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

% Judgment reserved on: 07th May, 2015
Judgment delivered on: 08th October, 2015

\+ **WP(C) No. 1874/2013**

TURNER BROADCASTING SYSTEMS ASIA PACIFIC INC. ..... Petitioner

versus

DEPUTY DIRECTOR OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr M.S. Syali, Sr Advocate with Mr Mayank Nagi, Ms Husnal Syali and Mr Harkunal Singh

For the Respondent: Mr Rohit Madan, Mr Ruchir Bhatia, Mr Akash Vajpai and Mr Alay Kshatriya

AND

\+ **WP(C) No. 1984/2014**

TURNER BROADCASTING SYSTEMS ASIA PACIFIC INC. ..... Petitioner

versus

DEPUTY DIRECTOR OF INCOME TAX ..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr M.S. Syali, Sr Advocate with Mr Mayank Nagi, Ms Husnal Syali and Mr Harkunal Singh

For the Respondent: Mr Rohit Madan, Mr Ruchir Bhatia, Mr Akash Vajpai and Mr Alay Kshatriya

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. Since both the petitions involve common questions and pertain to the same petitioner, the same are being disposed of by a common judgment. WP(C) 1874/2013 pertains to assessment year 2007-08 and WP(C) 1984/2014 pertains to assessment year 2008-09.

2. The petitioner, Turner Broadcasting Systems Asia Pacific Inc., formerly known as Turner Entertainment Networking Asia Inc. (hereinafter referred to as 'TENA') is a company incorporated in the state of Georgia, U.S.A. and is a tax resident of the U.S.A. During the relevant financial years, TENA derived income from the grant of exclusive rights to Turner International India Private Limited (TIIPL) in India to sell advertising on the products and to distribute the products, namely, (a) Satellite Delivered Televisions Services called Cartoon Networks, TCM Turner, TCM Turner Classic Movies, POGO and Boomerang ; (b) from Interactive Entertainment Services known as cartoonnetworkindia.com and POGO.T.V.; and (c) from Entertainment Mobile Telecommunication Services "Cartoon Network Mobile and Boomerang Mobile.

WP(C) No. 1874/2013 (Assessment year 2007-2008)

3. The petitioner filed its return of income on 27.03.2009 declaring an income of Rs. 12,40,99,555/-.

4. On 11.08.2009, a questionnaire was issued by the respondent/revenue seeking details/evidence/explanations on various aspects pertaining to taxability of the petitioner. In total 38 queries were raised. For the present context, the following queries may be noticed:-

(i) Give detailed note regarding the nature of business activities performed by the Petitioner. Furnish details regarding the projects executed in India during the year;

(ii) File copy of return of Income for AY 2007-08 with Balance-sheet, Profit and Loss account and Notes on accounts.

(iii) Furnish Statement/ Computation of Income with supporting/ evidence in support of the return of income.

(iv) Furnish report in Form 3CEB under Section 92E read with Rule 10E.

(v) Copy of agreement / contract with Indian customer or any other party in India from whom payment is received during the year.

(vi) Copy of all orders under Section 195(2), which Assessee might have received from payers relevant to the AY in question.

(vii) Explain in detail whether you have Permanent Establishment in India.

(viii) Give the list of AE's in India, if any, and also give details of transactions entered with them.

(ix) Copy of Tax Residency Certificate.

(x) Copy of last Assessment Order."

5. On 5.10.2009, the petitioner filed a detailed reply to the questionnaire and reply given to the above referred queries was as under:-

(i) In reply to query no. 1, it was submitted that Petitioner was company incorporated under the laws of state of Georgia. During the AY in question, the Petitioner derived the largest portion of its Indian income from the grant of exclusive rights to Turner International India Private Ltd. (`TIIPL') in India to sell advertising on the products and to distribute the products.

(ii) In reply to query no 2, a print of Corporate Tax Return e-filed for AY 2007-08 was submitted.

(iii) In reply to query no. 3, a copy of computation of income along with Notes to computation was filed.

(iv) In reply to query no. 5, a copy of report in Form 3CEB was filed.

(v) In reply to query no. 12, copy of Order under Section 195(2) of the Act, determining the withholding tax rate for making remittance to the Petitioner was filed.

