11 SCOB [2019] HCD 83

HIGH COURT DIVISION
(Special Original Jurisdiction)

Writ Petition No. 18905 of 2017

Concord Consortium Limited.
……. Petitioner.
Vs.
Deputy Commissioner of Taxes, Taxes Circle-96 (Companies), Taxes Zone-5, Dhaka and others.
……Respondents.

Mr. M.A. Noor with
Mr. Muhammad Nawshad Zamir with
Ms. Sonia Zaman Khan with
Mr. Ziaul Hakim with
Mr. Reajul Hasan with
Mr. Md. Tanvir Prodhan, Advocates
… For the petitioner

Mr. S. Rashed Jahangir, D.A.G with
Mr. Pratikar Chakma, D.A.G with
Ms. Shuchira Hossain, A.A.G. with
Ms. Samira Tarannum Rebeya, A.A.G with
Mr. Mohammad Shaiful Alam, A.A.G
….For the respondent No.02.

Heard on 22.03.2018 and
judgment on: 27.03.2018.

Present:
Mr. Justice Sheikh Hassan Arif
And
Mr. Justice Md. Badruzzaman

Change of mind by the assessing officer can not justify re-opening of assessment under section 93 of the Income Tax Ordinance, 1984:
The relevant provisions in our Income Tax Ordinance, 1984 are still like pre-enactment of Indian Income Tax Act, 1961. That means, the precondition of having definite information which has to come into the possession of the Deputy Commissioner of Taxes after completion of original assessment is still very much intact under sub-section (2) of Section 93 of the said Ordinance. Therefore, we fully agree with the submissions of Mr. Noor that, the DCT must have fresh information in his possession which has come to his possession after completion of original assessment and, only on such happening, the DCT is entitled to reopen the completed assessment of a particular assessee. ... (Para 10)

When a particular issue has been categorically addressed by the DCT in the original assessment order and there is no allegation that the assessee has not disclosed any particular fact or materials at the time of original assessment and when the DCT completed such assessment on the basis of the materials disclosed by the assessee taking a particular view on a particular amount, change of such view subsequently by the concerned DCT, for whatever reason, cannot not justify reopening of assessment. This position of law has been categorically affirmed by various higher Courts in India in the above referred cases. Since it is apparent from the facts and circumstances of the case that, the impugned reassessment was in fact initiated not because of any fresh

information having come to the possession of the concerned DCT, rather the same was the result of subsequent change of opinion or change of mind of the DCT being influenced by a report of local office of CAG, such change of opinion is not permitted to be the ground for reopening the assessment. ... (Para 14)

JUDGMENT

SHEIKH HASSAN ARIF, J

1. Rule Nisi was issued calling upon the respondents to show cause as to why notice dated 29.10.2014 (Annexure-'B'), issued by the Deputy Commissioner of Taxes (respondent No.1) under Section 93 of the Income Tax Ordinance, 1984, and the reassessment and penalty orders dated 19.06.2017 (Annexure-'D' & 'E') for the assessment year 2013-2014 pursuant to the said notice, and the orders dated 15.11.2017 (Annexure-'G' & 'G1') passed by the respondent No.2 under Section 121A of the Income Tax Ordinance, 1984 affirming the said reassessment and penalty, should not be declared to be without lawful authority and are of no legal effect.

