

If all transactions weren't disclosed during first reassessment, second reassessment was justified HC

Summary – The High Court of Delhi in a recent case of OPG Metals & Finsec Ltd., (the Assessee) held that where information regarding all transactions were not subject matter of earlier reassessment proceedings and details provided fresh material for Assessing Officer to initiate second reassessment proceedings, second reassessment could not be said to be based upon mere change of opinion.

Facts

- Six transferor companies, merged with the assessee company in view of the approval granted by the High Court.
- Return of income declaring loss was originally filed by assessee after consolidating the accounts of all companies.
- The Investigation Wing reported that the assessee was a beneficiary who had obtained accommodation entries through unexplained sums from the entry operators MKM. Case was reopened under section 147. It was found that one of the transferor companies produced shares and sold them to entry operator thus, had taken accommodation entries. Accordingly, assessment was completed making addition to assessee's income.
- Thereafter a comprehensive investigation was carried out by the Investigation Wing for identification of entry operators engaged in the business of money laundering and it was found that the transaction between entry operator, and that said transaction was not disclosed during the first round of reassessment proceedings in respect illegal transaction of sale of shares.
- Thereafter, the Assessing Officer sought to reopen reassessment. He took approval of the Commissioner on ground that on account of failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, the income chargeable to tax to the extent of accommodation entry had escaped assessment.
- The assessee filed appeal and submitted that it was a case of change of opinion as earlier a notice under section 148 was issued to the assessee, in respect of the same assessment year and the information regarding alleged dubious transactions, which was made subject matter of the second reassessment notice, was already available with the Assessing Officer when he had passed the first reassessment order and there had been full and true disclosure of all material facts.
- The Commissioner (Appeals) had accepted the appeal of the assessee and deleted the additions made by the Assessing Officer. The revenue had accepted the said decision and, therefore, the present reassessment proceedings were based on surmises and conjectures.
- On writ :

Held

- The Assessing Officer on the basis of information received from investigation wing issued the first reassessment notice dated 7-11-2006 under section 148.

- It is apparent from the heading that the notice was issued specifically in respect of the company named 'Om' which was one of the six companies/concerns which merged with the petitioner's company, and there were three transactions dated 29-4-2002 and 11-2-2003 regarding which or, on the basis of information made available by the investigating wing, the Assessing Officer had formed a *prima facie* view that these were accommodation entries. The first two entries related to accommodation entry provider (MKM) account holder and mentions the bank and branch name from where the money was received.
- From the chart submitted by the petitioner giving details of long term capital gains/short term capital gains in respect of five companies, it does not transpire that the transactions were brokered or the sale consideration was received from MKM. There was no reason or cause for the Assessing Officer to assume that these transactions of long term/short term capital gains were with MKM or there were also bogus sales. In fact, order sheet notings recorded in the first round reveal that the petitioner was asked to furnish details *vide* noting dated 11-7-2007 and by letter of the same date, information relating to transactions with MKM as well as other company was asked. Similarly, by another order dated 22-11-2007, the petitioner was asked to file bills and invoices of MKM through whom the transfers were made. However, in the replies filed by the petitioner only the details of shares which were earlier held by and then transferred to MKM were furnished. The petitioners kept silent on the numerous transactions made through five other companies with MKM and no details of these transactions were furnished. The documents *i.e.*, the chart, placed on record and on which assessee excessively relies prove that the petitioner had furnished the relevant information but was cautious and careful not to mention about any other transactions of MKM. From these documents it is not possible to discern involvement of MKM in any of the transactions made by the five companies. Neither did the petitioner mention or state that there were other sale transactions with MKM in any of the letters, communications and correspondence with the Assessing Officer. Had that been the case, the position would have been different.
- The Assessing Officer in the first round had only examined the transactions of Om and had not gone into any other transactions. Thus, it can be safely stated that it is not a case of change of opinion as propounded and argued on behalf of the petitioner.
- As regards the contention of the petitioner that information with regard to transactions of other companies with MKM was within the knowledge of the Assessing Officer in the first round as three letters had been written by the Investigating Wing of the Department. The letter dated 2-3-2006 was followed by letters dated 16-6-2006 and 5-2-2007. These letters were written by Directorate of Income Tax (Investigation) to the Chief Commissioner of Income Tax, Delhi/Commissioner of Income Tax, enclosing therewith, a compact disc. The disc had data that had to be scanned, sifted through and then the details of alleged transactions, including company name, persons involved etc., had to be fully ascertained. The Assessing Officers were required to scan through thousands of entries to discern and determine which of their assessee, if any, has been a beneficiary of an accommodation entry. From these letters, it is not possible to know that the Assessing Officer had information in his

possession and was aware that the five other companies had also entered into transactions with MKM but he has chosen to ignore and had deliberately not gone into the said aspect. The petitioner cannot point out any other information or detail available in the original file which reflects that the Assessing Officer had the knowledge regarding the same. Thus, when the same facts were not in knowledge of the Assessing Officer during the first reassessment proceedings before him to form an opinion on the transactions now in question, it would be a fallacy to argue that the second reassessment was change of opinion.

