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[2016] 76 taxmann.com 12 (Bombay)/[2016] 243 Taxman 421 (Bombay)/[2016] 388 ITR 557 (Bombay)

IT : Where assessee-project contractor took out insurance claim on loss of equipment in transit only in its capacity as contractor in terms of contract entered into with principal, said amount would not be income of assessee

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[2016] 76 taxmann.com 12 (Bombay)

HIGH COURT OF BOMBAY

Director of Income-tax (IT)-I, Mumbai

v.

Doosan Heavy Industries & Construction Co.*

M.S. SANKLECHA AND S.C. GUPTE, JJ.
IT APPEAL NO. 670 OF 2014†
OCTOBER 4, 2016

Section 28(i), read with section 148, of the Income-tax Act, 1961 - Business income - Chargeable as (Insurance and compensation) - Assessment year 2000-01 - Assessee was a Project Contractor for KPCL - KPCL awarded an offshore supply contract to one Hanjung for supply of equipment and in terms of contracts, assessee insured equipment jointly with purchaser KPCL - Equipment lost in transit - Whether since assessee was not supplier of equipment and it had taken out insurance claim only in its capacity as contractor in terms of contract entered into with KPCL, insurance claim had no connection with income of assessee - Held, yes [Paras 8 and 9] [In favour of assessee]

FACTS

- The assessee was a Project Contractor for KPCL. He was awarded a contract by Kondapalli Power Corporation Ltd. (KPCL) to set up a power plant and further, contract was awarded for supply of goods and services along with Commissioning of the plant. KPCL awarded an offshore supply contract to one Hajung for supply of equipment worth US $ 103 million. The delivery of these equipments was taken by the assessee on and behalf of KPCL. However, the aforesaid equipment was lost during its transit after the assessee took delivery from Hanjung. The assessee filed suit against the Insurance company for recovery of US $ 103 million and received the same on and behalf of KPCL.
- A re-opening notice was issued by the Assessing Officer for the subject assessment year on the grounds that the assessee had not disclosed the portion of the revenue received on account of claim from Insurance company in its return of income.
- On appeal, the Commissioner (Appeals) concluded that the assessee had taken out an insurance policy as a contractor in terms of its obligation to insure the equipments during transit. So no income arose in the hands of the assessee.
- On further appeal, the Tribunal upheld the conclusion of the Commissioner (Appeals).
- On appeal to the High Court:

HELD

- The two authorities have concurrently reached a finding of fact that the Respondent Assessee was not the supplier of the equipment and it had taken out insurance claim only in its capacity as contractor and in terms of the contract entered into between the parties. This conclusion was recorded by the Commissioner (Appeals) as well as the Tribunal upon consideration of the contract entered into between the parties and particularly with regard to transit insurance. The contract provided that the contractor, *i.e.* respondent-assessee will provide/arrange at its own cost in the joint name of the owner and contractor a comprehensive insurance cover to the project, including any damage to the goods during transit. It was in that context that the respondent-assessee had made a claim for insurance. Taking into account the concurrent findings of fact arrived at by the Commissioner (Appeals) and by the Tribunal, the view taken is a very possible view. Nothing has been shown to indicate that the finding is perverse. [Para 8]

- No doubt at the stage of a notice of reopening, the Assessing Officer does not have to 'establish' that any income has escaped assessment. He must simply be shown to have formed an opinion, which, in turn, is supported by reasons. The reasons themselves must be based on some material. A minimum requirement one would expect in the face of this scheme of things is that the material used by the Assessing Officer for forming his opinion must have some bearing or nexus with escapement of income. If not, the reopening notice would be clearly without jurisdiction. In the present case, the material used by the Assessing Officer for purportedly forming this opinion is the description of the assessee of itself as 'a supplier' of the equipment in an EPC contract, which *inter alia* required it to take off-shore delivery of the equipment from a foreign vendor and supply and install the same onshore. Mere description as a 'supplier' in a suit by the assessee against the insurance company claiming an insurance claim for loss of equipment, when the assessee insured the equipment jointly with the purchaser, can possibly have no connection with the escapement of any income arising out of sale of the equipment. Since that was the only material used by the Assessing Officer for issuance of the reopening notice, the notice is without any legal basis or justification. The authorities below were clearly, therefore, right in setting aside the notice. [Para 9]

- One more fact to be noted is that for the assessment years 1999-2000 and 2002-03, a Coordinate Bench of the Tribunal had taken a view that the respondent-assessee has not sold any equipment. In these circumstances, the order of the coordinate bench for assessment years 1999-2000 and 2002-2003 also supports the respondent's contention that they were not suppliers of the equipment and no income assessable to tax has escaped assessment. It's obligation was to insure the goods/equipment during transit done by it either on its own or through a sub-contractor. [Para 10]

- Therefore, no substantial question arose for consideration.