2. Short facts, relevant for the disposal of the Rule, are that, the petitioner, being a limited company and engaged in the real estate business is a regular tax payer bearing e-Tin No. 284120567875 and TIN No. 149-200-2921 under Taxes Circle No.96 (Companies), Taxes Zone-5, Dhaka. In the course of its such business, it submitted its income tax return for the assessment year 2013-2014 showing total income at Tk. 2,79,295/- and, accordingly, furnished statement of accounts duly audited and certified by the chartered accounting firm. The concerned Deputy Commissioner of Taxes (DCT), thereupon, made assessment after hearing under Sections 83(2)/82(C) of the Income Tax Ordinance, 1984 ("the said Ordinance") computing total income of the petitioner at Tk. 2,93,753/-. After completion of such assessment, it is stated, on audit objections raised by an audit and accounts officer of the Local and Revenue Audit Directorate, Dhaka, the concerned DCT issued impugned notices dated 29.10.2014 under Section 93 of the said Ordinance for the purpose of reopening the said assessment of the petitioner on the ground of its income being under assessed. As against such notice, the petitioner made representations to withdraw the same on various grounds. However, the DCT, vide impugned order dated 19.06.2017, made re-assessment after hearing the representatives of the petitioner and thereby re-computed the total income of the petitioner at Tk. 1,57,93,753/-. In such re-computing, the said DCT added Tk. 1,55,00,000/- to the originally assessed income of the petitioner on account of inter-company current liability of the petitioner on the ground that, the said liability of the petitioner remained unpaid for three years. Accordingly, the DCT added the said income to the total amount of the petitioner purportedly under Section 19(15)(aa) of the said Ordinance. Thereupon, additional tax was demanded from the petitioner for an amount of Tk. 67,66,990/- as well as the petitioner was imposed a penalty for alleged evasion of tax under Section 128 of the said Ordinance for an amount of Tk. 30,45,145/-. Accordingly, impugned demand notices dated 19.06.2017 (Annexures-D1 and E1) were served on the petitioner demanding the said additional tax and penalty. Being aggrieved by such re-assessment order, the petitioner filed revisional applications before the concerned Commissioner of Tax under Section 121A of the said Ordinance. Thereupon, the Commissioner of Tax, vide impugned order dated 15.11.2017, rejected the said applications. The petitioner then moved this Court and obtained the aforesaid Rule. At the time of issuance of the Rule, this Court, vide ad-interim order dated

27.12.2017, stayed operation of the concerned demand notices both dated 19.06.2017 (Annexures-D1 and E1) for a period of three months.

3. This matter was fixed for delivery of judgment on 08.03.2018 along with two other apparently similar matters. However, at the time of delivery of judgment, when it was detected that this writ petition involved some other legal issues, the same was withdrawn from the stage of delivery of judgment and, accordingly, heard separately.

4. The Rules are opposed by the concerned Commissioner of Tax (respondent No.2) by filing affidavit-in-opposition, mainly contending that, the petitioner submitted its return with in-accurate particulars in respect of the concerned assessment year and, accordingly, in the original assessment it was under assessed and as such the DCT committed no illegality in re-opening the said assessment under Section 93 of the said Ordinance. It is further contended by this respondent that, before re-assessment, the petitioner's representative was extensively heard and all materials submitted by the petitioner were considered by the concerned DCT and as such no illegality has been committed.

5. Mr. M.A. Noor, learned advocate appearing for the petitioner, at the outset, has drawn this Court's attention to the impugned notice dated 19.10.2014 issued under Section 93 of the said Ordinance as well as the letter dated 29.10.2014 as sent to the petitioner by the concerned DCT stating therein the grounds for such re-opening. Mr. Noor then submits that, the grounds as taken by the DCT for reopening the assessment of the petitioner is exactly similar to the grounds as mentioned by the concerned local office of the Controller and Accountant General, which is apparent from their report dated 25.08.2014, which is annexed to the writ petition along with Annexure-B. Learned advocate then submits that, though it is not apparent from the orders passed by the concerned DCT (Annexure B-2) that the DCT mechanically acted on the basis of such report of the local office of CAG, yet the contents or grounds on which the assessment was reopened was exactly the same as reported by the said local office. Therefore, from this aspect of facts and circumstances of the case, according to him, it is apparent that the DCT in fact acted on the instruction and dictation of the local office of CAG. According to him, since this Court has already in various cases decided that, such acting by DCT on the basis of such dictation of an extraneous authority is without jurisdiction, in the instant case as well this Court should follow the same course of legal view.

