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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.761 OF 2015

Godrej Industries Ltd. ..Petitioner.

V/s.

Dr.Commissioner of Income Tax,
Circle14(1)(2), Mumbai & Ors. ..Respondents.

Mr.F.V.Irani with Jitendra Jain i/b. Mr. Atul K. Jasani for the petitioner.

Mr.Arvind Pinto for the respondents.

CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.

DATED : 28TH APRIL, 2015

P.C. :-

1. This Writ Petition under Article 226 of the Constitution of India seeks the following reliefs:-

(a) this Hon'ble Court may be pleased to issue a Writ of Certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 28th March, 2014 (ExhibIt 'A') issued by Respondents under section 148 of the Act seeking to reopen the assessment for the assessment year 2007-08; and the order rejecting the objections dated 26th February 2015 (ExhibIt 'U');

(b) this Hon'ble Court may be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing Respondents to forthwith withdraw and cancel the notice dated 28th March, 2014 (Exhibit 'A') issued by Respondents under section 148 of the Act seeking to reopen the assessment for the assessment year 2007-08;

2. Since the affidavit in reply has been filed and Mr.Irani states he is proceeding on the basis of denial and records that we have heard both sides extensively.

3. Rule. Respondents waives service. By consent the petition is heard finally.

4. The petitioner before us is a company engaged in the business of manufacturing and trading in industrial chemicals and having a registered office at the address mentioned in the cause title.

5. It is regularly assessed to income tax. The present proceeding relates to the assessment year 2007-08.

6. Respondent Nos.1 & 2 are the officers who exercise powers under the statute being Income Tax Act, 1961 and exercised in this case and which is captioned under 148 of that Act.

7. The circumstance in which the petition came to be filed have been narrated elaborately. That on 7th November, 2007 a e-return in the electronic form was filed by the petitioner and it declared income of ₹21,86,10,187/-. On 7th August, 2008 the said return was selected for scrutiny by issuing notice under section 143(2) / 142(1) of the I.T. Act. Annexure-B is a copy of notice dated 29th July, 2009 in respect thereof.

8. On 17th August, 2009, the first respondent issued a detailed questionnaire calling for various details. It is alleged that these details were sought on several items such as loans and advances, additions to and sale of fixed assets, depreciation, details of interest expenditure claimed under section 36(1)(iii) of the I.T. Act, expenses relating to exempt income, reconciliation of TDS with income, etc. Annexure-C is a copy of the questionnaire dated 17th August, 2009.

9. The case of the petitioner is that on receipt of the questionnaire, the petitioner forwarded all the details including audited accounts and a copy of tax audit report. Thus, they

pointed out as to how the income has been worked out. There were further details filed on 9th September, 2009 based on discussions during the course of assessment proceedings and questionnaire issued. Further additional details pertain to sale of fixed assets, etc. The process continued inasmuch as, certain details came to be forwarded in October and November, 2009 vide annexures - F & G. At the end of all this, an order of assessment was passed by the first respondent under section 143(3) of the I.T. Act on 21st December, 2009 assessing the income at ₹20,83,16,673/- and book profit under section 115JB of the I.T. Act at ₹26,34,32,387/-. There were several disallowances made including under section 14A of the I.T. Act. A copy of this order is at annexure-H to the writ petition.

10. The specific pleading in the writ petition and particularly while narrating the facts in paragraph 3(i) and (j) and also (k) are that the petitioner aggrieved by the assessment order filed an appeal on 3rd February, 2010 before the Commissioner of Income Tax (Appeals). A copy of the memo of the appeal is annexed at annexure-I to the writ petition and pertinently on 3rd February, 20011 the above appeal was partly allowed by the Commissioner. A copy of that order is at annexure-J.

11. It is stated in para 3 (k) that being aggrieved by this

appellate order, both sides namely the assessee and the respondent filed cross appeals before the Tribunal and the Tribunal decided the same on 28th August, 2014 by a common order.

12. There is also another attempt by the respondent to revise the assessment and in that regard the second respondent sought to resort to power under section 263 of the I.T. Act. He directed the assessing officer to revise the additional depreciation claim @ 50%, addition of provision for doubtful debts under section 115JB of the I.T. Act, etc. That order was passed on 17th January, 2012 and 4th December, 2012 and the assessing officer passed an order giving effect to these directions and added back the provision for doubtful debts while computing the book profit under section 115JB of the I.T. Act and reduced the claim of additional depreciation. This is contained in the order at annexure-O to the petition.

