

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITIONS NO.639 & 640 OF 2011**

Betts India Pvt. Ltd.

L-78, Verna Electronic City,

Verna-Salcete,

Goa-403 722

....Petitioner

V/s

1. The Deputy Commissioner of
Income-tax, Circle-1, Margao, Goa.

2. The Commissioner of Income-tax,
Panaji-Goa.

....Respondents

3. Union of India through the Secretary,
Department of Revenue,
Ministry of Finance, North Block,
New Delhi-11001. ...deleted

Mr. Farrokh Irani with Ms. Priyanka Kamat, Advocate for the
Petitioner.

Ms. Asha Desai, Advocate for the Respondents.

**CORAM : F.M. REIS &
M.S. SANKLECHA, JJ.**

**Reserved on : 17th APRIL, 2015
Pronounced on : 30th APRIL, 2015**

JUDGMENT : (Per M.S. SANKLECHA, J.)

These petitions challenge two notices both dated 22/03/2011 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen the petitioner's assessment for the assessment years 2004-05 and 2005-06.

2. Writ Petition No.639/2011 challenges the notice dated 22/03/2011 seeking to reopen the assessment for the assessment year 2005-06. Writ Petition No.640/2011 challenges the notice dated 22/03/2011 seeking to reopen the assessment for the assessment year 2004-05. It is an agreed position between the Counsel that the facts in both the petitions are identical and even the reasons recorded for issuing the reopening notices are also identical save the quantum/ amount indicated therein. Consequently the decision rendered in any one of the two petitions would equally apply to the other. In view of the above, for the sake of convenience we refer to the facts set out in Writ Petition No.640/2011 dealing with the assessment year 2004-05.

3. Briefly the facts leading to this petition are as under:

(a) The petitioner is engaged in manufacture and sale of plastic

and laminated collapsible tubes for dental and healthcare products. For the assessment year 2004-05, the petitioner on the basis of technical evaluation re-estimated the useful life of certain plant and machinery. In view of the above, the petitioner claimed enhanced depreciation of Rs.5.03 crores. This was in accordance with accounting standards and the enhancement of depreciation was taken into account for arriving at its book profits in accordance with the provisions of the Companies Act. The same was subjected to audit by the statutory auditors and audited accounts were also approved by the general body of share holders at its annual general meeting.

(b) On the basis of the above, the petitioner filed on 29/10/2004 its return of income for the subject assessment year. In its return of the income, the petitioner declared nil income under normal provisions of the Act and Rs.4.08 crores under Section 115JB of the Act (MAT provision).

(c) On 7/12/2006, the Assessing Officer after subjecting the return of income to scrutiny assessment, passed an assessment order under Section 143(3) of the Act. By the above Assessment Order, the petitioner's returned book profit, as consequence of adjustment, was enhanced from Rs.4.08 crores to Rs.4.77 crores.

(d) On 22/03/2011 the Assessing Officer issued a notice under Section 148 of the Act to the petitioner proposing to reopen the assessment for assessment year 2004-05. In support of the impugned notice, the reasons recorded for reopening, which are communicated to the petitioner, were as under :

“The assessee has filed return of income for the A.Y. 2004-05 on 29/10/2004 declaring NIL income under normal provisions of the IT Act and books profits of Rs.4,08,06,697/- u/s 115JB of the IT Act. The assessee is carrying on the business of manufacturing and sale of plastic, collapsible tubes for dental and healthcare products. The assessment u/s 143(3) was completed on 07/12/2006 determining and the total taxable income at Rs.NIL after setting off carried forward business loss and depreciation loss, however the book profit were determine at Rs.4,77,13,260/-.

The assessee has stated in its notes on account which is annexed to P&L account and balance sheet as under “the useful life of certain Plant and Machinery has been re-estimated during the year and the written down value of these assets is being amortised over the remaining revised useful life, which has been subsequently ratified by the Board of Directors in their meeting of September 6, 2004. Accordingly, the Depreciation charge for the year when compared to the depreciation policy followed hitherto is higher by Rs.5,03,67,000/-, which has been reflected in the Profit and Loss Account as an exceptional and non recurring item with consequential impact on the profit for the year and on the net worth of the Company.” On account of this it is noticed that the depreciation charge for the year under consideration is higher by Rs.5,03,67,000/-. In other words the depreciation charge debited to P&L account is more by

Rs.5,03,67,000/- with a result suppression of book profit by that amount. The corresponding amount should have been added while computing income under section 115JB in order to bring to tax, the actual book profits of the business. Failure to do so has resulted into under assessment of income of Rs.5,03,67,000/- and short levy of taxes is Rs.38,71,963/-.”