6. Further drawing this Court's attention to the original assessment order dated 26.01.2014 (Annexure-A), Mr. Noor submits that, it is apparent from paragraph-2 of the said assessment order that the entire amount of Tk. 14,36,23,162/-, as mentioned by the petitioner in the audited balance sheet on account of intercompany current account, has been extensively considered and examined by the DCT and the DCT did not make any adverse comment against the said amount. According to him, the said amount having contained therein the alleged amount of Tk. 1,55,00,000/- as mentioned by the said local office alleging that the said amount was not returned within three years, the decision to reopen the assessment by the concerned DCT is nothing but a change of mind by him on a closed issue inasmuch as that, according to him, no new information or fact was available to the DCT before reopening the said assessment. Learned advocate submits that, the *words "definite information has come into the possession of the Deputy Commissioner",* as occurring in sub-section (2) of Section 93 of the said Ordinance as a prerequisite condition for re-opening the completed assessment, is totally absent in the facts and circumstance of the present case. Learned advocate submits that, it is apparent from the impugned notice issued by DCT for reopening the said assessment that, the initiation for reassessment was in fact done not for

any new information but for change of mind of the DCT. According to him, the change of mind of the DCT was caused for nothing but because of the view expressed by the local office of CAG, which is totally unwarranted and unacceptable in accordance with the provisions of the said Ordinance. Therefore, according to him, since the DCT has done something indirectly which he cannot do directly in this case, the ratio decided by this Court in the earlier cases should apply. In this regard, learned advocate has referred to various decisions of different High Courts of India, namely **Jayraj Madeppa Kadadi vs. Commissioenr of Income Tax, [1990] 186 ITR 161 (Bom), Reform Flour Mills (Pvt.) Ltd. vs. Commissioenr of Income-Tax, West bangal II, Calcutta, [1973] 88 ITR 150 (Cal), Yeshwant Talkies v. Commissioner of Income-Tax, [1986] 157 ITR 103 (MP), Diamond Sugar Mills Ltd. v. Income-Tax Officer, "C" Ward, District IV, Calcutta, and others, [1973] 89 ITR 171 (Cal), Birla Vxl Ltd. v. Assistant Commissioner of Income-Tax, [1996] 217 ITR 1 (Guj), Assam Cane Suppliers v. Income-Tax Officer, 'A' Ward, Dibrugarh, [1973] 91 ITR 364 (Gau), Poonjabhai Vanmalidas and sons (H.U.F.) v. Commissioner of Income-Tax, Gujarat, [1974] 95 ITR 251 (Guj) and Biswanath Samanta v. Income-Tax Officer, A-Ward, Spl. Survery Circle II, and others, [1973] 92 ITR 331 (Cal).** Learned advocate then submits that, the concerned Commissioner of Tax having not at all considered those aspects in passing the impugned orders under Section 121A of the said Ordinance, the same also cannot stand in the eye of law.

7. As against above submissions, Mr. Pratikar Chakma, learned Deputy Attorney General, submits that, there is nothing on record to suggest that the DCT acted on the instruction or dictation of the local office of CAG. Therefore, according to him, this case is quite different from the other cases as decided by this Court on the said point. Learned DAG further submits that, since the petitioner admittedly did not return the said amount of Tk. 1,55,00,000/- within three years to its sister concern or the company from which it took the said amount as loan, the same was correctly added to the total income of the petitioner.

8. Before addressing the issues raised by the learned advocates in the instant case, we need to look at the relevant provisions as changed time to time by different amendments as well as fresh enactment. It appears from the then relevant provisions under Section 34 of the Income Tax Act, 1922 (now repealed) that one of the preconditions for re-opening assessment was that the concerned Income Tax Officer must have had definite information which came into his possession after completion of original assessment. The same pre-condition remained intact when the similar provisions under Section 93 were incorporated in the Income Tax Ordinance, 1984, which is applicable now. While Sub-section (1) of Section 93 has empowered the concerned DCT to re-open the assessment for any assessment year, within certain limitation period, on the ground of escapement of assessment or under assessment or assessment at too low at rate or on the ground that a relief has been excessively given or that relief or refund has been excessively given, sub-section (2) therein has provided the precondition that such reopening cannot be done by the DCT *"unless definite information has come into the possession of the Deputy Commission of Taxes---------"*. The main contention of the petitioner, as raised by the learned advocate, is that, the said precondition of having definite information which has to come into the possession of the Deputy Commissioner after completion of original assessment was totally absent in the facts and circumstance of the present case. Therefore, according to him, in absence of such jurisdictional facts, the exercise of power under Section 93 was corum-non-judice or an act without jurisdiction.

