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

Judgment Reserved on: 03.08.2023

% *Judgment Pronounced on: 04.12.2023*

\+ **W.P.(C) 12709/2018**

SHOURYA INFRASTRUCTURE PVT. LTD. ..... Petitioner
Through: Mr Ruchesh Sin]ha, Adv.

versus

INCOME TAX OFFICER, WARD 23(2) & ANR. ..... Respondents
Through: Mr Vipul Agrawal, Sr Standing Counsel, with Mr Gibran Naushad and Ms Sakshi Shairwal, Standing Counsels.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE ANISH DAYAL
[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.:

Background and Facts

1. This writ petition concerns Assessment Year (AY) 2011-12.

2. *Via* this writ petition, a challenge is laid to the order dated 13.11.2018 [hereafter referred to as "impugned order"]. *Via* the impugned order, the respondent/revenue [hereafter referred to as "Assessing Officer (AO)"] disposed of the objections preferred by the petitioner, i.e., Shourya Infrastructure Pvt. Ltd. [hereafter referred to as "SIPL"].

3. The objections preferred by SIPL were directed against the initiation of the reassessment proceeding by the AO under Section 147 of the Income Tax Act, 1961 [in short, “Act”].

4. The issue for consideration in the instant matter is whether the AO correctly triggered the reassessment proceeding *qua* SIPL. For adjudication, the following broad facts are noticed:

4.1. SIPL is in the real estate business, including constructing, buying, and selling immovable properties. SIPL was incorporated in 2006. Upon the petitioner filing its Return of Income (ROI) for the AY in issue, the AO took it up for scrutiny under Section 143(3) of the Act.

4.2. SIPL was issued various notices, which were accompanied by questionnaires. These notices are dated 02.09.2013, 14.10.2013 and 23.10.2013. *Via* these notices, among other things, information was sought concerning, broadly, the following aspects:

(i) The nature of the business in which SIPL was engaged.

(ii) The main objects of the business.

(iii) Information about the land sold and the amount received as consideration.

(iv) Details of directors.

(v) Copies of balance sheets and extracts from accounts.

4.3. SIPL was required to furnish information about the aforesaid aspects, including a transaction relating to the sale of land, *qua* which it had received consideration of Rs. 1,51,00,000/-.

4.4. SIPL indicated to the AO that although it had purchased the land, the funds were provided by a group company named Shourya Towers Pvt. Ltd. [hereafter referred to as "STPL"]. According to SIPL, this arrangement was the subject matter of a Memorandum of Understanding (MoU)/agreement dated 02.03.2007 [hereafter referred to as "MOU/agreement"] entered between itself and STPL. SIPL had also emphasized that under the

MoU/agreement, it was empowered to sell the land if it was not used for any project for two to three years. Thus, as per SIPL, once the sale took place, it claimed as profit an amount calculated at the rate of Rs. 1,00,000/- per acre and remitted the balance to STPL. SIPL conveyed to the AO that the amount remitted to STPL was claimed as expenditure, and the resultant profit earned, i.e., Rs. 1,73,002/-, was offered for levy of tax.

5. This explanation, broadly, formed part of the replies submitted by SIPL on various dates, i.e., 21.10.2013, 11.11.2013, 18.11.2013, 09.12.2013, and 16.01.2014.

6. In the backdrop of the explanation furnished by the petitioner/assessee that the AO framed the assessment order dated 28.02.2014 under Section 143(3) of the Act, without making any addition concerning the sale of the subject land; which had fetched a price of Rs. 1,51,00,000/-.

6.1. Despite detailed scrutiny, the AO served a notice dated 28.03.2018 on the petitioner's Chartered Accountant (CA) concerning the AY in issue.

6.2. Once again, *via* this notice, the AO sought various documents, which included balance sheets for the Financial Year (FY) in issue as well as the immediately preceding FY; ROI for the AY in issue, i.e., AY 2011-12; statements of the accounts maintained with banks referred to therein, and a copy of the assessment order passed under Section 143(3) of the Act.

