

TAX FLASH NEWS

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Supreme Court's decision on the re-assessment proceedings

Recently, the Supreme Court in the case of New Delhi Television Ltd¹ (the taxpayer) while dealing with various re-assessment related issues held that for determining whether there were reasons to believe that income had escaped assessment, facts which came to the knowledge of the Assessing Officer (AO) after the completion of assessment proceedings could be taken into consideration.

The Supreme Court rejected the invocation of extended period of limitation of 6 years as the taxpayer had disclosed all primary facts before the AO and it was not required to give any further assistance to the AO by disclosure of other facts

With respect to invocation of 16 years period for re-assessment, the Supreme Court held that neither the reassessment notice² nor the reasons provided for re-opening made a reference to the provisions allowing a 16 years period for initiation of re-assessment. The Supreme Court did not express any opinion on whether the revenue could take benefit of the invocation of 16 years period for re-assessment³. Therefore, the revenue may issue a fresh notice taking such benefit if otherwise permissible under law.

Facts of the case

The taxpayer is an Indian company engaged in running television channels of various kinds. It has subsidiary based in the United Kingdom (UK) named NDTV Network Plc., U.K. (NNPLC). The taxpayer submitted a return for the Financial Year (FY) 2007-08 i.e. Assessment Year (AY) 2008-09 on 29 September 2008 declaring a loss. The case was taken up for assessment and the order was passed on 3 August

2012. The issue was with respect to step-up coupon bonds amounting to US\$100 million. These bonds were issued in July 2007 through the Bank of New York for a period of 5 years. The taxpayer had agreed to furnish corporate guarantee for this transaction. These bonds were subscribed to by various entities. These bonds were to be redeemed at a premium of 7.5% after the expiry of the period of 5 years. However, these bonds were redeemed in advance at a discounted price of US \$74.2 million in November 2009.

The AO held that NNPLC had virtually no financial worth, it had no business of the name and therefore it was difficult to believe that it could have issued convertible bonds of US\$ 100 million, unless the repayment along with interest was secured. This was secured only because of the taxpayer agreeing to furnish guarantee in this regard. The AO did not doubt the validity of the transaction but imposed guarantee fee @ rate of 4.68% by treating it as a business transaction and added Rs.18.72 crores to the income of the taxpayer.

On 31 March 2015, the tax department sent a notice to the taxpayer stating that the authority has a reason to believe that net income chargeable to tax for the AY 2008-09 had escaped assessment within the meaning of Section 148 of the Act. The main reason given was that in the following AY i.e. AY 2009-10, the AO had proposed a substantial addition of Rs.642 crores to the account of the taxpayer on account of monies raised by the taxpayer through its subsidiaries⁴.

The AO relied upon the order of the DRP holding that there is reason to believe that funds received by NNPLC were actually the funds of the taxpayer. It was specified that NNPLC had a capital of only Rs.40 lakhs. It did not have any business activities in the UK except a postal address.

¹ New Delhi Television Ltd v. DCIT (Civil Appeal No. 1008 of 2020) (SC) – Taxsutra.com

² Under Section 148 of the Income-tax Act, 1961 (the Act)

³ Second proviso to Section 147 read with Section 149(1)(c) - Where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year – Notice can be sent upto sixteen years

⁴ NDTV BV. the Netherlands. NDTV Networks BV. the Netherlands (NNBV).

The taxpayer claimed that there had been no failure on the part of the taxpayer to disclose fully and truly all material facts necessary to make an assessment. The proceedings had been initiated on a mere change of opinion and there was no reason to believe that the income of the taxpayer had escaped assessment.

The objections of the taxpayer were rejected and thus the taxpayer filed a writ petition in the High Court challenging the notice. The High Court dismissed the petition and therefore the taxpayer filed an appeal before the Supreme Court.

Issues before the Supreme Court

The Supreme Court dealt with the following issues:

- Whether the revenue had a valid reason to believe that undisclosed income had escaped assessment.
- Whether the taxpayer did not disclose fully and truly all material facts during the course of original assessment and whether the revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso Section 147 of the Act⁵.
- Whether the notice along with reasons communicated could be termed to be a notice invoking the provisions of the second proviso to Section 147 of the Act⁶.

Supreme Court's decision

The fact that the original assessment is a detailed one, cannot take away the powers of the AO to issue notice under Section 147 of the Act.

Reason to believe that undisclosed income had escaped assessment

- It is trite law that an AO can only reopen an assessment if he has 'reason to believe' that undisclosed income has escaped assessment. Mere change of opinion of the AO is not sufficient to meet the standard of 'reason to believe'.
- Some of the Supreme Court decisions⁷ clearly lay down that subsequent facts which come to the knowledge of the AO can be taken into account to decide whether the assessment proceedings should be reopened or not.
- The material disclosed in the assessment proceedings for the subsequent years as well as the material placed on record by the minority shareholders form the basis for taking action under Section 147 of the Act. At the stage of issuance of notice, the AO is to only form a prima facie view. Thus the material disclosed in assessment proceedings for subsequent years was sufficient to form such a view.

