

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

WRIT PETITION NO. 157 OF 2011

Raman & Weil Pvt. Ltd.

..Petitioner

Vs.

DCIT. 1(3) Mumbai & Anr.

..Respondents

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Mr. J.P. Mistry, Sr. Advocate a/w Mr. Nishant Thakkar a/w Mr. Rajesh Poojary i/b Mint and Confreres for Petitioner.

Mr. Arvind Pinto, Advocate for Respondent.

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**CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.**

DATED : 12 FEBRUARY 2015

P.C.:

1. This petition under Article 226 of the Constitution of India challenges:

(a) notice dated 26 March 2010 issued under Section 148 of the Income Tax Act, 1961 (the 'Act') seeking to reopen the assessment for Assessment Year 2005-06;

(b) order dated 23 November 2010 passed by the Assessing Officer disposing of the petitioner's objections to the grounds in support of the impugned notice dated 26 March 2010;

(c) the assessment order dated 30 November 2010 passed under Section 143(3) r/w Section 147 of the Act alongwith demand notice under Section 156 of the Act; and

(d) show cause notice dated 30 November 2010, as to why penalty under Section 271 of the Act should not be imposed.

2. This petition was admitted on 20 June 2011 and the respondents were restrained from acting upon the Assessment Order, demand notice and show cause notice to impose penalty till the final disposal of the petition.

3. On 26 November 2007, an assessment order was passed under Section 143(3) of the Act, in respect of the petitioner for the Assessment Year 2005-06. thereafter, the impugned notice dated 26 March 2010 sought to reopen the assessment for the Assessment Year 2005-06. In support of the impugned notice the reasons recorded as communicated to the petitioners read as under:

“During the Assessment Year 2005-06, the assessee had claimed the deduction under Section 80IB(4) for its two units situated at Daman. The unit wise deduction claimed during the Assessment Year 2005-06 are as under:

Deduction Allowed

Date of commencement

<i>Unit-I</i>	<i>1,56,38,980/-</i>	<i>31.03.1997</i>
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<i>Unit-II</i>	<i>54,02,039/-</i>	<i>22.03.2004</i>
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As per the provisions of Section 80IB(4), where the gross total income of an assessee includes any profits and gains derived from an industrial undertaking which begins to manufacture or produce articles or things at any time during the period from 01.04.1993 to 31.03.2004, the deduction is allowable at the prescribed percentage of profits for specified period. Further, subsection (13) r.w.s. 80IA(7) stipulates that the deduction is allowable only if the assessee furnishes alongwith the return of income, a

certificate in Form-10CCB from an accountant who audited the accounts of the assessee.

It is seen that the accounts of the assessee were audited by Shri. Surendra Nigsure, Chartered Accountants of M/s Harshad H. Parekh & Co. whereas audit certificate in Form 10CCB was furnished by Shri. Vipul R. Ladda, Chartered Accountants of M/s Shah & Ladda. As the accountant who has audited the accounts has not certified the eligibility of the undertaking the claim of deduction based on another auditor's certificate in irregular. The has resulted in incorrect claim of deduction u/s 80IB of Rs.2,10,41,019/-.

It is also observed that in the 10CCB certificate date of commencement of Unit-II has been shown as 22.3.2004. However, the Factory Licence is found to be issued on 22.4.2004 by the Chief Inspector of Factories, Daman. As the factory can not function without a licence from the competent authority and the licence was issued only on 22.4.2004, the date of commencement of production shown prior to 1.4.04 in the audit certificate is not correct. As such the unit is not eligible for deduction u/s. 80IB due to non fulfillment of all the prescribed conditions.

In view of the above facts, the assessee's claim of deduction u/s. 80IB is not in order and has resulted in income escaping assessment to the tune of Rs.2,10,41,019/- within the meaning of Section 147 of the I.T. Act, 1961. the relevant assessment year being A.Y. 2005-06, the remedial action contemplated is before the expiry of four years from the end of the relevant assessment year.

I have therefore reasons to believe that the income of Rs.2,10,41,019/- has escaped assessment under the provisions of Income-tax Act, 1961 for the A.Y. 2005-06 and accordingly it is a fit case for reopening u/s. 147 of the I.T. Act, 1961. Hence, the assessment for A.Y. 2005-06 is hereby re-opened."

4. The petitioners by their letter dated 19 August 2010 set out

their objections to the grounds mentioned in the reasons recorded in support of the impugned notice. In particular, the petitioners pointed out that there was no requirement under the Act that a certificate claiming benefit under Section 80IB of the Act has to be of an Accountant who has audited the petitioner's accounts but it is only to be of an Accountant who has audited the undertaking which is claiming the benefit and furnish the certificate as required in Form 10-CCB of the Act. So far as the second ground mentioned therein viz. non-commencement of manufacturing activity in view of the fact that factory license was issued only after the end of the previous year relevant to the Assessment Year 2004-05. The petitioners pointed out they had commenced manufacturing activity during the previous year relevant to the assessment year 2004-05 and in support thereof produced licence given by the Drug Authorities, registration with Excise Authorities, Sales Tax Authorities, etc. in support to its contention that manufacturing activity had commenced in previous year relevant to assessment year 2004-05. It was also contended that the impugned notice is on account of mere change of opinion.