7. SIPL responded to the notice and furnished the documents sought under the cover of a letter dated 29.03.2018.

8. The AO, within barely a day's gap, i.e., on 31.03.2018, issued a notice under Section 148 of the Act to SIPL, on the ground that he had reasons to believe that income chargeable to tax had escaped assessment. Accordingly, SIPL was asked to file a return in the prescribed form within 30 days of

service of the said notice.

9. In response to the notice, a return was filed by SIPL on 21.04.2018. Since SIPL had not been furnished with a copy of the reasons recorded by the AO for reopening its assessment, a communication in that behalf dated 28.07.2018 was served on the AO. *Via* this communication, besides asking for a copy of the reasons recorded for reopening the assessment, SIPL also asked for a copy of the approval given by the specified authority, as mandated under Section 151 of the Act.

10. The record shows that the AO furnished the reasons recorded [which were penned on 30.03.2018] to SIPL, along with a communication dated 12.09.2018.

11. The reasons recorded by the AO, based on which the reassessment proceeding was triggered *qua* SIPL, broadly touched upon the following aspects:

11.1 Firstly, information had been received from the Income Tax Officer .(Investigation), OCM (Operation Clean Money) Cell-2, New Delhi, to the effect that SIPL had sold immovable properties for a value that was below the market value/value calculated at the circle rate which was applicable for the determination of stamp duty, by the valuation authority. Accordingly, the AO had pegged the value based on the circle rate of the subject land i.e., Rs. 2,08,30,000/-.

11.2 Secondly, the AO triggered the provisions of Section 50C of the Act based on his reasoning that SIPL was not in the business of trading in land. In this context, he referred to the balance sheet drawn up on 31.03.2011, in which current assets/stock-in-trade was shown only concerning the National Highway (NH)-58 project. According to the AO, SIPL never intended to use

the land for development.

11.3 Thirdly, SIPL was one of the Special Purpose Vehicles (SPV) incorporated to purchase land, which it sold at a value much lower than the prevailing circle rate. In sum, as per the AO, since SIPL was not in the business of purchasing and selling land, its transactions with STPL were on capital account. In this context, it was also noticed that the funds received from STPL by SIPL were shown under the head "Sundry Creditors" and not as advances.

11.4 Fourthly, it was the AO's view that the money received by SIPL was a loan and, therefore, any payment made by SIPL to STPL should result in scaling down the loan liability.

11.5 Fifthly, the AO also noticed that SIPL had failed to substantiate its stand that it had used funds provided by STPL for purchasing the subject land.

11.6 Lastly, doubts were also raised concerning the MOU/agreement dated 02.03.2007 on the ground that it was executed on plain paper. In sum, the AO's view was that there was collusion between SIPL and STPL; therefore, the provisions of Section 50C were applicable.

12. Pivoted on the aforesaid rationale, the AO concluded that SIPL had earned income by way of capital gains amounting to Rs. 57,30,000/-. The AO arrived at this figure by adjusting the sale consideration, i.e., Rs.1,51,00,000/-, against the value of the land arrived at based on the circle rate, i.e., Rs.2,08,30,000/-.

13. Significantly, the AO also alluded to the fact that STPL in the same FY, i.e., FY 2010-11 [AY 2011-12], had registered revenue amounting to Rs. 41.11 crores, against expenditure o Rs.41.75 crores.

14. Thus, according to the AO, even the nominal business income shown on the sale transaction had been diverted by SIPL to STPL.

15. Since SIPL disagreed with the reasons recorded by the AO, it preferred its objections by way of communication dated 26.10.2018. Broadly, *via* the objections filed on behalf of SIPL, the following assertions were made:

(i) It was, *inter alia*, in the business of buying, selling and developing properties.

(ii) The subject land was stock-in-trade; therefore, the provisions of Section 50C were not applicable.

