement between India and the U.S.A, the executive meetings and fees for included services, which had been referred to by the revenue, did not constitute a permanent establishment.

6. After considering the said objections dated 14.09.2007, the Assessing Officer passed an order on 30.11.2007 holding that the petitioner should cooperate in the assessment proceedings and submit the details / information as called for by the notices issued during the assessment proceedings under the said Act. In the said order dated 30.11.2007, it was specifically noted that the objection to the allegation that the petitioner had a permanent establishment through research and development centres in India, needed no comment as the same was yet to be verified.

7. Subsequent to the said order dated 30.11.2007, the assessment proceedings were continued and it culminated in the assessment order dated 31.12.2007. It is relevant to note that after considering the submissions made on behalf of the petitioner and examining all the details of the case before her, the Assessing Officer assessed the total income of the petitioner at Rs. 377,451,421/- out of which the component of royalty was Rs. 357,375,000/-. The total tax payable was worked out to Rs. 5,66,17,713/- at the rate of 15%. It was submitted by the learned counsel for the petitioner that from the assessment order dated 31.12.2007 this much is evident that the submissions made by the petitioner with regard to the petitioner not having any permanent establishment in India was accepted and it is for this reason that the lower rate of 15% was employed and not the higher rate of 20%. It is another matter that the petitioner had filed an appeal against the said assessment order which has also culminated in the order of the Commissioner of Income Tax (Appeals), whereby the same rate of 15% has been employed. The learned counsel for the petitioner states that now the matter is pending in appeal before the Income Tax Appellate Tribunal.

8. The matter rested there for some time, that is, till 30.03.2010, when the Assessing Officer, once again, issued a notice under Section 148 of the said Act. The purported reasons for issuing the notice under Section 148 were as under:–

"Reasons for the belief that income has been under assessed in the case of M/s Qualcomm Inc for A.Y 2003-04

> The assessee, M/s Qualcomm is a foreign company engaged in the design, development, manufacture marketing & licensing of digital wireless telecommunications products and services based on its code division multiple access (CDMA) technology. For the year under review, order u/s 143(3)/ 147 was passed assessing the income of the assessee at Rs. 37,74,51,420- as against returned income of Rs 20,07,76,421/-. The additional income was assessed as royalty income and taxed @ 15% in accordance with the provisions of section 9(1)(vi) and Article 12(7)(b) of the DTAA.

Subsequently, it was observed that the assessee has business connection and PE in various form, in India, under provisions of section 9(1)(i) of IT Act and in terms of Article 5 of the DTAA, respectively. The assessee company is earning Royalties in India from utilization of its patented products including CDMA technology embedded in the handsets supplied to Indian telecom operators. Moreover, Fees for Technical Services is earned from providing technical support services for facilitating the utilization of its products in India. As the year under review pertains to F.Y. prior to 01.04.2003 it is therefore implied that the agreements must/ should have been executed well before 01.04.2003. Therefore, this income must be taxed @ 20% gross instead of 15%.

It was the duty of the assessee to disclose fully and truly all material facts necessary for the assessment but it has not done so. The facts pertaining to existence of PE and business connection in India has not been fully disclosed. This has led to taxation of the royalty income at 15% instead to 20%. Therefore, I have reasons to believe that income of more than Rs 1 lakh of the assessee company for AY 2003-04, has escaped assessment. I am therefore satisfied that it is a suitable case to be reopened for reassessment."

9. From the said purported reasons, it is evident that there is an allegation that the petitioner did not fully and truly disclose all material facts necessary for the assessment. It is pointedly mentioned therein that the facts pertaining to the existence of the permanent establishment and business connection in India had not been fully disclosed. According to the said reasons, it is this non-disclosure which has led to the taxation of the royalty income at the rate of 15% instead of 20%.

10. The petitioner submitted its objections on 26.07.2010, wherein the petitioner, *inter alia*, took the specific plea that the re-assessment proceedings were barred by limitation. On this aspect, the petitioner took the following objections:-

"B. <u>On law and facts- Reassessment proceedings barred by limitation</u>

The assessment was reopened by your kind office under section 147 of the Act vide notice dated March 30, 2010 after the expiry of four years from the end of the relevant AY i.e. AY 2003-04. In accordance with the proviso to section 147 of the Act, QCOM vide its letter of May 3, 2010 had challenged the validity of the 148 notice stating that the notice is barred by limitation. Accordingly, QCOM requested your good self to drop the reassessment proceedings.

However, in the reasons recorded for reopening the assessment, your good office has wrongly alleged that QCOM has not disclosed fully and truly all material facts pertaining to the existence of PE and business connection in India.

At the outset, we wish to submit that a reference to the reasons show that it is not explained by your good self as to how the true and full particulars were not disclosed in as much as the reason pertain to the same record and not to any new material / information which has come subsequently to the notice of your kind office. With due respect, we submit that the above cited allegation of non disclosure of facts is without any basis and the same is not supported by any justification or explanation as to how the assessee has failed to disclose fully and truly all the material facts necessary for the assessment.

The above allegation by your kind office is completely contrary to the facts and evidences on record. In this regard, it is pertinent to bring to your kind notice all the information sought/required for determining the existence of PE in India that was furnished during the course of assessment proceedings……….”