13. On 29th March, 2014 the first respondent also passed an order in reassessment proceedings initiated in the case of the petitioner for immediately preceding assessment year 2006-07. The issues concern the depreciation on windmills and reconciliation of the tax deducted at source on the income assessed to tax. Thus, the assessment was reopened for the preceding assessment year 2006-07 in exercise of powers under section 148 of the I.T. Act.

Some of the issues were revisited. The reassessment order was passed and the claim of the assessee is that the first respondent accepted the stand of the petitioner and no addition / disallowance had been made in the reassessment order for the said assessment year.

14. It is in this backdrop that the petitioner received a notice under section 148 of the I.T. Act dated 28th March, 2014 (impugned notice) seeking to reopen / reassessment completed during the assessment for the assessment year 2007-08. On receipt of this notice, the petitioner addressed two letters dated 1st April, 2014 and 7th April, 2014 requesting the respondents to forward the reasons for reopening, since they had not been communicated. The petitioner also and we are informed in terms of a routine procedure stated by letter dated 7th April, 2014 that the original return filed on 7th November, 2007 be treated as the return filed in compliance with notice under section 148 of the Act subject to further additions / disallowances accepted by the petitioner in terms of the earlier appellate / revision proceedings.

15. Despite this communication the reasons were not supplied and, therefore, on 23rd January, 2015, a copy of the reasons recorded were again sought by the petitioner. They were furnished with a communication at annexure-S dated 5th February,

2015.

16. Thereupon, the petitioner on 23rd February, 2015 filed detailed objections and contended that initiation of proceedings is invalid and illegal. The reopening is in terms of a power conferred by the first proviso under sub-section (1) of section 147 of the I.T. Act, therefore, there ought to be failure to disclose all material facts. In the present notice, no such case is made out and, therefore, there being no tangible material nor the allegation being specific, that notice be withdrawn. One of the objection was that the issues raised in the notice and inter alia any reassessment have merged in the appellate / revision proceedings.

17. However, the petitioner's grievance is that by annexure-U which is a communication dated 26th February, 2015, the first respondent informed that there is no substance in any of the objections to drop the reassessment proceedings and that he would go ahead and in terms of notice issued to the petitioner.

18. It is in this backdrop that the writ petition was moved before us on 25th March, 2015. On that day we passed an order directing that no orders pursuance to impugned notice and the refusal to entertain objections and accept them shall be passed by the competent authority. That ad-interim order continues till today.

19. Mr.Irani, learned counsel appearing on behalf of the petitioner submitted that the impugned notice is ex-facie illegal and invalid. He would submit that the assessment year 2007-08 is the year in which the assessment was made and which is sought to be reopened. It is sought to be reopened after a period of four years and, therefore, the assessing officer must indicate clearly and in terms of the proviso that income chargeable to tax has escaped assessment for reasons of failure on the part of the assessee to make a return under section 139 of the I.T. Act or in response to section (1) of section 147 or 148 of the I.T. Act or to disclose fully and truly all material facts necessary for that assessment year. Mr.Irani submits that the impugned notice falls short of this requirement and the legal mandate. He has tendered a chart / table for our benefit and convenience and a copy of which is handed over to respondents' Advocate Mr.Pinto.

20. Mr.Irani submits that the first issue is disallowance under section 14A of the I.T. Act. The reasons for re-opening are that the disallowance has been calculated in terms of this section after considering interest income of Rs.6.22 crores as against the gross interest of Rs.34.29 crores. The allegation is that no separate cash flow has been provided and there is failure on the part of the assessee to furnish fully and truly all material facts. He invited our

attention to page 451 of the paper-book in that regard. However, Mr.Irani submits that the assessee raised specific objections at page 454 and 456 of the paper-book by pointing out that in the original assessment proceedings, this very issue was raised by the assessing officer and the Commissioner of Income Tax (Appeals). He invites our attention to pages 313 to 321 of the paper-book and pages 350, 359 including 358 of the paper-book. The cash flow statement was provided in terms of a clarification. The questionnaire and the correspondence giving true disclosures and details of interest paid on which a specific query was raised during the original assessment, there is response given. The response is clearly detailed. Our attention is invited to pages 43 & 44, 62, 294, 297, 308 to 311 of the paper-book.