(vi) In reply to query no. 14, a detailed explanation was given showing how the Petitioner did not have any PE in India.

(vii) In reply to query no. 19, list of AE's of the Petitioner in India was provided to the Respondent.

(viii) In reply to query no. 25, a copy of Tax Residency Certificate was filed.

(ix) In reply to query no. 37, copy of last Assessment Order for AY 2006-07 was furnished.

(x) Further, in response to query no. 10, inter alia, the Distribution and Advertising Sales Agreement, dated as of April 1, 2006 was filed before the Respondent vide letter dated 14.12.2009.

6. On 24.12.2009, the proceedings u/s 143 (3) of the Income Tax Act were concluded and the assessment was framed. The Assessing Officer came to the conclusion that only 10% of the total advertisement and distribution revenue earned in India was taxable in India. In the detailed assessment order, specific reference is made to the notes to computation of

income tax filed during the course of assessment proceedings. The Assessing Officer in the assessment order has referred to the mutual agreement to avoid double taxation under Article 27 of India/USA DTAA for the assessment years 2001-2002 to 2004-2005 and the fact that subsequently for the assessment year 2005-06, assessment was concluded following the MAP resolution. The Assessing Officer in the assessment order has specifically recorded that since the facts of the year under consideration remain the same, therefore, following the agreement reached by the respective competent authorities in the earlier years, the tax was computed at 10% as per the MAP resolutions.

7. On 27.03.2012 notice under Section 147/148 was issued, within the period of four years and the said notice was served on 30.03.2012. The reasons recorded for re-opening of assessment were as under:-

> "The assessment in this case of M/s Turner Entertainment network Asia Inc., a foreign company for the assessment year 2007-08 was completed u/s 143(3) in December, 2009 determining the income of Rs. 12,40,99,555/-. Form the perusal of Assessment records it is observed that the income of the assessee from advertisement and distribution revenue was taxed by taking only 10% of the revenue as the net profit chargeable to tax in India as per the MAP resolution for the A.Y. 2001-02 and A.Y. 2004-05. Even the ITO-TDS u/s 195 of the I.T.Act has held that there receipts are taxable as royalty and also as per article 12(3) of the

DTAA with USA, tax is deductible at 10%. As the MAP Resolution was only for A.Y. 2001-02 to 2004-05 and the revenue was accruing the assessee in A.Y. 2007-08 in pursuance of the agreement, which is effective from 01.04.2006, it should have been offered and taxed at 10% as per section 115A of the I. T. Act, 1961. Thus, the assessee has chargeable income, in excess of 1 lakh rupees, which has escaped assessment.

In view of the above, I have reasons to believe that the income chargeable to tax the escaped assessment within the meaning of section 147/148.

(Mazhar Akram)

Deputy Director of Income Tax Cir-2(2) Intl. Taxation New Delhi"

8. On 14.05.2012, the petitioner filed objections to the reasons. By order dated 22.02.2013, the objections have been disposed of. The petitioner has thus impugned the notice under Section 148 as well as the order disposing of the objections in this petition.

WP(C) 1984/2014 (Assessment Year 2008-09)

9. On 05.03.2010, the petitioner filed its return of income declaring an income of Rs. 11,17,78,295/-.

10. On 25.08.2010, notice under Section 143 (2) of the Act was issued by the respondent asking the petitioner to produce documents, accounts and any

other evidence on which the petitioner relied in support of the return of income.

11. On 22.10.2010, the petitioner filed the computation of income alongwith notes to computation disclosing the income from advertisements and distribution alongwith its tax treatment both in the notes as well as in the computation. The petitioner by letter dated 3.12.2010 furnished the India Specific Revenue Statement and by letter dated 15.12.2010 submitted a copy of the distribution and advertisement sales agreement effective April 01, 2006 with the department.

12. On consideration of the material filed during the assessment proceedings, the Assessing Officer framed the assessment on 20.12.2010 concluding and holding that 10% of the total advertisement and distribution revenue received from India was taxable in India. The Assessing Officer in the Assessment Order has specifically noted that in case for Assessment Years 2001-02 to 2004-05, the respective competent authorities of India and USA have reached a mutual agreement to avoid double taxation under Article 27 of India/USA DTAA. As per the terms of the mutual agreement, 10% of the advertisement revenues received from Indian Sources during the relevant previous years by the appellant is deemed to net profit chargeable to tax in India.

