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### SUPREME COURT QUASHES (WITH CAVEAT) REASSESSMENT INITIATED ON NDTV IN INR 405 CRORE 'UNACCOUNTED MONEY' CASE

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#### Introduction

In a recent ruling in *New Delhi Television Limited v DCIT* (Civil Appeal No. 1008 Of 2020) (Ruling), the Hon'ble Supreme Court (Supreme Court) has quashed the reassessment proceedings initiated on New Delhi Television Limited (Taxpayer). The reopening was initiated beyond 4 years for alleged INR 405.09 crore 'unaccounted money' case introduced to the Taxpayer's subsidiary based in United Kingdom (UK) named NDTV Network Plc. (UK Sub) by way of issuance of step-up coupon bonds during financial year (FY) 2007-08 [relevant for assessment year (AY) 2008-09], for which the Taxpayer agreed to furnish a corporate guarantee. In doing so, the Supreme Court ruled that there was no failure on the part of the Taxpayer to disclose all material facts necessary for the purpose of making assessment and thus, the reassessment proceedings were in excess of jurisdiction.

#### Background

Section 148 of the Income-tax Act, 1961 (IT Act) provides power to the Assessing Officer to assess or reassess Taxpayer's income if the Assessing Officer believes that such income chargeable to tax has escaped assessment by issue of a reopening notice (Notice). The IT Act also provides the following timelines within which such Notice can be issued as under:

- 4 years from the end of the relevant AY if the income escaped does not exceed INR 1 Lacs;
- 6 years from the end of the relevant AY if the income escaped exceeds INR 1 Lacs; (Note: It has been further provided that if an original assessment or reassessment has been earlier passed in the case of any taxpayer, assessing officer cannot reopen such assessment or reassessment after the expiry of 4 years from end of relevant AY unless income chargeable to tax has escaped assessment due to failure on taxpayer's part to file the return under section 139 or 142 or 148 of the IT Act or truly and fully disclosing all the material facts necessary for making assessment for that AY. However, such requirement is not required to be met if the income escapement relates to any foreign assets.) and
- 16 years from the end of the relevant AY if the income escaped relates to any foreign assets

In this case, during FY 2007-08, the Taxpayer's UK Sub issued step-up coupon bonds amounting to US \$ 100 million for which the Taxpayer agreed to furnish a corporate

guarantee. The Taxpayer's case was selected for scrutiny during FY 2007-08 and an original assessment order was passed. While passing the original assessment order, the Assessing Officer observed that UK Sub had virtually no financial worth. The Assessing Officer further held that UK Sub could not have raised such a huge amount without having this assurance from the Taxpayer. Though the Taxpayer had never actually issued a guarantee, the Assessing Officer made a transfer pricing adjustment in the hands of Taxpayer by imposing a guarantee fee. Pertinently, the Assessing Officer, however, did not doubt the validity of the transaction.

Subsequently, the Assessing Officer served Notice to the Taxpayer on 31 March 2015 (ie within 6 years from the end of relevant AY 2008-09) wherein it was stated that he had 'reason to believe' that income chargeable to tax for FY 2007-08 (relevant for AY 2008-09) has escaped assessment. Thereafter, at the request of the Taxpayer seeking reasons for reopening the assessment, such reasons were provided on 04 August 2015. The reopening was mainly based on the observations of the Dispute Resolution Panel (DRP) for subsequent AY which held that Taxpayer's transaction with its subsidiary companies based in Netherlands were 'sham' and 'bogus' transaction and that these transactions were done with a view to get the undisclosed income for which no tax was paid, back to India through circuitous round tripping. The Assessing Officer also observed that US Sub had a capital of only 40 Lakhs, no business activities were carried out by it in UK except a postal address. The Assessing Officer was thus of the opinion that it was unnatural for anyone to make such a huge investment in a virtually non-functioning company. He thus inferred that it was Taxpayer's own funds introduced in UK Sub in the garb of the impugned bonds. The Assessing Officer also relied upon complaints received from minority shareholders in which it was alleged that the money introduced in UK Sub was shifted to another subsidiary of the Taxpayer in Mauritius from where it was taken to a subsidiary of the Taxpayer in Mumbai and finally to the Taxpayer. Further observing that UK Sub itself was placed under liquidation on 28 March 2011, the Assessing Officer opined that there were reasons to believe that the funds received by UK Sub were the funds of the Taxpayer under a 'sham' transaction and that the amount of INR 405.09 crores introduced into the books of UK Sub through the transaction involving the step-up coupon convertible bonds pertains to the Taxpayer.

During the reassessment proceedings, the Taxpayer objected the reopening and argued that the reassessment proceedings have been initiated merely on the basis of a 'change in opinion' and there was no 'reason to believe'. It was also submitted that the transaction was treated as genuine by the Assessing Officer during original assessment proceedings by levying only the guarantee fees. Since Notice was issued after the limitation period of 4 years and as there was no failure on the Taxpayer's part to disclose fully and truly all material facts necessary to make an assessment, reopening was not valid.

The Assessing Officer passed order dated 23 November 2015 dismissing the objections (Rejection Order) raised by the Taxpayer on the reopening. Notably, in the said Rejection Order, the Assessing Officer also stated that as UK Sub was a foreign entity, the extended limitation period of 16 years would be applicable for issuing the Notice.