(iii) STPL was also in the real estate projects and development business. The projects it executed were located in and around Noida and Ghaziabad.

(iv) To comply with the land-ceiling provisions in the state of UP and other States, the incorporation of SPVs was necessary to facilitate land purchase.

(vi) Since STPL was not able to execute any project on the subject parcels of land within two or three years of its purchase due to commercial non-viability, the SPV, i.e., SIPL, sold such parcels of land, in pursuance of the MoU/agreement dated 02.03.2007 executed between itself and STPL.

16. Under the said MoU/agreement, upon sale of land which SIPL purchased from funds made available by STPL, SIPL was entitled to receive, out of the sale consideration, an amount calculated at the rate of Rs.1,00,000/- per acre, which was declared as its profit earned on the sale transaction. The balance amount was to be remitted to STPL, treating it as the cost of land in the hands of SIPL and profit in the hands of STPL.

17. In the FY in issue, i.e., FY 2010-11, SIPL declared a profit of

Rs.1,73,002 upon the sale of land, and the balance amount, i.e., Rs.46,93,536/-, was transferred to STPL.

18. Thus, according to SIPL, since the aforementioned facts were discernible from the assessment records, the reopening was not called for as, after thorough scrutiny, an assessment order under Section 143(3) had been framed by the AO. SIPL asserted that the law did not require registration of an agreement executed between group companies. The contract executed between SIPL and STPL is one such example. The submission was that parties could well have entered into an oral agreement.

19. It was contended by SIPL that since reopening was triggered after four (4) years from the end of relevant AY, as per the first proviso appended to Section 147 of the Act, a case had to be made out that there was a failure on the part of SIPL to disclose fully and truly all material facts which were relevant for assessment.

20. This assertion was sought to be supported by referring to the following judgements:

(i) ***Haryana Acrylic Manufacturing Co. v. CIT*** (2009) 308 ITR 38 (Delhi).

(ii) ***Wel Intertrade (P.) Ltd. v. ITO*** (2009) 308 ITR 22 (Delhi).

(iii) ***CIT v. Suren International (P.) Ltd***., (2013) 357 ITR 24 CIT (Delhi).

21. Since the issue that triggered reassessment was an aspect that was inquired into by the AO while framing the assessment order dated 28.02.2014 under Section 143(3) of the Act, SIPL averred that this was a case of change of opinion, both concerning the nature of the transaction, and the applicability of provisions under Section 50 of the Act. Furthermore, because a query was raised and answered, the AO had no jurisdiction to

reopen the assessment.

21.1. In this context, reliance was placed on the Full Bench decision rendered by this Court in ***CIT v. Usha International Ltd.***, (2012) 348 ITR 485 (Delhi) and ***CIT v. Kelvinator of India Ltd.***, (2002) 174 CTR (Delhi) (FB), which was upheld by the Supreme Court in ***CIT v. Kelvinator of India Ltd.*** (2010) 187 Taxman 312 (SC).

22. It is also submitted on behalf of SIPL that the Principal Commissioner of Income Tax [in short, "PCIT"] did not apply its mind while granting his approval under Section 151 of the Act. It was emphasized that he had appended the word "approved" without examining whether notice under Section 148 of the Act was required to be issued in the instant matter.

23. In this regard, reliance was placed on the judgment rendered in ***United Electrical Company Pvt. Ltd. v. CIT*** 258 ITR 317 (Delhi), ***PCIT v. NC. Cables Ltd***. passed in ITA No.335/2015 and ***CIT v. S. Goyanka Lime Chemicals Ltd.*** (2015) 64 taxmann.com 313 (SC). It was highlighted that in ***S. Goyanka Lime*****,** the approving authority had merely used the expression "Yes, I am satisfied".

24. As noticed right at the outset, the objections filed by SIPL did not find favour with the AO, which led to the issuance of the impugned order, whereby SIPL's objections were dismissed.

