

Any income couldn't be deemed to be taxable just because tax at source had been deducted on it

Summary – The Mumbai ITAT in a recent case of ABB Switzerland Ltd., (the Assessee) held that where assessee, a Switzerland based company, undertook contract work for installation of power sub station in India, mere fact that TDS had been deducted on amount received from Powergrid Corporation, it did not lead to any inference that income from offshore supply was taxable in India, especially when sale had been concluded outside India on principal to principal basis

Facts

- The assessee was a non-resident company incorporated under the laws of Switzerland. It had undertaken a contract work for installation of power substation at New Delhi, *vide* agreement dated 29-3-2005.
- In the return of income, the assessee had disclosed income mainly from two streams, firstly, royalty/FTS and secondly, training fees received from Powergrid Corporation of India Ltd. in pursuance of the project of installing of substation. The assessee stated that so far as the income from offshore supply was concerned, the same was not taxable in India because, the sale was concluded outside India on principal to principal basis. As regards other limbs of the project, the assessee had not disputed the tax liability and offered it for tax in return of income.
- The return of income was duly processed and accepted under section 143(1), therefore, the said income stood assessed in the aforesaid manner and had attained finality.
- Subsequently, the Assessing Officer initiated reassessment proceedings for two reasons, firstly, even though TDS had been deducted on amount received from Powergrid Corporation still assessee had not offered said amount to tax and, secondly, contract for installation of project was one turnkey project and, thus, entire income was taxable in India under section 44BBB.
- The Commissioner (Appeals) upheld the validity of reassessment proceedings.
- On second appeal:

Held

- From the perusal of the 'reasons recorded' it is seen that, the first part consists of information that assessee had received an income of Rs. 11.71 crores from Powergrid Corporation of India Ltd. on which TDS has been deducted but same has not been offered for tax. This factum alone that TDS has been deducted did not lead to any inference that income from offshore supply to the assessee was taxable in India, especially when the sale had been concluded outside India on principal to principal basis.
- The second part of the 'reasons' refers to the contract for project of installation which has been stated to be divided into three parts, *viz.*, onshore supply; offshore supply; and onshore services and to demonstrate that the income from the project is one, Assessing Officer has extracted a contract

document in the 'reasons' and thereafter, he concludes that it is one turn-key project, therefore, entire income is taxable in India in view of the provision of section 44BBB of the Act.

- The contract document extracted therein is the substratum of Assessing Officer's belief which refers to a project of Navsari substation, which has been entered into on 12-9-2009. This contract, admittedly, was not the source of the income for the assessee in this year, *albeit* from assessment year 2010-11 and the agreement on which assessee had carried out its contract work in this year is dated 29-3-2009, that to be for installation of substation at New Delhi.
- Thus, the entire premise for entertaining 'reason to believe' was the contract agreement entered into September, 2009 and not the agreement entered into March, 2009 which was the source of income in the impugned assessment year. It is well settled and trite law that Assessing Officer can acquire jurisdiction to reopen the case under section 147 only when he has 'reason to believe' that any income chargeable to tax has escaped assessment. Such 'reason to believe' must be based on tangible material and cogent facts having live-link-nexus with the income escaping assessment. If a wrong fact or material is the foundation for entertaining the 'reason to believe' then the whole edifice on which reasons to believe has been entertained collapses and falls in the realm of suspicion, pretence or surmises.
- A bonafide reasonable belief based on cogent material and information is a pre-condition that clothes the Assessing Officer with power to reopen the assessment which otherwise has attained finality due to lapse of time. Not only the 'reasons to believe' must have direct nexus with formation of opinion of Assessing Officer but it must also be based on a foundational fact and material. The Courts have held that, though sufficiency of material and belief entertained by the Assessing Officer may not be gone into but it has to be seen that it must be based on cogent and relevant material and is rational belief entertained in a good faith.
- If the reason entertained by the Assessing Officer to reopen the assessment is based on incorrect facts then the entire exercise of reopening is bad in law. Here in this case also, the 'reason to believe' that assessee's income has escaped assessment was without any factual basis, that is, was based on wrong material and facts. The entire foundational fact which has been taken into account by the Assessing Officer for reopening is based on wrong fact and material which do not have any live-link nexus with escapement of income.
- It has been admitted even by the Assessing Officer in the assessment order that it was a mistake which has to be treated of a typographical mistake. It is not a typographical mistake, albeit it is palpably incorrect assumption of fact. Here admittedly 'reason to believe' that income has escaped assessment is based on palpably erroneous reasons sans any tangible material or information, therefore, such a reopening based on such wrong assumption of fact has to be quashed at the threshold.
- In the present case 'reasons recorded' do not meet the requirement of law and do not confer the jurisdiction to reopen the case under section 147 and, accordingly, entire proceedings under section 148 is held as *void ab initio* and same is hereby quashed. Consequently, the entire proceeding

initiated by notice under section 148 is held as *null* and *void* and therefore, the entire discussion on merits has been rendered purely academic hence, no adjudication is required. Accordingly the appeal of the assessee is treated as allowed.