9. To have a clear picture of the law prevailing in this country as against the submission made by the learned advocate for the petitioner, we have examined the similar provisions under the Indian Income-Tax Act. It appears from such examination that, though India did have similar provisions like us under Section 34 of the then Income Tax Act, 1922, the Legislature in India has made drastic changes in respect of almost all the provisions as contained in the said act, in particular the provisions under Section 34 for reopening the assessment. In the newly enacted Section 147 of the Indian Income Tax Act, 1961 (as amended by Finance Act, 2013) for reopening of such completed assessment on similar grounds, the precondition of having 'definite information coming into the possession of the concerned income tax officer' was completely omitted. The only condition incorporated by the Legislature in India is that, in such reopening, the concerned assessing officer shall have to have reason to believe that, the concerned assessee escaped assessment or assessment was too low at rate etc. Even then, it appears from various judicial pronouncements of higher Courts in India that, the Courts in India have consistently held that such reopening cannot be justified on the ground of change of opinion of the concerned assessing officer. It was held by the said Courts that, the words "the assessing officer has reason to believe" as occurring in the said Section 147 of the Indian Income Tax Act should be given their full effect in that, such belief has to be the belief of a reasonable man. Reference may be made in this regard to cases in **CIT vs. Calvinator 256, ITR 1,** as affirmed by the Supreme Court of India in **CIT vs. Calvinator, 320 ITR 561 (SC) or (2010) 2SCC-723**. It was further held in **CIT vs. Simbhaoli Sugar Mills Ltd. 333 ITR 470** that, initiation of such reassessment proceedings on the basis of internal audit objections of the Tax department is also bad in law.

10. Be that as it may, the relevant provisions in our Income Tax Ordinance, 1984 are still like pre-enactment of Indian Income Tax Act, 1961. That means, the precondition of having definite information which has to come into the possession of the Deputy Commissioner of Taxes after completion of original assessment is still very much intact under sub-section (2) of Section 93 of the said Ordinance. Therefore, we fully agree with the submissions of Mr. Noor that, the DCT must have fresh information in his possession which has come to his possession after completion of original assessment and, only on such happening, the DCT is entitled to reopen the completed assessment of a particular assessee.

11. As against above legal position, if we examine the materials on record in the instant writ petition, in particular the original assessment order dated 26.01.2014 (Annexure-A), that, "Intercompany Current Account" was a particular heading under paragraph-2 (1) of the said assessment order, and the total amount as mentioned by the petitioner in the balance sheet on account of such Intercompany Current Account was Tk. 14,36,23,162. Admittedly, the alleged amount of Tk. 1,55,00,000/- was included in the said total amount as disclosed by the petitioner during the concerned assessment through its balance sheet and, after consideration of the entire balance sheet as well as the said amount in detail, the concerned DCT left the said amount without adding the same to the total income of the petitioner. Therefore, it appears that, knowing fully well that the said amount of Tk. 1,55,10,000 as in the total amount as mentioned by the petitioner in the balance sheet, the DCT took a decision or formed an opinion to leave the same as it is without making any adverse comment. However, it appears, the same DCT, while issuing the impugned notice dated 29.10.2014 (Annexure-B) and the letter enclosed thereto issued on the same day, contended that certain loan amount had not been returned by the assessee even after expiry of its tenure—being the sole ground for reopening the assessment of the petitioner.