Submissions of Counsel

25. Given this backdrop, arguments for SIPL were advanced by Mr Ruchesh Sinha, Advocate, while Mr Vipul Agrawal, Senior Standing Counsel, advanced submissions on behalf of the respondents/revenue.

26. Mr Sinha re-emphasized the assertions made in the objections filed on behalf of SIPL, which we have broadly captured hereinabove. Therefore, for

the sake of brevity, we do not intend to put them down once again.

27. As far as Mr Agrawal is concerned, according to him, the initiation of the reassessment proceeding against SIPL was in order, and in support of this stand, he made the following submissions:

(i) The arrangement between SIPL and STPL constituted a sham transaction. SIPL had sold the land and remitted almost the entire consideration to its flagship company, i.e., STPL. STPL, because of the loss incurred in the period in issue, showed the nominal amount received from SIPL as profit, which was set off against its losses, resulting in a large part of the revenue being lost.

(ii) The AO had not examined the subject arrangement while framing the original assessment order, from the perspective of it being a sham transaction. This aspect has been brought to the fore in the reasons recorded by the AO, once he received the report of the OCM Cell. In support of this plea, Mr Agrawal placed reliance on the judgment rendered by the Supreme Court in ***Phool Chand Bajranglal v. ITO*** (1993) 4 SCC 77.

(iii) Both the Additional Commissioner of Income Tax [in short, "ACIT"] and PCIT had applied their mind before approving the initiation of the reassessment proceeding against SIPL. The fact that PCIT clearly stated that the action was approved was sufficient for the purposes of Section 151 of the Act. [See ***PCIT v. Meenakshi Overseas Ltd***. passed on 11.01.2016 in ITA No.651/2015]

(iv) The submission made on behalf of SIPL that this was a case of change of opinion was untenable for the reason that the AO had neither expressly nor by necessary implication expressed an opinion on the matter, which was the basis for triggering the reassessment proceeding *qua* SIPL [***ITO v.***

Techspan India Private Ltd. (2018) 6 SCC 685].

Analysis and Reasons

28. We have heard learned counsel for the parties. The essential facts which have been set forth hereinabove are not in dispute. Thus, what requires our consideration is whether this case necessitated the initiation of a reassessment proceeding. To reiterate, what is not in dispute are the following facts:

(i) Both SIPL and STPL are in the real estate business. The subject land was sold during the FY in issue for Rs. 1.51 crores.

(ii) Under the MoU/agreement, which was executed between SIPL and STPL, SIPL retained Rs.1,73,002/-, calculated at the rate of Rs.1,00,000/- per acre, *qua* the parcel of land which ad-measured 1.7230 acres.

(iii) Accordingly, the profit that SIPL offered for the imposition of the tax was Rs. 1,73,002/-. The remaining profit, i.e., Rs. 46,93,536/- was transferred by SIPL to STPL after adjusting the cost of land, i.e., Rs.1,02,33,462/- against the sale consideration amounting to Rs.1,51,00,000/-. STPL had included the income earned in its profit and loss account, which was set off against losses incurred by it.

29. There is nothing on record to suggest or, at least, no information was furnished to us, about when the reassessment proceeding *qua* this transaction was triggered against STPL.

30. Undoubtedly, it is this very transaction that triggered reassessment *vis-à-vis* the petitioner/assessee. This is evident on a perusal of the reasons recorded by the AO on 30.03.2018.

31. The AO, however, among other things, took a view that this was a

capital account transaction and, therefore, the provisions of Section 50C of the Act were applicable. Thus, keeping this in the backdrop, the AO concluded that the difference between the consideration received by SIPL against the sale of the subject parcel of land and its value calculated based on the then prevailing circle rate was the income that had escaped assessment.

32. As indicated above, the AO pegged the escaped income at Rs. 57,30,000/-.

33. Although Mr Agrawal vehemently argued that the provisions of Section 50C of the Act were not the foundation of the reasons that were recorded, the plain text reads otherwise.