- Therefore, there were reasons to believe that income had escaped assessment in this case.

Whether there was failure on the part of the taxpayer to make a full and true disclosure of all the relevant facts

- The issue before the Supreme Court was whether the revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso to Section 147 of the Act. This can only be done if the revenue can show that the taxpayer had failed to disclose fully and truly all material facts necessary for its assessment. The Supreme Court observed that the taxpayer had disclosed all the primary facts which it was bound to disclose.
- If the tax department wanted to investigate the matter further, it could have easily directed the taxpayer to furnish more facts.
- The High Court had observed that merely because the transaction of convertible bonds was disclosed at the time of original assessment does not mean that there was true and full disclosure of facts. However, the Supreme Court did not agree with this conclusion and observed that all relevant facts were available with the AO.
- The Supreme Court in the case of Calcutta Discount Co. Ltd.⁸ held that it is the duty of the taxpayer to disclose fully and truly all material facts which it termed as 'primary facts'.
- The taxpayer had disclosed all 'primary facts' before the AO and it was not required to give any further assistance to the AO by disclosure of other facts. It was for the AO at that stage to decide what inference should be drawn from the facts of the case.
- The AO on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the taxpayer. Revenue's reliance on the proceedings before the DRP and facts subsequent to the assessment order does not help the revenue's case.
- Before the Supreme Court the revenue strenuously urged that the taxpayer was guilty of non-disclosure of material facts, however, before the High Court the case of the revenue was just opposite. Therefore, the revenue cannot now turn around and urge that the taxpayer was guilty of non-disclosure of facts.
- The taxpayer had fully and truly disclosed all material facts necessary for its assessment and, therefore, the tax department cannot take benefit of the extended period of limitation of 6 years.

⁵ Notice can be sent upto 6 years if the income chargeable to tax which has escaped assessment amounts to or likely to amount to one lakh rupees or more

⁶ Where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year – Notice can be sent upto sixteen years

⁷ Claggett Brachi Co. Ltd. v. CIT (1989) 2 SCC 182, Phool Chand Bajrang Lal and Another v. ITO (1993) 4 SCC 77, Ess Kay Engineering Co.(P) Ltd. v. CIT (2001) 10 SCC 189

⁸ Calcutta Discount Co. Ltd. v. ITO AIR 1961 SC 372

Invocation of limitation period of 16 years

- The notice is conspicuously silent with regard to the second proviso to Section 147 of the Act. It does not rely upon the second proviso and basically relies on the provision of Section 148 of the Act.
- There is no case set up in relation to the second proviso either in the notice or even in the reasons supplied with regard to the notice. It is only while rejecting the objections of the taxpayer that reference has been made to the second proviso in the order of disposal of objections.
- This is not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the taxpayer should have been informed that the revenue relied upon the second proviso and the limitation of 16 years would apply. The taxpayer must be put to notice of all the provisions on which the revenue relies upon.
- In case the tax department had issued a notice to the taxpayer stating that it relies upon the second proviso, the taxpayer would have had a chance to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The taxpayer cannot be deprived of this chance while replying to the notice.
- The notice issued to the taxpayer and the supporting reasons did not invoke provisions of the second proviso of Section 147 of the Act.

Conclusion

- The notice issued to the taxpayer shows sufficient reasons to believe on the part of the AO to reopen the assessment but since the revenue had failed to show non-disclosure of facts the notice issued after a period of 4 years was quashed.
- The Supreme Court clarified that it has not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law. Accordingly, both the parties shall be at liberty to raise all contentions with regard to the validity of such notice.

Our comments

The Supreme Court in this case has given clarity on various important aspects relating re-assessment proceedings. The Supreme Court has accepted that subsequent facts which come to the knowledge of the AO can be taken into account to decide whether the assessment proceedings should be reopened or not. However, the Supreme Court rejected the invocation of extended period of limitation of 6 years as the taxpayer had disclosed all primary facts before the AO and it was not required to give any further assistance to the AO by disclosure of other facts i.e. secondary facts.

Further with respect to the application of extended period of limitation of 16 years, the Supreme Court observed that the AO should inform the taxpayer either at the time of issue of notice or atleast at the time of furnishing of reasons that the revenue wants to rely upon the second proviso to Section 147 and the limitation of 16 years would apply.

The Supreme Court clarified that it has not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law.

This decision will help taxpayers who are facing a similar challenge from the tax department vis-à-vis re-assessment proceedings.



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