

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

% Judgment reserved on : 17th July, 2013
Judgment pronounced on: , 2013

+ **WP(C) 1004/2013**

MOSER BAER INDIA LTD. Petitioner
Through Mr. Ajay Vohra, Ms. Kavita
Jha and Mr. Vaibhav
Kulkarni, Advocates.
versus

DEPUTY COMMISSIONER OF INCOME-TAX AND ANR.
..... Respondents
Through: Mr. Kamal Sawhney,
Advocate.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SANJEEV SACHDEVA

SANJEEV SACHDEVA, J.

1. The petitioner by way of the present petition has challenged the order dated 01.02.2013, passed by the Deputy Commissioner of Income Tax and the issuance of notice dated 04.05.2011 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and the proceedings initiated pursuant thereto.
2. Assessment year in issue is 2005-06.
3. The petitioner is a company engaged in the business of

manufacture and sale of optical and magnetic storage media projects i.e. CD-Rom, Floppy Disks, etc. The petitioner during the relevant financial year pertaining to the Assessment Year 2005-06 had two units one at A-164, Sector-80, Noida and the other at 66, Udyog Vihar, Greater Noida. Both the units were eligible for deduction under Section 10B of the Act.

4. On 31.10.2005, the petitioner filed its return of income for the Assessment Year 2005-06 declaring a loss of Rs.1,65,43,08,282/- under the normal provisions of the Act and book profit under Section 115JB of the Act at a loss of Rs.40,97,92,770/-. The petitioner claimed deduction under Section 10B of Rs.29,08,16,451 in respect of the profit derived from the unit at A-164, Sector 80, Noida. No such deduction was claimed in respect of the unit at 66, Udyog Vihar, Greater Noida.
5. Pursuant to the filing of the return, the Assessing Officer issued various questionnaires on 31.10.2007, 01.10.2008 and 14.11.2008 seeking details/ explanations from the assessee. The questionnaires

among other details sought explanation from the assessee qua the claim under Section 10A/10B of the Act as well as claim of deduction of deferred revenue expenditure for technical know-how fee. The petitioner/assessee responded to the questionnaires and submitted the requisite information/explanation.

6. The assessment of the petitioner was completed under Section 143(3) of the Act and the claim of the petitioner under Section 10B and deduction of deferred revenue expenditure for technical know-how fee were accepted. The Assessing Officer completed the assessment at an income of Rs.95,47,60,410/- under the normal provisions making following additions and disallowances:-

- a. Addition of Rs.239,28,55,948 on account of adjustment in the arm's length price of the international transaction entered into by the Petitioner in the relevant financial year.
- b. Restricting the claim of deduction under section 10B of the Act at Rs.25,42,43,918 as against Rs.29,08,16,451 claimed by the Petitioner.
- c. Disallowing royalty of Rs.11,50,83,837 being 25% of Rs.46,03,35,350 as

against actual expenditure on royalty of Rs.37,73,17,928 claimed by the Petitioner in the P&L account.

d. Disallowing expenses of Rs.9,33,27,335 alleging the same to be incurred for earning exempt dividend income invoking provisions of section 14A read with Rule 8D of the Income-tax Rules, 1962.

7. On 27.05.2009, the Assessing Officer passed an order under Section 154 of the Act rectifying the Assessment Order dated 31.12.2008 and reduced the claim of deduction under Section 10B of the Act to Rs.25,24,21,751/- as against deduction of Rs.25,42,43,918/- allowed in the earlier assessment order.
8. On 04.05.2011, the Deputy Commissioner of Income Tax issued a notice to the petitioner under Section 148 proposing to re-assess the income of the petitioner. The reasons to believe recorded for the said notice are as under:-

“Return of income was filed on 30.10.2005 declaring loss of Rs.1,65,43,08,282/-. Assessment under Section 143(3) was completed on 31.12.2008 at Rs.95,47,60,410/-

subsequently, rectified under Section 154 on 27.05.2009 at an income of Rs.87,31,23,193/.