34. Quite obviously, Mr Agrawal wanted to move away from this aspect of the matter, as Section 50C of the Act has no application in the facts of this case. Section 50C applies only when there is a transfer of a capital asset. However, it is clear that the subject land was a stock-in-trade, since SIPL was involved in the real estate business. This fact emerges from a perusal of the assessment order dated 28.02.2014 as well, wherein the AO has observed the following:

> "*The assessee company is engaged in the business of real estate and land development.*"

34.1. This conclusion is buttressed by the fact that the subject land was treated as stock-in-trade in the hands of SIPL as well as STPL. Thus, the AO, according to us, committed an error in taking recourse to Section 50C of the Act.

34.2. Because the AO took recourse to Section 50C of the Act, he proceeded to arrive at the escaped income by calculating the value of the

land based on the then prevailing circle rate, after adjusting it against the sale consideration.

34.3. This, according to us, was a fatal error.

34.4. Apart from the above, what has emerged is that although reassessment had been triggered, concededly, after the end of four (4) years from the date of the end of relevant AY and at the end of the cusp of the sixth (6) year, i.e., on 31.03.2018, the AO did not allege that SIPL had failed to disclose fully and truly all material facts which were necessary for carrying out the assessment. This, according to us, was a grave folly. The reason, perhaps, why the AO did not allude to this aspect was because queries were raised during the original assessment, which included questions concerning the sale of the subject land. More particularly, answers were furnished by SIPL, along with the relevant documents and material sought by the AO. By way of illustration, extracts of the pertinent queries raised and answered are set forth hereafter:

"F.No. ITO Ward 8(2)/Scrutiny/2013-14/ Dated: 23.10.2013

To,

The Principal Officer,
M/s Shourya Infrastructure (P) Ltd.
78-B, Sector D-2
DDA Flats, Kondli Gharoli Mayur Vihar Phase-3
Delhi-110096

Sir,

Subject: Assessment proceedings in your case – Questionnaire Information called for u/s 142(1) for AY 2011-12- reg-

****

In connection with the ongoing assessment proceedings for the AY 2011-12 in your case. you are requested to furnish the following

information/documents:-

1. Note of nature of business, main objects and date of incorporation. File relevant resolution in case the main objects as indicated above has changed.
2. Copy of Memorandum & Article of Association.
xxx xxx xxx
7. Party wise details sale of land with name, address, PAN, amount received and property which was sold.
xxx xxx xxx

Yours faithfully
-s/d-
Income Tax Officer
Ward 8(2), New Delhi."

"Date: 18.11.2013

To

The Assessing Officer
Ward 8(2)
Room No.197A
CR Building
New Delhi-110001

Dear Sir,

RE : SHOURYA INFRASTRUCTURE PRIVATE LIMITED, PAN: AAJCS9570M

SUB : YOUR NOTICE U/S 142(1) OF THE INCOME TAX ACT, 1961 DATED 23.10.2013 FOR THE AY 2011-12.

In the matter of the assessment proceedings of the above-named assessee, we are submitting replies to the remaining queries from the questionnaire dated 23.10.2013 as follows:

1. The assessee sold some of its project and as follows:

S.No	***Land Details***	***Sold to / Date of sale / PAN***	***Consideration***
1.	***Land situated at Morti, Ghaziabad, khata no.130, khasra no.146, admeasuring 7001.668***	***S.S. Buildcon Pvt. Ltd./20.05.2010/ AAJCS0645K***	***Rs.1,51,00,000/-***

	mtrs (1.73002 acres)		

We are enclosing a copy of the relevant sale deed as above for you kind perusal and ready reference.