It was also pointed out by the learned counsel for the petitioner that the impugned notice dated 30.03.2010 and the purported reasons of the same date were misconceived inasmuch as the entire issue of the petitioner having a permanent establishment in India had been gone into in the first round, that is, pursuant to the notice dated 29.03.2007 which had been purportedly issued under Section 148 of the said Act and which culminated in the assessment order dated 31.12.2007. Therefore, according to the learned counsel for the petitioner, the objection that the impugned notice dated 30.03.2010 was barred by limitation, was fully justified. However, the Assessing Officer did not pay any heed to these objections and passed an order dated 27.10.2010. The objections were disposed of in the following manner:-

“3. The objections raised by the assessee have been carefully perused:

(a) The assessee argues that the reason to believe in the instant case is based on the same set of facts as mentioned in the earlier 148 notice dated March 29, 2007. The subsequent notice amounts to change of opinion on the facts which already existed. The assessee has relied upon a plethora of case laws to support its argument. However, this assertion of the assessee is based upon a wrongful appreciation of law. The reasons recorded, as also provided to the assessee, clearly show that the assessing officer had sufficient reason based on which the proceedings u/s

147 were initiated. Hence, this objection of the assessee deserves to be rejected.

(b) It is argued by the assessee that the re assessment proceedings have been barred by limitation. This again does not hold water. The proceedings have been initiated within time as prescribed in the Act. There was reason to believe that income of more than Rs 1 Lakh has escaped assessment for the year under review and after recording the reasons the notice u/s 148 was issued in Financial Year 2009-10 for AY 2003-04 which is within the prescribed time frame of 6 years. Hence, it is factually incorrect to say that the notice is barred by limitation.

(c) The assessee has objected that the reopening proceeding initiated is based- on the audit objection. To this, it must be pointed out that reasons were recorded before issuing the notice u/s 148 after application of mind by the AO. The copy of these reasons recorded was provided to the assessee on request. A perusal of the reasons would show that there is no mention of any audit objection. Hence, it is factually incorrect to say that the initiation of the proceedings is based on audit objection. This objection, of the assessee also deserves to be rejected.

4. Accordingly, the objections of the assessee stand disposed off. The assessee is directed to co-operate in the assessment proceedings and submit the details / information as called for vide notice u/s 142 issued along with the questionnaire (attached)."

11. It is clear that in the order dated 27.10.2010 there is no finding, even *prima facie*, that the petitioner had failed to disclose fully and truly all material facts with regard to the allegation that the petitioner had a PE in India. Despite that, the objections of the petitioner have been rejected. Even where the order dated 27.10.2010 deals with the question of limitation, it does not indicate as to how the impugned notice dated 30.03.2010 would be within limitation when admittedly, it was issued after four years from the end of the assessment year 2003-04.

12. Being aggrieved by the said notice dated 30.03.2010 and the order dated 27.10.2010, the petitioner has filed this writ petition seeking the quashing of the same. On the first date of hearing, that is, on 29.11.2010, this Court, *inter alia*, directed that the assessment proceedings could continue but no final order was to be passed without the leave of this Court.

13. In this factual backdrop, we have to decide as to whether the impugned notice dated 30.03.2010 and the impugned order dated 27.10.2010 can be sustained in law or not. From what has been mentioned above, it is evident that the question of the petitioner having a permanent establishment in India had been gone into in the first round.

This is apparent from the reasons dated 29.03.2007 read with the objections dated 14.09.2007 and the order dated 30.11.2007 and ultimately the assessment order dated 31.12.2007, wherein the lower rate of tax of 15% was employed. We have already indicated that throughout the proceedings in the earlier round, one of the questions that had been raised was with regard to the petitioner having a permanent establishment in India. Once that aspect of the matter had been gone into in the earlier round, it was not open to the Assessing Officer to reagitate it in the second round without any other / fresh material. No such other or fresh material has even been alleged in the reasons in the second round. It has also not been indicated as to how the petitioner has failed to fully and truly disclose all material facts with regard to the question of the petitioner having a permanent establishment in India. Whatever information was required from the petitioner in the first round by the Assessing Officer on this question of permanent establishment, has been given by the petitioner. It is obvious from the assessment order dated 31.12.2007 that the submissions of the petitioner that it did not have a permanent establishment in India had been accepted and that is the reason why the petitioner was subjected to the lower tax rate of 15% and not the higher tax rate of 20%, which might have been the case, if the petitioner had a permanent establishment in India.

14. It is well settled that re-opening of assessments cannot be done merely on the basis of change of opinion. It is also a settled position in law that unless and until the conditions stipulated in the proviso to Section 147 are fully satisfied, such re-opening cannot be done beyond the period of four years from the end of the relevant assessment year. In the present case, we find that not only is there a change of opinion but also the re-opening is barred by limitation inasmuch as the condition that the escapement of income must have resulted from the failure on the part of the petitioner to fully and truly disclose all material facts, has not been satisfied. The impugned order dated 27.10.2010 merely glosses over the objections raised by the petitioner with regard to limitation. As we have already observed above, there is no finding in the order dated 27.10.2010 that there was a failure on the part of the petitioner to fully and truly disclose all material facts particularly in connection with the issue of the petitioner having a permanent establishment in India. On the contrary, the above facts reveal that the issue of permanent establishment was specifically raised and dealt with in the first round which culminated in the assessment order dated 31.12.2007. The issue of permanent establishment having been addressed in the first round, the allegation that the petitioner had not fully and truly disclosed the material particulars in relation thereto has no basis. Consequently the condition stipulated in the proviso to Section 147 is not satisfied and, therefore, the notice dated 30.03.2010, being admittedly beyond four years from the end of the relevant assessment year (i.e., 2003-04), is barred by limitation.

15. As a result of the foregoing discussion, the impugned notice dated 30.03.2010 and the impugned order dated 27.10.2010 cannot be sustained in law. Resultantly, the same are quashed. So, too, all proceedings pursuant to the said notice dated 30.03.2010. The writ petition is allowed. There shall be no order as to costs.