Perusal of assessment record revealed that the assessee claimed from its total income the loss/depreciation of Rs.1,44,81,23,306/- pertaining to Greater Noida unit (100% E.O.U.) which was eligible for deduction under Section 10B. As the deduction under Section 10B do not form part of total income, the loss (being negative deduction) should also have been excluded from the total income. The mistake resulted in underassessment of income of Rs.144,81,23,306/- involving tax effect of Rs.76,83,61,555/-. Further, the assessee was allowed, in computation of income, a deduction of Rs.1,36,90,221 on account of deferred revenue expenditure as one-sixth of Rs.8,21,41,326/- (sum of Rs.1,80,05,185/- & Rs.6,41,36,441/-, being expenditure on technical know-how pertaining to financial years 2001-02 and 2002-03. Out of the above, Rs.19,29,127/- & Rs.25,72,170/- were debited to P&L a/c in F.Y. 2001-02 and 2002-03 itself as Miscellaneous Expenditure written off. Out of the remaining Misc. expenditure of Rs.7,76,40,029/-, Rs.5,20,83,202/- was capitalized and Rs.2,55,56,827/- was written off during financial year 2003-04. Hence, no balance remained out of the above expenditure to be written off. Thus, the deduction of Rs.1,36,90,211/- was inadmissible and should have been disallowed. This mistake resulted in underassessment of income of

Rs.1,36,90,221/- involving tax effect of Rs.72,63,911. The failure on the part of the assessee to disclose true and correct particulars of its income.

Thus, I have reason to believe that income of assessee to the extent of Rs.1,46,18,527/- has escaped assessment by way of not declaring true and correct income. Thus, there is failure on the part of the assessee to fully and truly disclose true particulars of its income and the same is required to be reassessed and taxed which requires reopening of assessment by initiation of proceedings under Section 147 by issue of notice under Section 148. Therefore, notice under Section 148 is hereby issued. The notice is issued after obtaining approval from CIT-II, New Delhi, vide her letter NO. F.No. CIT-II-Delhi/Notice u/s 148/2011-12/292 dated 29.04.2011.”

9. The petitioner filed objections to the issuance of the said notice, inter-alia, on the grounds that the issuance of notice was barred by limitation under proviso to Section 147 as the petitioner had made full and true disclosure of material facts. Notice under Section 148 seeking to reopen the assessment was based on change of opinion as no fresh information or tangible material had come to the knowledge of the Assessing Officer.

10. Vide the impugned order dated 01.02.2013, the Deputy Commissioner of Income Tax disposed of the objections raised by the petitioner by rejecting on the grounds raised by the petitioner. Aggrieved by the disposal of the objections vide order dated 01.02.2013 and the issuance of notice under Section 148 proposing to reopen the assessment, the petitioner has filed the present petition.
11. In terms of the proviso to Section 147, any reassessment sought to be done after the lapse of a period of four years from the end of the relevant assessment year, is permissible only if:-
- “.....any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139..... or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”
12. The relevant assessment year in the present case is 2005-06 and in terms of proviso to Section 147, the reassessment notice issued after the expiry of four years from the end of the assessment year has to satisfy the requirements of the said proviso i.e. the assessee has

failed to disclose fully and truly all material facts necessary for his assessment for that year. In the present case, the notice seeking to reopen the assessment has been issued on 04.05.2011, which is clearly beyond the stipulated period of four years.

13. The contention of the petitioner is that there is full and true disclosure of all material facts and as such, the notice seeking to reopen the assessment was barred by limitation and that the reassessment proceedings were merely initiated for the purpose of reappraising the material on record and to change the opinion formed earlier.
14. The original assessment order passed by the Assessing Officer was under Section 143(3) of the Act. The reasons to believe recorded prior to the issuance of notice dated 04.05.2011, pertain to the following:-
 - (i) Deduction under Section 10B of the Act;
 - (ii) Deduction on account of deferred revenue expenditure being expenditure on technical know-how.
15. With respect to the deductions under Section 10B, the record reveals that the petitioner alongwith the return of

income had enclosed the profit and loss account of both the units as well as the computation of deduction under Section 10B in respect of both the units. In the notes filed to the computation of income, the petitioner had specifically disclosed that no deduction was being claimed in respect of the unit at Greater Noida on account of loss in the said unit and had stated as under :-

"1. Claim of benefit u/s 10B of the Income-tax Act, 1961 ('the Act')

The assessee company is engaged in the business of manufacturing of compact disks, magnetic disks and other optical storage media devices, and is eligible to claim deduction u/s 10B of the Act. Accordingly, the assessee has claimed benefit u/s 10B of the Act in respect of the following units:-

- (a) A-164, Sector – 80, Noida – Phase II – The said unit is registered as a 100% Export Oriented Unit (on May 19, 1998) and is accordingly eligible for claiming tax-holiday benefits u/s 10B of the Act. The said unit had commenced commercial production w.e.f March 1, 2000. The required Report in Form 56G in respect of the said benefit claimed u/s 10B of the Act is enclosed.*
- (b) 66, Udyog Vihar, Greater Noida – The said unit is registered as a 100%**

Export Oriented Unit (on November 28, 2001) and is accordingly eligible for claiming tax-holiday benefits u/s 10B of the Act. No deduction u/s 10B of the Act has been claimed in view of a loss situation. The required Report in Form 56G in respect of the said unit is enclosed.