(e) The petitioner by letter dated 22/08/2011 filed its detailed objection to the reasons recorded in support of the impugned notice. In particular, the petitioner pointed out that the impugned notice being beyond the period of 4 years from the end of the relevant assessment year was without jurisdiction as there was no failure to disclose all material facts necessary for assessment. Besides, it was also contended that in any event, the proposed reopening is only on the basis of a change of opinion and the reasons recorded for reopening are contrary to the provisions of Section 115JB of the Act. In particular, the petitioner in its objections pointed out that all facts and materials relevant for assessment were disclosed by the petitioners in its return of income as is evident from the reasons recorded in support of the impugned notice itself. It is for this reason that the reason recorded do not even allege any failure on the part of the petitioner to fully and truly disclose all material facts necessary for assessment.

(f) The Assessing Officer by order dated 29/08/2011 rejected the petitioner's objection to the reasons recorded in support of the impugned notice dated 22/03/2011. The above order dated 29/08/2011 rejects the petitioner's contention that there was no failure to disclose all material facts necessary for assessment on the ground that as additional depreciation was claimed by the petitioner, the book profits of the petitioner were reduced, leading to escapement of income chargeable to tax on application of MAT under Section 115JB of the Act. The other two objectives of the petitioner, though adverted to, were not dealt with.

4. Both the petitions were admitted on 23/11/2011 and stay of proceedings was also granted.

5. Mr. F. Irani, learned Counsel appearing for the petitioner in support of the petition submits as under:

(A) The impugned notices dated 22/03/2011 seeking to reopen the assessment for assessment year 2004-05 and 2005-06 are beyond the period of 4 years from the end of relevant assessment year. Thus, in terms of the first proviso to Section 147 of the Act the jurisdiction

to issue notice only arises when there is failure on the part of the petitioners to disclose truly and fully all material facts necessary for assessment. In this case, all material fact necessary for assessment has been truly and fully disclosed. Thus, the impugned notices are without jurisdiction.

(B) The reasons recorded in support of the impugned notices itself proceed on the basis of information disclosed by the petitioner in their profit and loss account and balance sheet filed as a part of the return of Income, disclosing the fact that additional depreciation had been claimed. Thus there was no failure to disclose material facts necessary for assessment. This is evident from the fact that the reasons as recorded also do not even allege the same, and

(C) In any view of the matter, the Assessing Officer could have no reason to believe that the petitioner's income assessable to tax has escaped assessment in view of the provisions of Section 115JB of the Act.

6. Ms. A. Desai, learned Counsel for the respondent - Revenue supports the impugned notice. In support, she submits as under:

(A) It is not disputed that all facts necessary for assessment

were fully disclosed by the petitioner in its return of income. However, the requirement under the Act for ousting the jurisdiction of the Assessing Officer in case of notices issued beyond period of 4 years is there must have been no failure to fully and truly disclose all material facts necessary for assessment. It is submitted that in view of the excess depreciation taken by the petitioner, it had failed to truly disclose all material facts necessary for assessment. Thus, the notice is within jurisdiction of the Assessing Officer; and

(B) The impugned notice calls for no interference in view of the reasons set out in the order dated 29/08/2011 disposing of the petitioner's objections to the reasons recorded.

7. We have considered the rival submissions. It is an admitted position that both the impugned notices dated 22/03/2011 seeking to reopen the assessment for assessment year 2004-05 and 2005-06 have been issued beyond the period of 4 years from the end of the relevant assessment year. It is a settled position that in cases where the assessment sought to be reopened is beyond the period of 4 years from the end of the assessment year, the jurisdictional requirement for issuing a notice under Section 148 of the Act is not only the Assessing

Officer must have reason to believe that income chargeable to tax has escaped assessment but there must also be a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. These twin requirements are cumulative and both must be satisfied before the Assessing Officer can invoke jurisdiction to reopen assessments beyond a period of four years from the end of the relevant Assessment Year.

