

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION (L) NO. 944 OF 2015

Capgemini India Pvt. Ltd.	}	Petitioner
versus		
Asst. Commissioner of Income Tax	}	
Circle 14(1)(2), Mumbai and Ors.	}	Respondents

Mr. Percy Pardiwalla-Senior Counsel with
Mr. Jitendra Jain and Mr. P. C. Tripathi i/b.
Mr. Atul K. Jasani for the Petitioner.

Mr. Anil Singh-Additional Solicitor General
with Mr. Suresh Kumar and Mr. Arvind Pinto
for the Respondents.

**CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.**

DATED :- MAY 6, 2015

ORAL JUDGMENT :- (Per S.C. Dharmadhikari, J.)

This Writ Petition under Article 226 of the Constitution of India challenges the notice under section 148 of the Income Tax Act, 1961 (for short “the IT Act”), copy of which is at Annexure 'A' and the order dated 12th February, 2015 (Annexure 'AB') and reassessment order dated 27th February, 2015 (Annexure 'AC').

2) On the earlier occasion we had extensively heard both sides. We have also heard both sides today. In the light of the agreement and consent of both sides, we dispose of this Writ Petition finally.

3) Rule. Respondents waive service.

4) On 21st April, 2015, we had passed an order inviting the attention of the Respondents to the averments in the Writ Petition and particularly in para 12. Thereafter, we indicated to the Respondents that in view of authoritative pronouncements by this Court as also by the Hon'ble Supreme Court in the case of *Asian Paints vs. Deputy Commissioner of Income Tax and Anr.* reported in **(2008) 296 ITR 90** and in the case of *GKN Driveshafts (India) Ltd. vs. Income Tax Officer* reported in **(2003) 259 ITR 19**, the order passed on 12th February, 2015 rejecting the objections should have been communicated and the Respondents thereafter ought not to have proceeded with for a period of four weeks and in pursuance of the impugned notice. Since the order of assessment dated 27th February, 2015 is assailed on the ground that this direction of the Division Bench of this Court and the Hon'ble Supreme Court has not been followed, we had called upon the Respondents' Counsel then appearing to take appropriate instructions and inform the Court as to whether that assessment order should be set aside by consent or appropriate corrective steps would be adopted.

5) The matter was placed today for passing orders, because we were not happy with the stand taken by the Respondents in the affidavit in reply. We had also noticed that in several matters the

Respondents have been adopting similar course. There could be difficulties in meeting certain deadlines and particularly of 31st March, but that does not justify that in every case the Respondents defy the directions in the Judgments of the Hon'ble Supreme Court and of the Division Bench of this Court. We could have appreciated a case of genuine difficulty and brought forward fairly and completely, but what we find in this case is that the notice under section 148 of the IT Act is dated 27th March, 2014. That was served on the Petitioner, but the reasons which are said to be recorded, annexed to this notice, came to be furnished to the Petitioner on 29th October, 2014. Thereafter, the Petitioner raised the objections on 12th December, 2014. The order passed by the Respondents, rejecting these objections, is dated 12th February, 2015. The Respondents were obliged to abide by the above directions and not passed an order of assessment for a period of 4 weeks from the date of service of this order rejecting the objections. In the instant case, if that order itself was served on 10th March, 2015, then, this haste in passing an assessment order within four weeks cannot be justified. If the notice is dated 27th March, 2014, then, the period till 27th March, 2015 was enough to conclude the steps and in accordance with law. The Respondents having delayed the proceedings and at their own end, it would not be open for them to justify their conduct and complete disregard to the orders and directions which are

binding on them. In such circumstances, we are not in agreement with the contention that the assessment order having now been passed, the Writ Petition should not be entertained and the Petitioner must be relegated to the statutory remedies. We are of the firm opinion that having regard to the factual statements in para 12 of the Writ Petition and there being absolutely no reply thereto in the affidavit in reply, this contention of the Respondents cannot be accepted.