13. Subsequently for assessment years 2005-06, 2006-07 and 2007-08 (WP(C) 1784/2013), assessments were concluded following the afore-mentioned MAP resolution. Further, the Assessing Officer has noted that since the facts of the year under consideration remain the same as for assessment year 2007-08, therefore, following the agreement reached by the respective competent authorities in the earlier years, the returned income was being assessed. The advertisement revenues received were assessed at 10%.

14. On 28.03.2013, notice was issued by the respondents under Section 147/148 seeking to reopen assessment concluded under Section 143 (3). The reasons recorded for reopening as supplied to the petitioner are as under:-

> "The assessment of M/s Turner Entertainment Network Asia Inc. for the assessment year 2008-09 was completed under section 143 (3) of the Income Tax Act, 1961. In December 2010, determining the income at Rs. 11,17,78,295/- The income of the assessee from the advertisement & distribution revenue was taxed by taking only 10% of the revenue as the net profit chargeable to tax in India as per the MAP resolution for the assessment years 2001-02 and 2004-05. During the course of perusal of records, it is revealed that the MAP resolution was application only for assessment years 2001-02 & 2004-05, and the current revenue was accruing to the assessee in assessment year 2008-09 (FY 2007-08) in pursuance of the agreement, which is effective from 01.04.2006. Hence, it would have been taxed at the rate of 10% on gross basis as per the provisions of section 115A of the Income Tax Act, 1961,

> In view of the above, I have reason to believe that the income chargeable to tax has escaped has assessment within the meanings of section 147/148 of the Act, 1961.
>
> (Mazhar Akram)
> Deputy Director of Income Tax
> Circ 2(2) Intl. Taxation, New Delhi"

15. On 30.1.2014, the petitioner filed its objections against the notice seeking to reopen the assessment. By the order dated 20.02.2014, the objections have been disposed of. The petitioner in the present petition has impugned the notice under Section 147/148 seeking to re-open the assessment and the order dated 20.02.2014 disposing of the objections filed by the petitioner.

Discussion

16. Perusal of the assessment orders in both the petitions clearly show that an opinion was formed by the Assessing Officer that taxation of advertisement and distribution revenue was to be governed by MAP resolution and the competent authorities of USA and India had agreed to an attribution of 10% of the total revenue generated from the said distribution and advertisement sales agreement. The same was agreed to be treated as business income.

17. A detailed questionnaire had been issued to the petitioner, which was duly replied to. As many as 38 queries had been raised and a detailed reply alongwith all annexures and supporting documents were furnished by the petitioner in response to the queries raised. The copies of the relevant agreements, the generation of income and the tax treatment given by the petitioner to the said income was duly disclosed to the assessing officer. The material based on which the reopening has been sought to be done by the department was available before the assessing officer at the time of the framing of the assessment under Section 143. Not only was the same before the Assessing Officer, the Assessing Officer has referred to the same in the Assessment Year and taken note of the same.

18. In **Commissioner of Income Tax Versus Usha International Ltd. 348 ITR 485 (Del.) (FB)**, Full Bench of Court laid down the following propositions of law:

> (i) The expression 'change of opinion' postulates formation of opinion and then a change thereof. In the context of section 147, it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.
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> (ii) Reassessment proceedings will be invalid in case the assessment order itself records that the issue

was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of 'change of opinion'.

(iii) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations, it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer, had formed an opinion in the original assessment, whether or not he had recorded his reasons in the assessment order."