8. In this case, the reasons recorded in support of the impugned notices do not allege any failure to disclose fully and truly all material facts, necessary for assessment. It is true, as held by this Court in *Allanasans Ltd. Vs. Dy. CIT, 369 ITR 648* that the mere absence of the words 'failure to disclose' in the reasons by itself would not be fatal to the notice. However, if on reading of the reasons in support of the notice as a whole, do not indicate any failure to disclose fully and truly facts material to the assessment, then, the reopening notice is without jurisdiction. In this case, in fact, the reasons indicate that the basis of the impugned notice is the declaration made by the petitioner in its profit and loss account and its balance sheet read with its notes to the accounts. These clearly show that the petitioner had claimed

higher depreciation in view of reestimation of the written down value of its assets over the remaining revised useful life. This information was available with the Assessing Officer at the time when he passed the assessment order dated 29/08/2011 under Section 143(3) of the Act. Thus, the reasons ex-facie do not even remotely suggest that there was a failure on the part of the petitioner to disclose all material facts necessary for assessment. However, the Assessing Officer seeks to draw an inference from the facts which were already available that in view of claiming higher depreciation, there was suppression of book profits, resulting in lower tax payable under the MAT provision i.e. Section 115JB of the Act. In the course of submissions, even the Revenue accepted that there was no failure on the part of the appellant to disclose all material facts necessary for assessment.

9. However, it is the contention of the Revenue that there was a failure on the part of the appellant to truly disclose all material facts necessary for assessment. It is emphasised by the Revenue that the obligation under the proviso to Section 147(1) of the Act is not only to disclose all material facts, but also disclose it truly. The word 'truly' would necessary imply that either the assessee has declared

falsely or has practiced '*suppressio veri suggestio falsi*'. The reason recorded for reopening of assessment do not even whisper that there has been any false declaration made by the petitioner. The reliance by the respondents - Revenue that reopening notice is sustainable in view of the fact that as a result of claiming higher depreciation (which is admittedly disclosed) the book profits were reduced resulting in lower tax under Section 115JB of the Act. This claiming of a particular amount as a depreciation whether eligible or not is completely different from not disclosing fully and truly material facts necessary for assessment.

10. In view of the above facts, we specifically asked Ms. Desai, the learned Counsel for the Revenue to tell us what facts were not truly disclosed by the appellant and also where do the reasons recorded in support of the impugned notice dated 22/03/2011 so indicate. The respondent- Revenue contended that on reading of the notice as a whole, an inference can be drawn that there was a failure on the part of the appellant to disclose truly all material facts necessary for assessment. This inference is being drawn on the basis that it is the result of claiming higher depreciation (admittedly disclosed) that the

book profits of the petitioner was reduced. We are not able to understand what facts were not truly disclosed that is either falsely declared or were so disclosed that the true facts were suppressed in the form of *suppressio veri*. We find no such indication in the reasons recorded in support of the impugned notice. We are not able to understand how inference of disclosing falsely material facts can be drawn from the reasons recorded.

11. In any case, this Court in Hindustan Lever Ltd. V/s. R.B. Wadkar, Assistant Commissioner of Income Tax reported in (2004) 268 ITR 332 has held as follows :-

“The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and

should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.” (emphasis supplied)

In view of the above, it is not permissible to the Revenue to draw inferences from the reasons recorded that all material facts, though fully disclosed, are not truly disclosed. Even otherwise, the Revenue was not able to show the facts, which have not been truly disclosed by the appellant, during the assessment proceedings.

12. Accordingly, we find that the primary requirement for issuing the two impugned notices beyond period of 4 years, namely failure to

disclose fully and truly all material facts necessary for assessment is not satisfied in the facts of both the impugned notices. Therefore, the impugned notices are without jurisdiction.

13. In view of the view taken by us on the failure to satisfy one of the twin requirements for issuing a reopening notice beyond the period of 4 years from the end of the relevant assessment year, there is no occasion for us to consider the other issues raised by the petitioners in their challenge to the impugned notices dated 22/03/2011.

14. Accordingly, rule is made absolute in both the petitions. Both the petitions are allowed. No order as to costs.

M.S. SANKLECHA, J.

F.M. REIS, J.

NH/-