Tajveer Singh *for the Appellant.* **Sunil Lala** and **Ms. Nikita Panhalkar** *for the Respondent.*

ORDER

1. This appeal under Section 260-A of the Income Tax Act, 1961 ("the Act") challenges the order dated 19 July 2013 passed by the Income Tax Appellate Tribunal ("Tribunal").

2. The impugned order relates to Assessment year 2000-01.

3. Although the Appeal Memo urges various questions of law, Mr. Tejveer Singh, learned Counsel for the Appellant Revenue, urges only the following question of law for our consideration:

> "(I.) Whether on the facts and circumstances of the case and in law, the Tribunal has erred in holding that notice issued u/s.148 is bad in law and be set aside?"

4. The Respondent Assessee is a Project Contractor. It was awarded a contract by Kondapalli Power Corporation Ltd.(KPCL), Andhra Pradesh to set up a power plant on a turn-key basis. Further, KPCL had awarded an onshore contract to the Respondent-Assessee for supply of goods and services along with the commissioning of the plant. KPCL also awarded an offshore supply contract to Hanjung DCM Co. Ltd. (Hanjung) for supply of equipment valued at US$ 103 million. The equipment valued at US$ 103 million was supplied by Hanjung and taken delivery of outside India by the Respondent Assessee for and on behalf of KPCL. The aforesaid equipment was lost during its transit after the Respondent-Assessee took delivery from Hanjung. As the insurance claim was not honoured, the Respondent- Assessee filed a suit

against the Insurance Company for recovery of US$ 103 million. The regular assessment proceeding was completed for the subject Assessment Year under Section 143(3) of the Act on 26 March 2003.

5. On 26 March 2004, a reopening notice was issued by the Assessing Officer for the subject Assessment Year and the reasons recorded in support thereof were as under :—

> "26.03.2004 Reasons to believe that income chargeable to tax has escaped assessment u/s. 147 of the Income Tax Act, 1961
>
> 1. The Original return of income was filed by the assessee on 30.11.2000 showing total income of Rs.46,350/-. Order u/s.143(3) of the Income Tax Act, 1961 passed on 26.03.2004 assessing income under MAT at Rs.6,38,062/-.
>
> 2. During the course of assessment proceedings in A.Y.2001-02 it was noticed that there was another contract titled "Offshore Equipment Supply Contract" also dated 1st February, 1998 entered into between M/s. Lanco Kondapalli Power Private Limited and M/s. Hanjung DCM Co. Ltd. (henceforth referred to as Hanjung) having its registered office at 64, Shinchon-dong, Changwon, Kyongsangam-Do, Korea. This contract was of USD 103 millions. Although this contract is apparently with different person it is seen that a recovery suit of insurance for loss of equipment was filed on behalf of the assessee.
>
> The assessee has not disclosed the portion of the revenue amounting to USD 103 million received on account of the same from India in its return of income for this assessment year.
>
> 2.1 Thus I have reason to believe that income of USD 51.5 million chargeable to tax has escaped assessment for A.Y. 2000-01.
>
> 3. Issue notice u/s. 148 of the Income Tax Act, 1961."

6. The Respondent-Assessee during the Assessment proceedings consequent to reopening notice dated 26 March 2004 submitted that the same is without jurisdiction and, therefore, must be quashed. Nevertheless, the Assessing Officer proceeded on the basis that in the suit filed by the Respondent Assessee in the Secunderabad Court against the Insurance Company it had claimed to have supplied equipment valued at US$ 103 million which was lost. The Assessing Officer placed reliance on para 5 of the plaint, which reads as under :—

> "5. MAIN SUPPLY CONTRACT
>
> Under the terms of contract dated 15 February 1998 ("Supply Contract") between Plaintiff and LKPL, Plaintiff agreed to supply equipment, materials and design for the construction of LKPL's combined cycle power plant at Kondapalli IDA, Andhra Pradesh in India (the "Kondapalli Project"). The value of this Supply Contract was about USD 103 million."

It was on the aforesaid basis that the Assessing Officer sought to justify his reasons to believe that income chargeable to tax has escaped assessment and, therefore, proceeded to hold even on merits against the Respondent Assessee by an order dated 31 March 2005.