6) On the earlier occasion, the learned Additional Solicitor General had also assured us that corrective steps would be taken and hereafter none of the Assesseees would be visited with the consequences that are faced by the present Petitioner. We are informed today that appropriate corrective steps have been taken and the Principal Commissioner has issued clear directives to all Assessing Officers to abide by the law laid down by the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd.* (supra) and equally by this Court in the case of *Asian paints Ltd.* (supra) and *Aroni Commercial Ltd. vs. Deputy Commissioner of Income Tax* reported in **(2014) 44 Taxman 304**. It is in these circumstances that we have proceeded to ignore the assessment order and on perusal of the notice under section 148 of the IT Act as well we are satisfied that this is a fit case for interference in our Writ Jurisdiction.

7) Turning to the legality and validity of the notice under section 148 of the IT Act and the proceedings in pursuance thereof, we find that the notice is issued to reopen the assessment for the assessment year 2007-08. The reasons for the same are recorded at page 198 of the paper book. We have proceeded on the footing that these reasons have been recorded on 27th March, 2014 and they reflect the satisfaction of the Assessing Officer.

8) In the present case, the Assessing Officer has issued notice under section 148 of the IT Act to reopen the assessment for the assessment year 2007-08. Going by this admitted factual position, it is evident that the Assessing Officer could have reopened the assessment only on recording his satisfaction that the income chargeable to tax has escaped assessment for the relevant assessment year by reason of the failure of the Assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. The reasons recorded and copy of which is at Annexure 198 of the paper book read as under:-

“ANEXURE
M/s. Capegemini India Pvt. Ltd.
Reason for issue of notice u/s 148 of the Income Tax Act, 1961
A. Y. 2007-08

In this case, the assessee company filed its return of income for A. Y. 2007-08 on 02.11.2007 declaring income of Rs.2,76,74,434/- under normal provision of the Act. Then the case was selected for scrutiny and the assessment was completed

u/s 143(3) r.w.s. 144C(13) of the Act on 14.10.2011 assessing the total income at Rs.115,90,05,170/-.

The assessee company is engaged in business of development and export of software. During the year under consideration, it is seen that the assessee company had claimed deduction u/s 10A of the Act for its Unit II & III without setting off losses of Unit IV from the profits derived by the eligible units. As per the provisions of section 10A of the Act, deduction u/s 10A of the Act is allowable on the net profit derived by the assessee company from eligible units after setting off of losses from other eligible units.

I have therefore, reasons to believe that the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, within the meaning of the provisions of section 147 of the Income-tax Act, 1961, income of Rs.5,14,12,534/- chargeable to tax has escaped assessment. This is, therefore, a fit case for issue of notice u/s 148 of the I. T. Act, 1961.”

9) The Petitioner raised a specific objection by a letter dated 12th December, 2014. The Petitioner pointed out that it had filed a return of income for assessment year 2007-08 on 2nd November, 2007. The admitted factual position was that it declared an income of Rs.2,76,74,434/- under normal provision of the IT Act. The case was selected for scrutiny and the assessment was completed under section 143(3) read with section 144C(13) of the IT Act on 14th October, 2011 assessing the total income at Rs.115,90,05,170/-. The Petitioner company is engaged in the business of development and export of software. The Petitioner pointed out that the return of income, which was furnished for the assessment reflected the deduction under section 10A of the IT Act. There is a Pune Unit of the Petitioner and there is a

Hyderabad Unit. The Petitioner pointed out that the deduction under section 10A of the IT Act was elaborated in Schedule 10A. The deduction in respect of Units located in Software Technology Park, namely Undertaking No. 1 and Undertaking No. 2 have been disclosed with figures. In the Schedule 'BP', "Income from Business or Profession", the deduction under section 10A of the IT Act was disclosed and it was pointed out that during the course of assessment proceedings, there was a questionnaire and which was forwarded to the Petitioner Assessee. This was attached to a notice under section 142(1) of the IT Act dated 14th July, 2010. That raised a specific query in relation to the deduction claimed under section 10A of the IT Act. The query is also reproduced in the Petitioner's letter dated 12th December, 2014. The response to this query is contained in the Petitioner's letter dated 22nd November, 2010. The Petitioner stated that it filed three audit reports in Form 56F in respect of the three software units, which were eligible for deduction under section 10A. The said audit reports are enclosed to this letter as Annexures 1 to 3. Thereafter, the relevant particulars in the audit reports were highlighted. Thus, the Pune II Unit is known as Unit II and the claim is raised for the 6th year, where as Hyderabad Unit is known as Unit III and the claim is raised for the 4th year. Chennai Unit is known as Unit IV and the claim raised is in the 7th year in relation thereto. The Petitioner company set off the losses of