21. Mr.Irani then submitted on the second issue on which assessment is sought to be reopened is provision of bad and doubtful debts. The allegations are that this provision is not a allowable deduction and the assessee has not added back the same while computing the total income under the provisions of the Act. It is pointed out in the objections that statement of total income is added back. There is an order passed under section 143(3) of the I.T. Act read with section 263 thereof at pages 391 and 392 of the paper-book which shows that this amount was already disallowed under section 115JB of the I.T. Act. Our attention

is invited to the third issue namely interest allocation to capital gains. The Notice alleges that the assessee has not provided any separate cash flow which resulted in excess interest on borrowed funds being claimed by the assessee. The assessee pointed out that there is cash flow which is provided (page 56), facts fully disclosed in the audited accounts schedule 18 and schedule 21 and the tax audit report at pages 62, 63 & 83 of the paper-book and it has been also pointed out that excess depreciation at 15% is completely dealt with during the original assessment. There is a discussion on depreciation in the assessment order. Equally, the tax audit report refers to all these material facts. In so far as depreciation is concerned, it is stated to be in excess. Mr.Irani submits that there is a specific query raised during the original assessment. There is a detailed response to the query. The discussion on depreciation in the assessment order pages 327 to 329 is relied upon claiming that in the absence of these disclosures, it would not have been possible for the assessing officer to discuss this issue and to render any finding on the same. Pertinently, the argument is that this issue was also raised in reassessment proceedings in the immediately preceding assessment year 2006-07 but no addition / disallowance was made on this ground. In that regard, it is pointed out with some vehemence that the order dated 29th March, 2014 which was passed in the reassessment proceedings for immediate preceding assessment year 2006-07 is after the date on which the impugned notice has been issued. It cannot be that the assessing officer and who has passed an order of reassessment and for the preceding assessment year 2006-07 was unmindful of this fact of issuance of notice. It is the same assessing officer who has issued both these namely, the reassessment order and the impugned notice.

22. With regard to the issue of reconsideration of TDS, Mr.Irani sought to read the reasons and as recorded. He submits that if the petitioner-assessee had received ₹47.92 crores under various heads like rent, professional fees, contract payment, commission, etc., then, in the absence of any details, the assessing officer would not have been in a position to identify the payments from the parties. Even otherwise, specific query was raised during the original assessment and response was given to the queries duly reconciling the income and the tax deducted at source therein. Mr.Irani submits that identical issue was raised in the reassessment proceedings for immediately preceding assessment year 2006-07 but no addition / disallowance was made on this ground. Our attention is invited to pages 45, 293, 303 to 305 and pages 395, 437 to 442 of the paper-book. Mr.Irani, therefore, submits that it is a clear case where reasons recorded fall short of the statutory mandate. There is absolutely no material for the assessing officer to form a reasonable opinion and belief. Mr.Irani submits that the

reassessment cannot be initiated to review an order passed by the earlier officer. It is not a power so as to record a contrary opinion. Once the issue was examined during the course of the original assessment and a particular view has been taken, then, in the absence of any new / fresh tangible material, the assessment could not have been reopened. Mr.Irani, has therefore, submitted that in view of the factual statements made in the writ petition and on oath having not been denied and disputed, then the reassessment proposed should be quashed and set aside. The notice itself is bad in law and the assessing officer having jurisdiction has not just made reference to the material which was placed before him but to all factual materials set out in the writ petition. They have been specifically considered according to Mr.Irani. For all these reasons, he submitted that the writ petition be allowed.

23. On the other hand, Mr.Pinto, appearing for the respondents submits that this Court cannot go into the sufficiency or inadequacy of the reasons. This Court cannot consider the issue in such details and as proposed by the petitioner. In his submission, the writ jurisdiction cannot be exercised to resolve a factual dispute or any issue which touches the merits of the controversy. Therefore, the recorded reasons were enough to reopen the assessment. It is not necessarily revisiting in the earlier proceedings and the matter should not be examined by this Court

on merits in its limited jurisdiction. He relied upon the statements made in the reasons and the affidavit-in-reply by the respondent. He submits that the writ petition be, therefore, dismissed.

24. With the assistance of learned counsel appearing on both sides, we have perused the bulky paper-book and equally the annexures which are relevant for our purpose. At page 38 of the paper-book is the impugned notice and it states that respondent No.1 has reasons to believe that income chargeable to tax for the assessment year 2007-08 has escaped assessment within the meaning of section 147 of the I.T. Act. At annexure-B is a letter from the Additional Commissioner of Income Tax addressed to the petitioner on 29th July, 2009 which refers to certain points in connection with the return of income submitted by the petitioner on which he sought further information.

25. Then, notice dated 17th August, 2009 under section 143(2) / 142(1) of the I.T. Act in connection with the assessment year 2007-08 was issued and the petitioner was called upon to produce the details and / or documents as per annexure attached to the notice. The annexure at page 41 are the details which are sought for and it pertains to unsecured loans including the fresh loans given, advances and working of gross profits for the last three years. There is a specific item in regard to computation of actual

profit and loss, additions to fixed assets / sale thereof and item 36 pertains to statement of different head-wise income comprised in TDS credit claimed by the assessee and the break-up of the income actually credited in the profit and loss account for the year under consideration. There is a query raised that if any income in respect of which the TDS is claimed during the year has not been accounted for as income, then, the same should be specified.

