

26 February 2016

## Reopening of intimation u/s 143(1) without proper 'reason to believe'

### Background

The Bombay High Court, in the case of Khubchandani Healthparks Pvt. Ltd.<sup>1</sup> ("the taxpayer"), dealt with a case of reopening of an assessment earlier completed by way of an intimation u/s 143(1) of the Act. The Bombay High Court, after considering the decision of the Supreme Court in the case of Zuari Estate Development and Investment Co. Ltd.<sup>2</sup>, held that the taxpayer is open to challenge a notice issued u/s 148 as being 'without jurisdiction' for absence of reason to believe even in case where the assessment has been completed earlier by Intimation u/s 143(1) of the Act

### Facts of the case

- The taxpayer had received share premium in the relevant year (AY 2010-11) which was more than the intrinsic value of the shares.
- The assessment was completed u/s 143(1) of the Act without making any inquiries.
- Hence, to ascertain the nature and the justification of share premium the assessing officer issued notice u/s 148 to reopen the assessment stating that he had reason to believe that the share premium over and above the intrinsic value of the shares had escaped assessment.

<sup>1</sup> Khubchandani Health Parks Pvt Ltd vs ITO (Writ Petition No 3027 of 2015)

### Taxpayer's contentions

- The taxpayer challenged the validity of the notice u/s 148 by way of a Writ Petition in the Bombay High Court.
- The taxpayer's contended that the notice does not contain reasonable belief that income chargeable to tax has escaped assessment as:
  - Notice does not quantify the extent to which the share premium was in excess of the intrinsic value
  - The basis on which it was believed that share premium was in excess of the intrinsic value
  - Notice did not dispute that the amount received was in the nature of share premium
- On merits, reliance was placed on the decision of the Bombay High Court in the case of Vodafone India Services Limited<sup>3</sup>, wherein it was held that share premium being a capital amount cannot be subjected to tax.

### Department's contentions

- The department defended the reopening on the basis that the assessment was completed u/s 143(1) and hence the AO is not required to have reason to believe that income chargeable to tax has escaped assessment. For this proposition, reliance was placed on the Supreme Court's decision on the case of Zuari Estate Development and Investment Co. Ltd.

<sup>2</sup> DCIT vs Zuari Estate Development & Investment Co Ltd (373 ITR 661) (SC)

<sup>3</sup> Vodafone India Services Ltd. vs CIT (368 ITR 01) (Bom)

## High Court's ruling

- The Supreme Court in the case of Zuari Estate Development and Investment Co. Ltd. has not dealt with the issue that the assessing officer is required to have 'reason to believe that income chargeable to tax has escapes assessment' at the time of reopening the assessment.
  - The law on this point has been expressly laid down by the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd.<sup>4</sup> and the same would continue to apply and be binding.
  - Even in cases where assessment is completed by Intimation under Section 143(1) of the Act, it is essential that the assessing office have 'reason to believe that income has escaped assessment' to issue a reopening notice.
- The decision of the Bombay High Court differentiating the order of the Supreme Court is a welcome decision and would place more responsibility on the department at the time of reopening of assessments.

## Our comments

- There has been significant debate on the reopening of assessments made u/s 143(1) without conducting any scrutiny. As the law stands today, section 148 does not differentiate between a scrutiny assessment made u/s 143(3) and assessment completed by way of an intimation u/s 143(1).
- The decision of the Supreme Court in the case of Zuari Estate Development and Investment Co. Ltd. has set aside the ruling of the Bombay High Court on the ground that the High Court Order has not dealt with the main issue of 'change of opinion' at the time of disposing of the appeal. As the issue of having a valid 'reason to believe' was not expressly dealt with by the Supreme Court, the decision of Zuari Estate Development and Investment Co. Ltd. should not be read out of context to infer that the conditions precedent to reopening can be overlooked for assessments made u/s 143(1).

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<sup>4</sup> ACIT vs Rajesh Jhaveri Stock Brokers Pvt Ltd (291 ITR 500) (SC)