2. The total cost of land sold as above was debited to the Profit and Loss account for the assessee company as follows:

S.No	***Khasra No.***	***Area***	***Direct Purchase Cost***	***Credit to NSIL***	***Total Cost***
1.	***146***	***7001 Hectare = 1.73002 ACRES***	***1,02,33,462/-***	***46,93,536/-***	***1,49,26,998/-***

xxx xxx xxx

5. Loans and Advances: We are enclosing a list of loans and advances as on 31.3.2011. The confirmation from Nitishree Realtech Pvt. Ltd. is being enclosed. Other advances (Advances for land (agreement) are very old and a list of such advances is being enclosed"

6. Creditors for land: As .already explained, the flagship company Shourya Towers Private Limited (then known as Nitishree Infrastructure Limited) had provided funds to its various SPVs and land was purchased in these SPVs for projects to be developed by the· flagship company. Likewise, in the assessee company too, the said flagship company is the Creditor for Land. We are enclosing a copy of account confirmation from the said company for your kind perusal and ready reference.

7. Bank accounts: The assessee company maintained three bank accounts during the previous year under consideration. We are enclosing a list of these accounts. There were no transactions in the account with Oriental Bank of Commerce. For the other two accounts , i.e. Noble Co-operative Bank and Punjab and Sind Bank, we are enclosing copies of the bank statements as well as the copies of bank's ledger accounts giving narrations of the entries appearing therein.

8. Debtors and Creditors : There are no debtors. In case of creditors, as explained, only the flagship company of the group (of which the assessee company is an SPV) is the creditor and there is project land appearing in the assessee's books against such credit balance. However, the creditors' amount should not be considered to be added to the income since the same has not been claimed as an expenditure while calculating the profit I loss of the assessee during any of the preceding previous years.

xxx xxx xxx"

35. Clearly, the transaction was examined and thereafter, an assessment order dated 28.02.2014 was passed wherein the AO, *inter alia*, adverted to

the following:

(i) A detailed questionnaire along with notice under Section 142(1) of the Act was issued on 23.10.2013. In response to the notice, the Chartered Accountant of SIPL attended the proceedings and furnished the necessary details.

(ii) Based on oral and written submissions made by the authorized representative of SIPL, the case was discussed.

(iii) Significantly, a categoric finding was recorded that the assessee company is engaged in the business of real estate and land development.

(iii) During the assessment proceeding, the assessee produced the books of accounts with bills and vouchers which were checked on a test basis.

(iv) Pertinently, it ended with the following statement: **"returned income of the assessee was accepted".**

36. Therefore, it cannot be said that the subject transaction was not scrutinized by the AO.

37. Mr Agrawal did attempt to argue that the assessment order dated 28.02.2014 did not disclose any reasoning. According to us, this submission is untenable in law, as an assessee has no control over how the assessment order is framed. In this context, we may quote the following apposite observations of the judgment rendered by the Supreme Court in ***Joint Commissioner of Income Tax and Anr v Cognizant Technology Solutions India Pvt Ltd*** (2023) SCC Online SC 465:

> ***"The assessee has no role to play and is not the author of the assessment order and hence the manner and contents of the assessment order as framed is not determinative (of) whether or not it is a case of change of opinion".***

[Emphasis is ours]

38. It is well-known that the AOs often issue questionnaires, seek answers to their queries and if satisfied, may decide to accept the explanation and consequently, the return.

39. Therefore, in our view, it is correctly argued on behalf of SIPL by Mr Sinha that this was a case of change in opinion.

40. This brings us to, perhaps, the last aspect concerning the matter at hand, which is, whether the PCIT applied his mind while granting approval.