26. Thereafter, the petitioner responded and forwarded all the details contained in the notice, relevant documents, books of account and related papers.

27. It is somewhat surprising that in the affidavit-in-reply which has been filed in response to the writ petition, specific factual statements made in the writ petition are not controverted. The affidavit at page 483 of the paper-book makes a statement that no comments are required with regard to the issuance of notice under section 143(2) of the I.T. Act but denies that the detailed questionnaire in the original assessment had touched upon the issues that were the subject matter of the reassessment proceedings. There is a denial of the averment that all material facts were disclosed. However, we do not find any statement which refutes or disputes the communications to which we have made reference hereinabove. Pertinently, there is reference made to the

submissions made on 9th September, 2009 and the additional details filed by the petitioner in the submissions dated 14th October, 2009. Though there is a reference in the reasons recorded, it is stated that there were no details provided regarding various streams of income such as rent, professional fees and contract details on which TDS was deducted at source. There is a mechanical and very casual remark that that a perusal of the order of assessment passed on 21st December, 2009 reveals that the issues that are now sought to be raised were not dealt with.

28. It is impossible to reconcile this statement with others made on an affidavit on oath. Pertinently, the deponent of the affidavit is present in the Court. She is supposed to have dealt with the objections to the reasons recorded in the impugned notice. When her attention was invited to the objections and which have been raised by the petitioner-assessee from pages 454 to 459 of the paper-book, we find that the said detailed objections running into about 7-8 pages, the deponent had no knowledge of the same. Therefore, no reference is made in the order rejecting the objections to these factual materials. Yet, it is boldly asserted that the issue sought to be raised by the impugned notice is not the subject matter of the appellate or revision proceedings. This is a specific statement and stand taken at page 482 of the paper-book of the affidavit-in-reply. However, in the same breath at pages 483

and 484 this deponent exhibits knowledge of the appeal, revision and reassessment proceedings. It has been asserted that "*I make bold to say that the impugned notice has been issued only after I had reasons to believe that income has escaped assessment by reasons of the failure of the petitioner to truly and fully disclose all material facts pertaining to the assessment sought to be reopened.*" If this is a bold assertion, nothing further and more was required. Yet we find that at page 484 of the paper-book, reference is made to the additional details, submissions including the appeal and cross appeal and the grounds thereof which is the subject matter of the notice dated 28th March, 2014. It is thus surprising that though the assessing officer who issued the notice and who made earlier assessment and reassessment was available, this deponent who has taken charge as Assistant Commissioner has been chosen to file the affidavit. If she has been chosen, then the reason assigned for the same is that it is she who passed the order dated 26th February, 2015 rejecting the objections. If this is the same officer who has passed the order rejecting the objections, then, the least that was expected of her was to refer to the specific objections.

29. The Court is required to make detailed reference to all this simply because in a proceeding which is as serious as this, the stand of the revenue appears to be mechanical. The attitude is

light hearted and casual. During the course of arguments as well the Advocate refers to the instructions issued to the counsel for the revenue as reflected in the reply affidavit. The officers ought to know that when they file an affidavit in the Court and make a statement on oath, such statements are subject to scrutiny and verification. Their veracity can be tested, including by asking the deponent to step into the witness box and affording to the adversary a chance to cross examine him or her and in the proceeding before the court. Now at least, we expect the officers like the present deponent to be careful and vigilant. If her deposition before the Court is based on records then the least that is expected is such records are perused by the officers before deposing on oath.

30. At page 451 of the paper-book is a specific para in the reasons recorded for re-opening the assessment for assessment year 2007-08. That refers to dissallowance under section 14A of the I.T. Act. Then, in para 3 at the same page, the provision for bad and doubtful debts and in para 4 there is a reference to non production of a separate cash flow statement. So also, the claim with regard to excess depreciation and TDS details a reference is made in the reasons for reopening the assessment. A specific assertion of the petitioner is that the assessment for the year under consideration was completed under section 143(3) of the I.T. Act by

the assessment order dated 21st December, 2008 and after making a detailed inquiry and after obtaining several details. After the regular assessment, further proceedings under section 263 of the I.T. Act were initiated and in terms of directions of the Commissioner, an order under section 143(3) read with section 263 of the I.T. Act dated 4th December, 2012 was passed, wherein the provision for bad debts was added to the book profit under section 115JB of the I.T. Act and additional depreciation on plant and machinery used for one hundred and eighty two days or less was restricted to 50% of additional depreciation allowable.