12. As against above, when we are confronted with the report of the local office of CAG dated 25.08.2014, as annexed to the writ petition as part of Annexures-B and B1, it appears that, this contention was first raised by the said local office of CAG in the following terms:

"করদাতা প্রতিষ্ঠানটির Balance Sheet এ প্রদর্শিত Current Liabilities হেডে Inter Company Current Account খাতে সর্বমোট ১,৫৫,০০,০০০/- টাকা ২০০৮-০৯ আয় বছরে দায় হিসাবে প্রদর্শন করে এবং ২০১১-১২ আয় বছরে তিন বছর অতিক্রান্ত হলেও তা পরিশোধ করা হয়নি। ফলে আয়কর অধ্যাদেশ ১৯৮৪ এর ১৯(১৫)(এএ) ধারা মোতাবেক পরবর্তী বছর অর্থাৎ ২০১২-২০১৩ আয় বছরে অন্যান্য আয় হিসাবে গণ্য করে করারোপযোগ্য। আলোচ্য ক্ষেত্রে তা করা হয়নি।"

13. Now, if we examine the impugned re-assessment order dated 19.06.2017 as against the said contention of the local office of CAG, it will be evident that the concerned DCT in fact exactly quoted the said contention of local office of CAG in the said re-assessment order under the heading Intercompany Current Account. The amount of Tk. 1,55,00,000/-, as determined by the DCT for adding to the total income of the assessee, is also same as mentioned by the said local office. Therefore, it is apparent from the facts and circumstances of the case that, though it cannot be said that the concerned DCT has mechanically acted on the instruction or dictation of the local office of CAG, it is clear that, the concerned DCT changed its mind or opinion because of the opinion as expressed by concerned local office of CAG.

14. When a particular issue has been categorically addressed by the DCT in the original assessment order and there is no allegation that the assessee has not disclosed any particular fact or materials at the time of original assessment and when the DCT completed such assessment on the basis of the materials disclosed by the assessee taking a particular view on a particular amount, change of such view subsequently by the concerned DCT, for whatever reason, cannot not justify reopening of assessment. This position of law has been categorically affirmed by various higher Courts in India in the above referred cases. Since it is apparent from the facts and circumstances of the case that, the impugned reassessment was in fact initiated not because of any fresh information having come to the possession of the concerned DCT, rather the same was the result of subsequent change of opinion or change of mind of the DCT being influenced by a report of local office of CAG, such change of opinion is not permitted to be the ground for reopening the assessment.

15. Therefore, in view of above circumstances, we are of the view that, the DCT in fact acted beyond his jurisdiction in issuing the impugned notice dated 29.10.2014 for reopening the concerned assessment under Section 93 of the said Ordinance. Since the act of reopening was without jurisdiction, this Court is of the view that, the petitioner was even initially entitled to come before the High Court Division under writ jurisdiction to challenge the same. Though, in the present case, the petitioner has availed of a revisional forum, upon perusal of the impugned revisional orders dated 15.11.2017passed by the concerned Commissioner under section 121A of the said Ordinance, it appears that, the Commissioner has miserably failed to consider this aspect of the case and as such this order also cannot stand in the eye of law.

16. In addition to above, it further appears that, the re-assessment order was even barred by limitation in view of the provisions under Section 94(2)(b) of the said Ordinance, in particular when it is apparent that the impugned notice was issued on 29.10.2014 and the re-assessment was done on 19.06.2017, which was beyond one year period from the end of the year in which the notice under Section 93 was issued. On this ground of limitation as well, the petitioner has a case before this Court under writ jurisdiction.

17. In view of above facts and circumstances of the case, since we find merit in the Rule, the same should be made absolute.

18. In the result, the Rule is made absolute. Accordingly, the impugned notice dated 29.10.2014 (Annexure-'B') issued by the Deputy Commissioner of Taxes (respondent No.1) under Section 93 of the Income Tax Ordinance, 1984, and the reassessment order and penalty order dated 19.06.2017 (Annexure-'D' & 'E') for the assessment year 2013-2014 pursuant to the said notice, and the orders dated 15.11.2017 (Annexure-'G' & 'G1') passed by the respondent No.2 under Section 121A of the Income Tax Ordinance, 1984, affirming the said reassessment and penalty, are hereby declared to be without lawful authority and are of no legal effect. Consequently, the demand notices (Annexure-D1 and E1) also fall apart.

19. Communicate this.