41. Mr Sinha, in this context, has drawn our attention to the relevant entries made in the form for recording reasons for initiating the reassessment proceeding and obtaining the approval of the PCIT. In this context, our attention has been drawn to the following:

"FORM FOR RECORDING THE REASONS FOR INITIATING PROCEEDINGS U/S 147 OF THE IT ACT, 1961 FOR OBTAINING THE APPROVAL OF THE PRINCIPAL COMMISSIONER OF INCOME TAX

1	*Name and address of the Assessee*	*:*	*M/s Shourya Infrastructure Pvt. Ltd.*
2	*PAN*	*:*	*AAJCS9570M*
3	*Status*	*:*	*Company*
4	*Ward/Circle*	*:*	*Ward-23(2)*
5	*Assessment year in respect of which it is proposed to issue Notice u/s 148*	*:*	*2011-12*
6	*The quantum of income which has escaped assessment*	*:*	*At least Rs.57,30,000/-*
7	*Whether the provision of section 147 are applicable*	*:*	*YES*
8	*Whether the assessment is proposed to be made for the first time. If the reply is in the affirmative, please state :-*	*:*	*NO*
	(u) Whether any voluntary return has already been filed	*:*	*Yes*
	(v) If so, the date of filing the said return	*:*	*27/09/2011*

9.	***If the answer to item No.(8) above is negative please state***		***NA.***
	(u) The income originally assessed.	*:*	-
	(v) Whether it is a case of under assessment at too low a rate, assessment which has been made the subject of excess relief of allowing of excessive loss or depreciation.		
xxx	*xxx*	*xxx*	

[Emphasis is ours]

42. Mr Sinha argues that since SIPL was not being assessed for the first time, the information sought against Sr. No. 9 had to be filled in, i.e., the AO had to indicate, firstly, the income at which SIPL was assessed initially and, secondly, whether it was a case of under-assessment at "too low a rate, assessment which has been made the subject of excess relief of allowing of excessive loss or depreciation".

42.1. In other words, Mr Sinha submitted that since the AO's assertion was that this was a case of under-assessment, in terms of clause (c) sub-clause (i) of Explanation 2 appended to Section 147 of the Act, it had, according to him, resulted in deemed escapement of income chargeable to tax. The relevant part of the said provision is extracted hereafter:

"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) :*

xxx *xxx* *xxx*

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 :—

xxx xxx xxx

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

(i) income chargeable to tax has been underassessed.

xxx xxx xxx"

43. In other words, the argument was that had this vital information been provided by the AO, the ACIT could have only then satisfied himself that this was a fit case for issuance of notice under Section 148, and likewise, the PCIT could have thereafter "approved" the initiation of the impugned action.

44. Thus, the submission was that, had there been due application of mind, the error involving the invocation of Section 50C would not have occured, given the fact that SIPL was in the real estate business and the subject land was stock-in-trade. Furthermore, it would perhaps have been noticed by the ACIT and PCIT that the subject sale transaction had undergone scrutiny by the AO while framing the assessment order under Section 143(3) of the Act.

45. As noticed above, Mr Agrawal has relied upon the judgment rendered by a coordinate bench in ***Meenakshi Overseas Pvt. Ltd.*** to sustain the approval granted by the PCIT.

46. A careful perusal of the said judgment would show what came up for consideration before the Court was whether signatures of the ACIT appended on the document wherein reasons were recorded by him would suffice without the endorsement of the word "approval".

47. The argument advanced by Mr Sinha in this particular case, as noticed above, is somewhat different. As seen hereinabove, the relevant information which, to our minds, was required to be placed on record by the AO, had not been provided. The ACIT noted that he was satisfied that it was a fit case for

issuance of notice under Section 148 of the Act that, without the requisite information placed before him that would point in the direction that it was a case of under-assessment.

47.1. Likewise, PCIT backed the ACIT and the AO by simply making an endorsement "approved".

48. Mr Agrawal, in defence of the ACIT and PCIT, stated that the reasons recorded by the AO were on record.

49. As alluded to hereinabove, the form for obtaining approval is what appears to have been placed before the ACIT and PCIT. The mandatory entries were not made. Therefore, the weight of the evidence seems to suggest that the ACIT cleared the path without delving into the aspect that this was, indeed, a case of under-assessment and, likewise, the PCIT rubber-stamped the request made by the AO for initiating the reassessment proceeding *qua* SIPL without applying his mind to the requisite aspects.