31. With regard to disallowance under section 14A, we find at page 454, 455 & 456 of the paper-book that there is a specific reference made to the questionnaire which we had pointed out above, correspondence pursuant to the same and the discussion in details in the assessment order. The objection is that after complying with Rule 8D of the Income Tax Rules, there is disallowance of the amount under section 14A of the I.T. Act. There is an appeal preferred from the order of the assessing officer to the Commissioner of Income Tax (Appeals) against such disallowance. He has also looked into this aspect. There is a reference made to the memo of appeal before the first appellate authority and subsequently to the order of the Commissioner where disallowance has not been entirely set aside and to the satisfaction

of the petitioner. There is reference to the cross appeals.

32. We do not find any application of mind by the Assistant Commissioner of Income Tax to these aspects at all. She rejected the objections on 26th February, 2015. We are surprised that neither she makes any reference to the Assessment and Appellate proceedings, the specific disallowance but files an affidavit in reply in the Court and merely copies the reasons which have been recorded by her predecessor. It was her bounden duty to have referred to all factual averments in the writ petition, the documents in support thereof and their contents and thereafter dealt with the same. There is a sanctity which is attached to the principles evolved by this Court and equally the Hon'ble Supreme Court. A opportunity is given to the parties like the petitioner to object to the reasons recorded and require that the objections be dealt with by passing a speaking order. The present case is a complete go-bye to the mandate in the orders and directions of this Court and equally the Hon'ble Supreme Court. The reproduction of the reasons and reiterating them again is no compliance with the law laid down by this Court. A speaking order is required to be passed dealing with the objections. If the objections are not found to be worthy of acceptance or have no merits, then, the order must speak as to why the said conclusion has been reached. One cannot reject the objections by a one line observation and finding or the

conclusion that there is no substance in the same. We have to be satisfied that the statutory power is exercised having regard to the provisions of section 147 of the I.T. Act, 1961. These are enacted to serve larger public interest. It is to enable the authorities to ensure that there is no escapement of income. If that has escaped in the assessment proceedings and such fact has come to the Assessing Officer's notice, then, that assessee is required to be dealt with to recover the revenue legitimately and lawfully due. If this is the object of enacting section 147 of the I.T. Act and the power that is conferred in the assessing officer is in the nature of a trust, then we would not countenance such an order as has been passed on 26th February, 2015.

33. We do not find that all matters concerning the objections to the reasons and for which notice under section 148 of the I.T. Act has been issued have been dealt with in a single line conclusion. That conclusion is not enough for the purpose of the present case.

34. If the objection is raised, then the speaking order must indicate as to why the same has not been found tenable. The objection cannot be refuted or dealt with by reiterating or repeating the reasons which have been recorded. Once the reasons have been objected to, then the justification for the same ought to be

spelt out and that is how a speaking order would meet the requirement of law.

35. We have found that on each of the factual materials and which have been tabulated before us, there is absolutely nothing in the order dated 26th February, 2015. We also find on reading of the notice that apart from it being vitiated by total non application of mind, it does not even make reference to the proviso and the satisfaction in terms of the contents of the same. Once the assessment is sought to be reopened after a period of four years, then, the proviso mandates recording that the assessee has failed to fully and truly disclose all materials facts necessary for the assessment for the relevant assessment year. There is absolutely nothing which would enable us to conclude that the assessee had failed to make such disclosure even prima facie. If the issue which has been raised and regarding which the assessment is proposed to be reopened has been dealt with, then, had the assessee not provided materials and completely, it would not be possible for the authorities under the Act to deal with those issues, discuss them while passing the assessment order and appellate orders. In the circumstances, we do not find that the impugned notice can be sustained. Once we have arrived at this conclusion and on all counts, the assessee's objections refer to the materials which were before the assessing officer for the earlier assessment year, some

of which were also the subject matter of revisional / Appellate proceedings, then, we would be failing in our duty if we do not interfere with the Notice in our writ jurisdiction. Once we come to this conclusion, then, we do not find any substance in the contention of Mr.Pinto that this Court cannot invoke its writ jurisdiction. As part of our further duty and to reinforce our conclusion that if the factual aspects and the details are undisputed then the issuance of the notice itself was not called for and if it was not called for, it cannot be upheld. Thus, by invoking the writ jurisdiction we interfere with and quash the same.

36. As a result of the above discussion, the writ petition succeeds. Rule is made absolute in terms of prayer clause (a). No order as to costs.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**