Unit IV (Chennai) against the profits of Unit I, namely, the Unit of Pune. The Petitioner also pointed out that there was a draft assessment order under section 143(3) r.w.s. 144C(1) dated 31st December, 2010. The paragraphs of the draft assessment order were reproduced. Thus, the complete claim of deduction was reflected in all the documents. The loss of the Chennai Unit has not been set off against the profits of Units II and III and therefore, impliedly the loss of Unit IV has been set off against the profits of Unit I, because that Unit has completed its 10 years of deduction under section 10A of the IT Act and therefore, not eligible for the said deduction. The assertion of the Petitioner was that complete facts were before the Assessing Officer during the course of the original assessment. They have been referred in the course of passing of the assessment order. If there were no particulars nor was the disclosure complete, truly and fully pertaining to material facts, it would not have been possible for the Assessing Officer to make an assessment and pass an assessment order. The Petitioner pointed out that though it has been called upon to comply with the notice under section 148(1) of the IT Act, it is incumbent upon the Respondents to deal with the objections and pass a speaking order thereon. The request to pass such an order was made on 23rd January, 2015. It was also brought to the notice of the Assessing Officer that the steps in furtherance of the impugned notice should not be taken so long as the

objections are pending and not dealt with by the speaking order. The course of events are set out at page 215 of the paper book, which is a copy of the letter dated 9th February, 2015. Thereafter, the Petitioner pointed out on 2nd March, 2015 that it is not possible for them to waive their right to seek redressal against the order, which is stipulated by law, namely of dealing with their objections. They, therefore, informed the Assessing Officer that if he proceeds and passed an order of reassessment in furtherance of the impugned notice, that course is impermissible. He should first deal with the objections and in the event he is inclined to reject them, he shall not proceed further for a period of 4 weeks. That is equally the communication at page 226 of the paper book.

10) However, we find that while the objections were dealt with, an order has been passed. That order reads as under:-

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GOVERNMENT OF INDIA MINISTRY OF FINANCE DEPARTMENT OF REVENUE	OFFICE OF THE ASSISTANT COMMISSIONER OF INCOME TAX-CIRCLE 14(1)(1) & 14(1)(2), ROOM NO. 460, AYAKAR BHAVAN, MAHARSHI KARVE MARG, NEW MARINE LINES, MUMBAI – 400 020. TEL : (022) 22039131 EXTENTION 2460
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No. ACIT/14(1)(1)/14(1)(2)/MUM/capegemini/2014-15 date : 12-02-2015

To,
CAPEGEMINI INDIA PRIVATE LIMITED,
SEP 2, GATE NO. 2, PHIROJSHA NAGAR,
WESTERN EXPRESS HIGHWAY,
VIKHROLI EAST, MUMBAI – 400 079

Sir,

Sub : Removal of objections in your case for the
A.Y. 2007-08 – reg.

Ref : Your letter dated 09-02-2015

Please refer to the above.

Vide your letter dated 09-02-2015, you have objected to the reassessment proceedings pending in your case for the A. Y. 2007-08. Your submission has been perused. However, the objection is not acceptable. In this regard, the objection is replied/removed as under:

1. Regarding Exemption claimed under section 10A :- You have claimed full exemption under section 10A with respect to profits earned from Units II and III without setting off the losses of Unit IV. This is not in order, following the decision of the Honorable Karnataka High Court in the case of Yokagawa India Private Limited dated 08-11-2011. Further, the Department is in appeal before the Honorable Supreme Court in respect of the deduction claimed under section 10A in your own case for the Assessment year 2005-06. To keep the issue alive, the deduction claimed by you is not allowable for this year also.