50. According to us, the reopening of the concluded scrutiny assessment is a serious business. The Act provides for a layered approach precisely for this reason. Senior officers like ACIT and PCIT are expected to apply their minds to such requests and, only after that, approve the initiation of reassessment proceedings. Several pitfalls that the Court's notice can be avoided if the concerned authorities were to look closely at the request made for re-opening.

51. In this context, it was brought to our attention by Mr Sinha that a similar request for initiating reassessment proceedings *qua* another group company, i.e., Shourya Builders was declined.

52. This is evident from the extract of the office note placed before us, which reads as follows:

"4. The AIR information in this case was sale of immovable property at Rs. 30 lacs of more (Transaction amount Rs. 67554000/-). Further it is worthwhile to mention here that in other group cases the information from Investigation wing is to check the feasibility of applicability of section 50C of IT Act but in this case only to check AIR information.

5. ***The assessee already made the inspection of the assessment folder of scrutiny done in this case u/s 143(3). If we dispose the assessee's objection the Assessee will file writ against the disposal of objection before HC and it will be difficult for the department to survive the case before the Court since the issue on which the case is re-opened is already examined during the original assessment.***

Note on pre-page may recall the case

6. ***In view of position explained above, the proceeding initiated u/s 148 in this case is hereby dropped u/s 152(2) of IT Act, 1961."***

[Emphasis is ours]

53. Clearly, in SIPL's case, these aspects were not examined by the concerned AO or by the ACIT/PCIT.

54. Before we conclude, we must deal with Mr Agrawal's submission that the impugned transaction was a sham and, therefore, reassessment was rightly triggered.

55. According to us, a sham transaction is "something that is not what it seems", i.e., a counterfeit document. [See Black's Law Dictionary 8th Edition, page 1407]

56. It is no one's case, not even the AO's case, that SIPL had not executed the MOU/agreement with STPL. The burden of the AO's order is that the sale of the subject land was a capital account transaction and, therefore, Section 50C of the Act was applicable. Thus, Mr Agrawal's reliance on the observations made in the ***Phool Chand Bajranglal*** case has no applicability. The facts therein are entirely distinguishable. That was a case wherein the appellant/assessee had claimed that he had borrowed a certain sum from an entity. Accordingly, the money borrowed was shown as

a liability in the balance sheet. The appellant/assessee also claimed that the money had been borrowed and returned in cash, although interest was paid *via* cheque/bank draft. Based on this broad assertion, the AO allowed a deduction of the interest claimed by the appellant/assessee to the lender company. However, the AO had doubts about the genuineness of the loan transaction, and therefore, he wrote to the AO of the lender company. The AO of the lender company informed his counterpart that the director of the lender company had confessed that it was a dummy entity and had not advanced any loan to any person. This letter conveyed that the so-called lender company lends money to different companies to launder their unaccounted money. It is against this backdrop that the court sustained the action taken to reopen the reassessment proceedings. Given this backdrop, the Court observed that it was not a case where the AO sought to draw fresh inference, which it could have raised when he framed the original assessment order regarding the loan transaction based on the material placed before him. Therefore, the fresh information in that case, as observed by the Court, exposed the falsity of the statement made on behalf of the appellant/assessee when the original assessment order was framed.

57. As mentioned above, the facts that obtained in the ***Phool Chand Bajranglal*** case are quite different from those obtained in the instant case.

Conclusion

58. Thus, we are of the opinion that for the reasons given above, this is not a case in which the reassessment proceedings ought to have been triggered against SIPL.

59. Accordingly, the impugned order dated 13.11.2018 is quashed.

60. Parties will act based on the digitally signed copy of the judgment.

(RAJIV SHAKDHER)
JUDGE

(ANISH DAYAL)
JUDGE

DECEMBER 4, 2023