The Taxpayer challenged the validity of such reopening by way of filing the writ petition before the Hon'ble Delhi High Court (High Court) which was dismissed. Aggrieved by the decision of the Hon'ble High Court, the Taxpayer filed appeal before the Hon'ble Supreme Court.

### Supreme Court Ruling

The Supreme Court held as follows with respect to the validity of reopening proceedings in the case of the Taxpayer:

➤ ***Re Whether the Assessing Officer had valid 'reason to believe' that undisclosed income had escaped assessment***

The Supreme Court relying on the co-ordinate bench decision in M/s Phool Chand Bajrang Lal and Another v ITO (1993) 4 SCC 77 ruled that information

which comes to the knowledge of the Assessing Officer during proceedings from subsequent years can definitely form tangible material to reopen an assessment. The Supreme Court thus held that material disclosed in the assessment proceedings of subsequent years as well as material on record by the minority shareholders form the basis for reopening the assessment. The Supreme Court also opined that at the stage of issuance of Notice, the assessing officer is only required to form a *prima facie* view. The Supreme Court thus held that the Assessing Officer had reasons to believe that income had escaped assessment in Taxpayer's case.

➤ **Re Whether there was failure on the part of the Taxpayer to fully and truly disclose material facts relevant for making assessment**

The Supreme Court observed that there was no failure on the part of the Taxpayer to fully and truly disclose primary material facts necessary for making assessment. In this regard, the Supreme Court observed as under:

- Factum of the issuance of convertible bonds and their redemption was given. The Taxpayer had also made a disclosure about having agreed to stand guarantee for the transaction made by UK Sub;
- The fact that the bonds were discounted at a lower rate was also disclosed before the assessment was finalised. The transaction was accepted by the Assessing Officer, genuineness of the transaction was not in doubt and he was of the view that the Taxpayer was liable to receive only guarantee fees for which necessary transfer pricing adjustments were made to the Taxpayer's income;
- Communication dated 08 April 2011 sent by UK Sub to Deputy Director of Income-tax (Investigation), wherein name of all the bondholders alongwith their names, address, number of bonds alongwith total consideration were submitted. This details also formed part of the Taxpayer's subsidiaries in their assessment orders dated 03 August 2012 in the case of NDTV Labs Ltd and NDTV lifestyle Ltd wherein the same Assessing Officer was involved. Thus, entire material was available with the Assessing Officer before passing the original assessment order.
- Relying on its Constitution bench in *Calcutta Discount Co. Ltd v ITO* AIR 1961 SC 372, the Supreme Court ruled that Taxpayer was only required to disclose fully and truly material facts that are 'primary' facts. Non-disclosure of other facts which can be termed as 'secondary' facts was not necessary.

The Supreme Court also rejected plea of the tax department that the Taxpayer had not disclosed details of the subsidiaries with final accounts, balance sheets and profit and loss account for the relevant period and hence amounted to non-disclosure. To this, the Supreme Court observed that the Taxpayer had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets etc and thus it cannot be said that the Taxpayer was bound to disclose this details to the Assessing Officer.

The Supreme Court further noted that while the tax department was arguing that the Taxpayer was guilty of non-disclosure of material facts, however, before the High Court the tax department argued that requirement of non-disclosure of material fact was not warranted as the income escapement related to foreign assets. The Supreme Court accordingly ruled that the tax department cannot now turn around and urge that the Taxpayer was guilty of non-disclosure of facts. Supreme Court further remarked that revenue could not be permitted to 'blow hot and cold' at the same time.

➤ **Re Whether impugned Notice satisfied the criteria for invoking extended limitation period of 16 years since income was derived from a foreign entity**

The Supreme Court observed that it is an uncontroverted fact that in the Notice dated 31 March 2015 there was no mention of any foreign entity and also the reasons to reopening provided to the Taxpayer never indicated that the Assessing Officer was intending to apply the extended limitation period of 16 years and it was only in the Rejection Order for the first time reference was by the Assessing Officer seeking to apply extended limitation period of 16 years for reopening the assessment. The Supreme Court thus ruled that it was not a fair and proper procedure and remarked that the Taxpayer should have been informed that the Assessing Officer was intending to apply extended limitation period of 16 years. The Supreme Court further stated that the Taxpayer must be put to notice of all the provisions which the Assessing Officer relies upon. Thus, the Supreme Court held that the Notice did not meet the criteria for invoking the extended limitation period of 16 years.

Notably, in its concluding remarks, the Supreme Court clarified that the Assessing Officer may issue a fresh Notice by taking benefit of the extended period of limitation of 16 years, if otherwise permissible under law.

**Comments**

This Ruling by the Supreme Court is quite interesting inasmuch as the issue as to whether the taxpayer has failed to disclose fully and truly material facts relevant for making assessment is quite subjective and is also a prerequisite for the assessing officer to assume jurisdiction for cases where Notice is issued after the expiry of 4 years from end of relevant AY. The Supreme Court also emphasised that the information which comes in the possession of assessing officer during assessment of subsequent years or so can also form a valid 'reason to believe' for reopening an assessment. It is worth noting that the Ruling also explains that the taxpayer is only required to disclose the 'primary' facts that are relevant for making assessment and is not required to disclose other facts that can be termed as 'secondary' facts. Having said so, at the same time, Supreme Court has provided leeway to the tax department to again issue Notice on the Taxpayer by taking benefit of the extended period of limitation of 16 years and thus, it would be interesting to see as to how such Notice is dealt with by the Taxpayer.

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