7. On appeal, the Commissioner of Income Tax (Appeals) (CIT(A)) examined all the facts. These facts included not only the suit as filed but also the terms of the contract and scope of work, in particular the responsibility of the parties thereunder. Based on this examination, the CIT(A) concluded that in terms of its obligation to insure the goods/equipment during transit, the appellant had taken out an Insurance policy as a contractor with KPCL as the principal. Based on this policy coupled with the plaint as filed, the CIT(A) observed that the plaint has to be read as a whole. So read, the nature of the relationship between the parties is described in paragraph 4 thereof, which, as extracted in the order, reads as under :—

> "4. A brief reference to the parties involved in relation to the subject matter of this suit is as follows :
>
> *a.* Lanco Kondapalli Power Pvt. Limited (formerly a public limited company) ('LKPL') is the owner of the Kondapalli Power Project.
>
> *b.* Plaintiff is the EPC contractor for the Kondapalli Power Project, and an assured under the policy issued by Defendant.

i. Encon Services Limited ('Encon') is the sub-contractor of Plaintiff for transportation of the GT & GTG from Kakinada to Machilipatnam.

j. Seaways Shipping Limited ('SSL') was appointed by Encon for inland transportation of GT & GTG from Kakinada to Machilipatnam, and was the character of 'Jala Hamsa' and 'Amethi-I'."

n. Aistom are the suppliers of the GT & GTC, from whom Plaintiff arranged to procure the replacement equipment for ensuring completion of the project."

On the aforesaid basis, the CIT(A) held that the word "supply" has to be read in para-5 of the plaint as only referring to its responsibility for setting up of the power project under the Onshore Contract. The CIT(A) held that the assessee did not at any time declare himself as the owner of the goods but rather declared itself as an EPC contractor for KPCL; and that the statement in para 5 of the plaint had to be appreciated in the context of the overall contract for the supply of equipment, Onshore Civil and Construction Service Contract, responsibility for transportation, etc. The CIT(A) came to the conclusion that on the basis of the words used in para 5 of the plaint, it cannot be established that the assessee had supplied (as owner) the equipment, material and design, and that the word "supply" only refers to the responsibilities of the assessee for setting up of the power project as per the onshore contract. The reasons as recorded do not therefore suggest any link between the material found by him and his conclusion that there was reason to believe that the income chargeable has escaped assessment. He, therefore, concluded that there was no reason to form a belief that income chargeable to tax has escaped assessment. On appeal by the Revenue, the Tribunal, by the impugned order, confirmed the finding of the CIT(A).

8. We find that the two authorities have concurrently reached a finding of fact that the Respondent Assessee was not the supplier of the equipment and it had taken out insurance claim only in its capacity as contractor and in terms of the contract entered into between the parties. This conclusion was recorded by the CIT(A) as well as the Tribunal upon consideration of the contract entered into between the parties and particularly with regard to transit insurance. The contract provided that the contractor, i.e. Respondent Assessee will provide/arrange at its own cost in the joint name of the owner and contractor a comprehensive insurance cover to the project, including any damage to the goods during transit. It was in that context that the Respondent Assessee had made a claim for insurance. Taking into account the concurrent findings of fact arrived at by the CIT(A) and by the Tribunal, the view taken is a very possible view. Nothing has been shown to indicate that the finding is perverse.

9. No doubt at the stage of a notice of reopening, the Assessing Officer does not have to "establish" that any income has escaped assessment. He must simply be shown to have formed an opinion, which, in turn, is supported by reasons. The reasons themselves must be based on some material. A minimum requirement one would expect in the face of this scheme of things is that the material used by the Assessing Officer for forming his opinion must have some bearing or nexus with escapement of income. If not, the reopening notice would be clearly without jurisdiction. In the present case, the material used by the Assessing Officer for purportedly forming this opinion is the description of the assessee of itself as "a supplier" of the equipment in an EPC contract, which *inter alia* required it to take off-shore delivery of the equipment from a foreign vendor and supply and install the same onshore. Mere description as a "supplier" in a suit by the assessee against the insurance company claiming an insurance claim for loss of equipment, when the assessee insured the equipment jointly with the purchaser, can possibly have no connection with the escapement of any income arising out of sale of the equipment. Since that was the only material used by the Assessing Officer for issuance of the reopening notice, the notice is without any legal basis or justification. The authorities below were clearly, therefore, right in setting aside the notice.

10. One more fact to be noted is that for the Assessment Year 1999-2000 and 2002-03, a coordinate bench of the Tribunal had taken a view that the Respondent Assessee has not sold any equipment. In these circumstances, the order of the coordinate bench for Assessment Years 1999-2000 and 2002-2003 also supports the Respondent's contention that they were not suppliers of the equipment and no income assessable to tax has escaped assessment. It's obligation was to insure the goods/equipment during transit done by it either on its own or through a sub-contractor.

11. In the above view, the question of law, as proposed, does not give rise to any substantial question of law. Thus, not entertained.

12. Therefore, the appeal is dismissed. No order as to costs.

SB

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*In favour of assessee.

†Arising out of order of ITAT, dated 19-7-2013.