19. In **Jindal Photo Films Ltd. Versus Deputy Commissioner of Income-tax (1999) 234 ITR 170 (Del)** a division bench of this court held as under:

14. Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) is the leading authority which still holds the field. It is well-settled that while submitting to the jurisdiction of an Assessing Officer, it is the duty of the assessee to disclose all the primary facts (in contradistinction with inferential facts) which have a bearing on the liability of the income earned by the assessee being subjected to tax. It is for the Assessing Officer to draw inferences from the facts and apply the law determining the liability of the assessee. The law

does not require the assessee to state the conclusions that can reasonably be drawn from the primary facts. Once that is done and assessment order framed, the Assessing Officer cannot at a later point of time merely on forming an opinion, by giving a second thought to the primary facts disclosed by the assessee, arrive at a finding that he had committed an error in computing the taxable income of the assessee and reopen the assessment by resort to section 147. Discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment Would constitute a 'reason to believe the income has escaped assessment' within the meaning of section 147. Here also such facts which could have been discovered by the assessing authority but were not so discovered at the time of original assessment may not constitute a new information. – Phool Chand Bajrang Lal v. ITO [1993] 203 ITR 456, 477 (SC), A.L.A. Firm v. CIT [1991] 189 ITR 285, 298/ 55 Taxman 497 (SC), Indian & Eastern Newspaper Society v. CIT [1979] 119 ITR 996, 1004 (SC), ITO v. Lakshmani Mewal Das [1976] 103 ITR 437, 445 (SC), CIT V. Bhanji Lavji [1971] 79 ITR 582, 588 (SC).

15. In Kalyanji Mavji & Co. v. CIT West Bengal II [1976] 102 ITR 287 (SC), one of the points decided was that where in the original assessment, the income liable to tax had escaped assessment due to oversight, inadvertence or a mistake committed by the ITO, the assessment can be reopened. It was a decision by a Bench of two Honourable Judges. At least on two occasions, Benches of three Honourable Judges have clarified that Kalyanji Mavji & Co.'s case (supra) cannot be taken to have overridden the consistently laid down law. Where

the ITO (very often successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or more often, by a predecessor ITO), was in his opinion incorrect, judicial decisions have consistently held that this could not be done. – Indian Eastern Newspaper Society's case (supra) and A.L.A. firm's case (supra).

16. The power to reopen an assessment was conferred by the Legislature but not with the intention to enable the ITO to reopen the final decision made against the revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods – CIT v. Rao Thakur Narayan Singh [1965] 56 ITR 234 , 239(SC).

17. In Phool Chand Bajrang Lal. v. ITO [1993] 203 ITR 456 (SC), their Lordships have held while interpreting section 147 as it stood in the assessment year 1963-64:-

> ". . . An Income-tax Officer acquires jurisdiction to reopen an assessment under section 147(a) read with section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income,

profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. . . ." (p. 477)

18. Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again, different High Courts of the country have taken the view that <u>if an expenditure or a deduction was wrongly allowed while computing the taxable income of the assessee, the same could not be brought to tax by reopening the assessment merely on</u>

> account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction - Siesta Steel Construction (P.) Ltd. v. K.K. Shikare [1985] 154 ITR 547 (Bom.), Satpal Automobile Co. v. ITO [1983] 141 ITR 450 (All.), Gopal Films v. ITO [1983] 139 ITR 566 (Kar.), CWT v. Manilal C. Desai [1973] 91 ITR 135 (MP).
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> (underlining supplied)

20. On applying, the above principles to the facts of the present case and on perusal of the reasons we find that no fresh information or material has been referred to in the reasons recorded for seeking to reopen the assessment. The material that is referred to is the very same material that was already before the Assessing Officer at the time of framing of the assessment under Section 143 (3) of the Act and even the reasons record that 'from the perusal of the assessment record, it is observed that'. This clearly shows that the assessing officer has sought to re-appreciate the material that was already there at the time when the assessment was framed under Section 143 (3). Thus, as seen from above, it is clearly a case of change of opinion, which is clearly not permissible.

21. In view of the above, we are of the considered opinion that the assessing officer has merely intended to revisit the concluded assessments and it is a clear case of change of opinion, which is not permissible in law. The impugned order dated 22.02.2013 and notice dated 27.03.2012 in

WP(C) 1874/2013 and the impugned order dated 20.02.2014 and the notice dated 28.03.2013 in WP(C) 1984/2014 are set aside and the proceedings initiated pursuant thereto to are hereby quashed.

22. In view of the above, the writ petitions are allowed, leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

October 08 , 2015
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