2. Amalgamation with M/s. Accurum India Private Limited :- According to information received in this office; it is seen that M/s.Kanbay Software (India) Private Limited has amalgamated with M/s. Accurum India Private Limited in the year 2007 vide order of the High Court of Madras dated 23-03-2007 sanctioning the scheme of amalgamation with effect from the appointed date 01-04-2006 subject to approval of the scheme by the Bombay High Court Vide Bombay High Court order dated 08-02-2007; the amalgamation date was 01-04-2006; which is the appointed date. Subsequently, M/s. Kanbay Software (India) Private Limited has changed its name to M/s. Capegemini India Private Limited (the assessee). You were asked to submit complete details of the amalgamation vide notice under section 142(1) dated 05-02-2015. However, you have failed to submit any details called for regarding this amalgamation. As per the scheme of amalgamation, the whole of the undertaking of M/s. Accurum India Private Limited [Transferor Company] comprising its business all assets and liabilities of whatsoever nature and wheresoever situated shall be transferred and vested in the Transferee company (yourself). All the profits or income accruing or arising to the Transferor Company or expenditure or losses arising to or incurred, including the effect of taxes by the Transferor Company with effect from the

appointed dated shall for all purpose and intents be treated and be deemed to be and accrue as the profits or incomes or expenditure or losses of Kanbay. From the Balance sheet submitted by you for the period under consideration, there is no increase/change in the authorized share capital and in the issue, subscribed and paid up capital as on 31-03-2006 and as on 31-03-2007. The changes in the assets and liabilities could not be verified since no accounts of M/s. Accurum India P Ltd. were made available by you. However, it is also seen that you have claimed amalgamation expenses totaling to Rs.22,01,126/- for your amalgamation with M/s. Accurum India Limited. Hence, an ad-hoc disallowance in this respect is proposed to be made.

3. Regarding deduction claimed under section 35DD : You have claimed deduction of professional expenses of Rs.2201126/- incurred in connection with amalgamation with Accurum India Private Limited as a revenue expense citing Supreme Court judgment in the case of Bombay Dyeing & Manufacturing Co. Ltd. [219 ITR 521 SC 1996]. This is not in order, since the decision relied upon by the assessee is prior to the introduction of specific section 35DD which provide for amortization of such expenses and therefore not applicable to the assessee.

4. In your case, there is enough tangible material in the hands of the assessing Officer to reopen the assessment. There being reasons to believe that income has escaped assessment, the same was reopened for scrutiny under section 147 of the Act.

5. In the light of the above facts, the objections raised by the assessee is dismissed.

[Jessie A. Ninan]
Assistant Commissioner of Income tax,
14[1][2], Mumbai”

11) It is in the light of the above undisputed factual position that we have heard Mr. Pardiwalla – learned Senior Counsel for the Petitioner and the learned Additional Solicitor General for the Respondents.

12) Mr. Pardiwalla's contention is that the notice under section 148 is totally vitiated as the Assessing Officer has failed to record the reasons mandated by the proviso to section 147. That proviso mandates that in the event the assessment is sought to be reopened after 4 years, then, the satisfaction in terms of the proviso must be recorded. That satisfaction must be reflected in the reasons accompanying the notice. Mr. Pardiwalla has invited our attention to the reasons to submit that far from indicating as to how the assessment already made can be faulted, the Assessing Officer has failed to even record the mandatory satisfaction. That is a pre-condition, inasmuch as, the reasons to believe cannot merely chant the words of the section. It must be indicated as to how the Assessee failed to disclose fully and truly all material facts necessary for the assessment. Mr. Pardiwalla criticised the reasons recorded by terming them as nothing but after thought or based on change of opinion. The Assessing Officer proposed to reopen the assessment so as to deal with the return of income furnished and for the assessment year 2007-08 afresh insofar as the deduction under section 10A of the IT Act is concerned. Further, it is alleged that was a deduction not allowable and permissible. The Respondents, according to Mr. Pardiwalla, can take recourse to other legal provisions and in the very statute. However, to revisit this deduction and based on a different opinion is clearly impermissible in law. He submits that once the

deduction is allowed and which was otherwise also permissible in law, then, the impugned notice cannot be sustained. It must be quashed and set aside for the failure to comply with the mandatory pre-condition. The reasons recorded did not reflect that there is any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment. Mr. Pardiwalla sought to justify the course adopted by the Petitioner/Assessee during the course of the original assessment by relying on a Division Bench Judgment of this Court in the case of *Hindustan Uniliver Limited vs. Deputy Commissioner of Income Tax* reported in **(2010) 325 ITR 102**.