For computing the profits of the above undertaking, certain expenses/income debited/credited in the head office have been allocated to such units in the ratio of turnover.”

16. Vide annexures dated 31.10.2007, 01.10.2008 and 14.11.2008, specific queries were raised by the Assessing Officer with regard to the units eligible for deduction under Section 10B, which queries were replied to and detailed explanations rendered. After appreciating the response of the petitioner on the said issue of deductions under Section 10B of the Act, in respect of the respective units, the Assessing Officer allowed the deduction at Rs.25,42,43,918/- as against the deduction claimed of Rs.29,08,16,451/-. It is pertinent to note that even the allowed deduction of Rs.25,45,43,918 was subsequently rectified under Section 154 of the Act to Rs.25,24,21,751/-. The original assessment disallowing

the entire deduction claimed by the petitioner under Section 10B and the subsequent rectification on the same by the Assessing Officer clearly establishes that the Assessing Officer had formed a definite opinion on the claim of benefit under Section 10B as a deduction and also the fact that the unit at Greater Noida of the petitioner was eligible for such deduction. It further establishes that having formed an opinion, the Assessing Officer now seeks to change the opinion and has thus sought to reopen the assessment.

17. With regard to the reasons to believe recorded in respect of the deferred revenue expenditure, it is pertinent to note that the petitioner in Note No.2 attached with the return of income explained as under:-

“3. Deferred Revenue Expenditure Written Off

The balance in Miscellaneous expenditure written off as per annual accounts of March 31, 20013 was Rs.77,640,029 (sum of Rs.16,076,058 and Rs.61,563,971, being expenditure incurred on technical know-how i.e. Rs.18,005,185 and Rs.64,136,141 less Rs.1,929,127 and Rs.2,572,170 debited in profit and loss account in FY 2001-02

and FY 2002-03 respectively). Out of the above, Rs.52,083,202, being technical know-how has been capitalized in the books of account by adjusting the opening balance and remaining Rs.25,556,827 has been written off during the FY 2003-04.

However, as the Company would deserve the benefit from technical know-how for years to come, by relying on the Supreme Court judgment rendered in Madras Industrial Investment Corporation Ltd. Vs. CIT (225 ITR 802), the Company has deferred the cost of acquisition of technical know-how for a period of six years while computing taxable income. Accordingly, a deduction amounting Rs.13,690,221 (sum of Rs.1/6th of Rs.18,005,185 and Rs.64,136,141) has been claimed in the previous year relevant to the assessment year 2007-08.”

18. During the original assessment proceedings under Section 143(3) of the Act, the Assessing Officer had specifically in the questionnaire dated 31.10.2007 raised the query regarding deduction of Rs.1,36,90,221/- being 1/6th share of the payment of technical know-how fee aggregating to Rs.8,21,326 pertaining to the previous years 2001-02 and 2002-03. Vide letter dated 21.11.2008, the petitioner had submitted

details/explanation and also submitted worksheets for arriving at the said deduction and treatment of the deferred revenue expenditure relating to the technical know-how fee.

19. The fact that the petitioner disclosed the deduction of deferred revenue expenditure on account of payment of technical know-how fee in the notes appended to the return of income and that a specific query was raised and responded to by the petitioner demonstrates that the petitioner has made true and full disclosure of all material facts. The original assessment framed after receiving the response to the questionnaire specifically dealing with the said issue further establishes that the Assessing Officer had formed an opinion on the said claim of the petitioner.
20. The reasons to believe recorded by the Deputy Collector, Commissioner of Income Tax do not suggest that any fresh or further tangible material had come to the knowledge of the Assessing Officer whereby a reasonable bonafide belief could or was formed that

income had escaped assessment on account of failure of the assessee to disclose truly and fully the material facts.