- The first reassessment notice was very specific and related to shares which were procured by Om and had been sold to MKM. Two transactions with the said company were specifically mentioned and third transaction was with other company. The third transaction appeared to be fair transaction. The Assessing Officer could not have presumed that there were other transactions in respect of shares purchased by the amalgamated companies of the petitioner with MKM.
- The reasons recorded are fairly detailed and refer to comprehensive investigation carried out by the investigating wing for identification of entry operators engaged in money laundering. It is mentioned that the details were received from the investigating wing in parts, on two or three occasions and provides details of the account number of MKM and individuals with whom transactions were made. In respect of the entries, the reasons record that the transactions between the transferor company *i.e.*, the assessee and MKM who was an entry operator, was not disclosed during the first round of reassessment proceedings and the *prima facie* conclusion that income on account of the said bogus transactions had escaped assessment. Thus, the information regarding these transactions were not the subject matter of the earlier re-assessment proceedings and details provided fresh material for the Assessing Officer to initiate second reassessment proceedings. Neither the argument that there was no due application of mind by the Assessing Officer or that the reasons to believe do not constitute live link with the formation to believe that the income has escaped assessment could be accepted. In view of the position explained above, these contentions are baseless.
- The petitioner has placed heavy reliance on the order passed by the Commissioner (Appeals) dated 4-3-2009 deleting addition of Rs.6,66,382 made by the Assessing Officer on the sale transactions relating to shares which were purportedly sold by Om to MKM. The appellate authority has referred to the failure of the Assessing Officer to conduct a full and proper enquiry because he had issued notices for appearance of directors of MKM but failed to produce them for cross-examination, though the said company had written a letter testifying that they are not doing any business but were merely providing accommodation entries. The appellate authority felt that right of cross-examination was mandatory and there was violation of principles of natural justice.
- The appellate authority concluded that the Assessing Officer had relied upon information received from the investigation wing which was collected behind the back of the assessee, but he was not confronted. The directors of MKM were not produced or allowed to be cross-examined. It is in light of the said facts the Commissioner (Appeals) has observed that the assessee had discharged the initial onus and the Assessing Officer ignoring evidence, without further investigation or inquiry, had

made the addition without appropriately bringing on record adverse material and without confronting or giving opportunity to the assessee to meet the adverse material. The appellate order, therefore, proceeds on its own basis and factual matrix in the said case, cannot be regarded as order giving complete clean chit or holding that transactions with MKM were genuine or not bogus transactions or accommodation entries. It was a case of lack of investigation, improper conduct of proceedings and not a decision according pristine approval to the bona fides of the transactions. At the stage of issue of notice under section 148 only formation of tentative, *prima facie* view is required. The final opinion and authoritative opinion is formed when the assessment order is passed. The order passed by the Commissioner (Appeals) could not be said to authoritatively records or proves that transactions with MKM were genuine business or commercial transactions. There is no such finding recorded or pronounced. The said order refers to the failure of the Assessing Officer in the said proceedings and effect thereof which can by no stretch of imagination be construed that the petitioner did not indulge in bogus sales transactions, especially in case of the five companies involved in the present reassessment, on which the Commissioner (Appeals) did not dwell into and neither had the relevant material, at the time, to examine the same.

- The explanation supports the case of the revenue that mere submission of the chart that the five other companies had entered into sale transactions by itself would not amount to disclosure.
- Therefore, merely furnishing details or disclosing that the five companies had entered into some transactions itself would not meet the requirement of full and true disclosure. The disclosure was neither full nor true.
- Requirement of full and true disclosure at the time of first reassessment is not satisfied in the present case. Full and true disclosures cannot be garbled or hidden behind the cervices of the documentary material. The assessee must act with candor and there cannot be suppression of facts. The disclosure must be truthful and fair in all respects and assessee who seeks the benefit of the proviso to section 147 must make a full and true disclosure of all primary facts. However, here the assessee had not specifically pointed out at the time of the first reassessment that there were other transactions between amalgamated companies and entry operator. This is not stated in the chart or any of letters written by the petitioner in the original proceedings that there were other transactions with MKM. Thus, the assessee did not come with clean hands and did not discharge the onus of disclosing true and full material facts.