13) As far as the Respondents are concerned, they only rely upon the record, namely, the reasons, copy of which is at page 198 of the paper book and the order dismissing the objections. The affidavit in reply, as noted above, does not deal with para 12 of the Writ Petition at all. The affidavit in reply proposes to deal with the deduction and claimed by the Petitioner on merits. The affidavit admits that there was a questionnaire issued by the Assessing Officer in the original assessment but states that the same was a general one. The Petitioner has replied to this questionnaire and submitted general information. According to the Respondents, the Petitioner did not give information regarding the losses of Unit IV neither did the Petitioner adjust the

losses of Unit IV with the profits of other units. The reply admits that the draft assessment order is faulty for the Assessing Officer for failing to adjust the losses of Unit IV against the profit making Units. Therefore, the Respondents, in the affidavit submit that there was no mention of the loss being adjusted against the profits of other units and this fact was not considered by the Assessing Officer in the draft assessment order. The Dispute Resolution Panel is equally faulted for having this draft assessment order accepted merely on the question of computation of deduction under section 10A of the IT Act. Then, the grounds of Appeal to the Tribunal have been referred to.

14) It is thus contended that the Tribunal, in the order passed in Appeal, did not consider the issue of adjustment of the losses of Unit IV against the profits of Units II and III, which is the subject matter of issuance of notice under section 148 of the IT Act. Therefore, this notice is justified by urging that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment for failure of the Petitioner/Assessee to disclose truly and fully all material facts relevant to the assessment year.

15) Upon hearing both sides and perusing the Writ Petition and all Annexures thereto so also the affidavit in reply, we fail to understand as to how the Respondents justify the issuance of the notice under

section 148 of the IT Act and by referring to such details including of the claim of deduction under section 10A of the IT Act. If these details and pertaining to deduction in question were not furnished and were not available with the Assessing Officer, then, one fails to understand as to from where the data and the computation has been taken and for reference by the Respondents themselves. In the reasons recorded, it is clear that the Assessing Officer is aware that the Petitioner Assessee is engaged in the business of development and export of software. The Assessing Officer was aware of the Units set up by the Assessee/Petitioner before us. He has derived the figures of profits and losses from the relevant records and the information, some of which was supplied and furnished by the Petitioner itself. In these circumstances and when material facts relevant to the assessment year were disclosed and were on record, then, one fails to understand as to why this notice has been issued. From the reasons itself, it is apparent that it is issued to revisit this claim of deduction under section 10A of the IT Act and as put forward by the Petitioner/Assessee. If the deduction under section 10A of the IT Act is allowable on the net profit derived by the Assessee company from eligible units, after setting off lossess from other eligible units, then, it is apparent that all the particulars and profits were before the Assessing Officer at the time of the original assessment. The Petitioner has, while disputing the reasons

recorded and raising objections thereto, pointed out in details as to how the relevant facts were before the Assessing Officer. We do not find any material to the contrary and which falsifies the Petitioner's assertions in the letter dated 12th December, 2014 raising specific objections to the reasons recorded for reopening the assessment under section 147 of the IT Act. The affidavit in reply is completely silent with regard to furnishing of these details and by the Petitioner. From the affidavit in reply, we have taken specific paragraphs, where the Petitioner's version before the Assessing Officer in the original assessment though accepted by the Assessing Officer, he is faulted for not having taken into consideration certain aspects of this deduction. If the Petitioner allegedly did not give information regarding the losses of the Unit IV and did not adjust the losses of Unit IV with the profits of other units and therefore the order in that behalf is termed as erroneous, then, this is a clear case of revisiting this claim. Now, a different opinion is held by the Respondents and for which they want to reopen the assessment. Such a course is clearly impermissible.

16) Having referred to the undisputed factual materials on record and finding that there is no justification for reopening the assessment that we have no alternative but to allow this Writ Petition. Once we find that the mandatory pre-condition and as set out in the statute has not been abided by, then, the notice under section 148 of the

IT Act and all steps in furtherance thereof cannot be sustained.

17) The Writ Petition is accordingly allowed. Rule is made absolute in terms of prayer clause (a). There would be no order as to costs.

(A.K.MENON, J.)

(S.C.DHARMADHIKARI, J.)