21. There appears to be an intensive examination in the first instance in respect of the said issues which are now sought to be made the basis for reopening of the assessment. It was necessary for the Assessing Officer to indicate specifically as to what other material or objective facts subsequently came to the knowledge of the Assessing Officer whereby a subjective opinion could be prima facie formed that the assessee had failed to disclose truly and fully the material facts. There has to be a tangible material existing on record for the reasons to believe which should have a direct nexus to the formation of such belief.

22. In the case of the petitioner, with respect to the Assessment Year 2004-05, a similar issue with regard to the claim of deduction under Section 10B was raised by issuance of a notice under Section 148 by the Deputy Commissioner of Income Tax. The petitioner had filed a

writ petition – W.P.(C) 7677/2011, which was allowed vide judgment dated 06.12.2012 and the notice and the proceedings consequent thereto were quashed. The Court while allowing the petition held as under:-

“17. In the present case, the original return of the assessee was subjected to scrutiny assessment, under Section 143 (3). The assessee was apparently closely questioned on various aspects, including its claim for treatment of the three units, under Sections 10-A/10B of the Act. In response to a query raised by Respondent No.1, the Petitioner by letter dated 21.02.2005 furnished information regarding the units eligible for deduction u/s 10A/10B. In the reply the Petitioner listed all three units as units eligible for claiming deduction. The issue of deduction under Sections 10A/10B was specifically examined by the Assessing Officer during the original assessment. Furthermore, Form 56F/56G was also submitted along-with the return of income. In the forms the Petitioner had specifically claimed deduction u/s 10A/10B in respect of profits of two units whereas NIL deduction for the third unit. Furthermore, in a Note (dated 12.01.2005), appended to the return of income, the writ petitioner specifically disclosed at Point 1(c) that, the claim for benefit under Sections 10A/10B of the Act, in respect of 66, Udyog Vihar, Greater Noida- was eligible for claiming tax- holiday benefits under Section 10B of the Act. No deduction under Section 10B of the Act was claimed in view of a loss situation. The Report in Form 56G for the said unit to was enclosed. On 27.12.2006 the Petitioner

filed an approval letter from the competent authority regarding eligibility of the units for deduction u/s 10A/10B; approval letters regarding all three units were submitted.

18. In the above background of facts, when there was intensive examination in the first instance in respect of the issue, which was the basis for re-opening of assessment, it was necessary for the AO to indicate, what other material, or objective facts, constituted reasons to believe that the assessee had failed to disclose a material fact, necessitating reassessment proceedings. That is precisely the "tangible material" which have to exist on the record for the "reasons" (to believe" bearing a "live link with the formation of the belief" as spelt out in Kelvinator. When the assessment is completed, as in the present instance, under Section 143 (3), after the AO goes through all the necessary steps of inquiring into the same issue, the reasons for concluding that reassessment is necessary, have to be strong, compelling, and in all cases objective tangible material. This court discerns no such tangible materials which have a live link that can validate a legitimate formation of opinion, in this case. It is not enough that the AO in the previous instance followed a view which no longer finds favour, or if the latter view is suitable to the revenue; those would squarely be change in opinion. Perhaps, in given fact situations, they can be legitimate grounds for revising an order of assessment under Section 263; but not for re-opening it, under proviso to Section 147.

19. As a result of the above discussion, it is held that the impugned notice, under proviso to Section 147, and consequent reassessment proceedings, are beyond jurisdiction. They are unsustainable, and are hereby quashed. The writ petition is allowed in these terms, without any order as to costs.”

17. We were informed that the respondent/revenue had assailed the said judgment by filing a Petition for Special Leave to appeal to the Supreme Court and the said Special Leave Petition bearing SLP (Civil) CC No.11048/2013 has been dismissed vide order dated 05.07.2013.

18. In view of the above, we are of the considered opinion that the assessee cannot be held to have failed to disclose truly and fully all the material facts. It is also not a case where fresh tangible material has come to the knowledge of the Assessing Officer. The Assessing Officer, at the time of original assessment, clearly formed an opinion on both the issues and a notice under Section 148 seeking to reopen the assessment is clearly an instance of change of opinion, which is impermissible in law.

19. In view of the above, the impugned order dated 1.02.2013 is set aside and the notice dated 04.05.2011 and the proceedings initiated consequent thereto are hereby quashed.
20. The writ petition is accordingly allowed with costs of Rs.10,000/-.

SANJEEV SACHDEVA, J.

SANJIV KHANNA, J.

July, 2013
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