5. The Assessing Officer by an order dated 23 November 2010 rejected the petitioner's objections to the reasons recorded for reopening of the assessment. This on the ground that there was no change of

opinion, as according to the Assessing Officer, no opinion was formed with regard to the issues now raised while passing the Assessment Order dated 26 November 2007 in regular assessment proceedings.

6. Thereafter the present petition was filed in this Court and the Assessing Officer was informed by letter dated 13 December 2010 that this petition has been filed challenging the impugned notice dated 26 March 2010. Besides the petitioner also drew attention to the decision of this Court in *Asian Paints Ltd. Vs. DCIT in 296 ITR 90* wherein it has been laid down that when an objection to reopening of an assessment is disposed of by an order, adverse to the petitioner, no further proceedings for reassessment would be initiated by the Assessing Officer for a period of four weeks from the date of disposal of the objections.

7. Notwithstanding the above binding decision of this Court in *Asian Paints Ltd. (supra)*, the Assessing Officer did not wait for a period of four weeks from the order dated 23 November 2010 and passed the assessment order on 30 November 2010 under Section 143(3) r/w 147 of the Act. The petitioner has made a grievance of the order dated 30 November 2010 being dispatched in the evening of 13 December 2010 after being informed of the writ petition filed. Be that as it may, at this stage we enquired of Mr. Pinto, the learned Counsel

for the Revenue as to how does he justify the order dated 30 November 2010 in the face of the decision of this Court in Asian Paints Ltd. (supra). Mr. Pinto very fairly states he is unable to justify the same.

8. Therefore the assessment order dated 30 November 2010 being in the face of binding decision of this Court in Asian Paints Ltd. (supra) cannot be sustained and the same is hereby quashed and set aside. The consequent demand notice dated 30 November 2010 issued under Section 156 of the Act and the show cause notice dated 30 November 2010 in respect of proposed penalty also cannot be sustained and are hereby quashed and set aside.

9. We shall now examine the challenge to the impugned notice dated 26 March 2010 seeking to reopen the assessment for the Assessment Year 2005-06. The second ground in the reasons recorded indicates that the basis of the Assessing Officer for issuing the impugned notice was that the factory license to manufacture the goods in respect of Unit No.II was issued to the petitioners only on 22 April 2004 i.e. after the end of the previous year relevant to the Assessing Year 2004-05 thus leading to a reasonable belief that the petitioners claim that they had commenced manufacturing in the Unit No.II on 22 March 2004 is not correct. This resulted in a prima facie view that in the absence of

manufacture in Unit No.II, during the Assessment Year 2005-06 the benefit of Section 80IB of the Act is not available. The petitioners pointed out to us the evidence in support of its case by contemporaneous evidence in the form of excise registration/records, registration with drugs authority, sales tax registration, etc. to indicate that the manufacture had commenced at Unit No.II on 22 March 2004 i.e. even prior to the issue of a factory license. It is the petitioner's case that absence of a factory license would not by itself indicate that there has been no manufacture carried out by the petitioners at Unit No.II while considering the petitioner's case for benefit under Section 80IB of the Act. The petitioners have also sought to contend that this aspect of the matter has been examined during the assessment proceedings and therefore the impugned notice is completely without jurisdiction. In the present facts this would also require investigation, as admittedly the petitioner had during the assessment proceedings not declared to the department that it did not possess factory license to manufacture at Unit No.II before 31 March 2004. It is a settled position of law that at the stage of the impugned notice, the Assessing Officer must have reason to believe the income eligible to tax has escaped assessment. This belief must be a prima facie view and not a final/concluded view. On reading of the grounds of the impugned notices, we are of the view that it cannot be

said that the grounds in support of the impugned notices did not indicate a prima facie view warranting the issue of the impugned notices. Thus it cannot be said the initiation of proceedings by the impugned notice is without jurisdiction.

10. The petitioners on production of the evidence before the Assessing Officer during the reassessment proceedings may be able to satisfy the Assessing Officer that manufacture had commenced with effect from 22 March 2004 in its Unit No.II before the issue of factory license entitling it to the benefit of Section 80IB of the Act. In the above view, we are not inclined to interfere at this stage with regard to the impugned notice. We may also make it clear that as we are not inclined to interfere with the impugned notice on the above ground we have not examined in depth the petitioner's challenge to the first ground in support of the impugned notice dated 26 March 2010 viz. the eligibility of Auditor's Certificate. This could also be enquired in reassessment proceedings.

11. However we make it clear that during the reassessment proceedings, it would be open to the petitioners to contend before the Assessing Officer that the impugned notices seeking to re-open the assessment is without jurisdiction on both the grounds mentioned in the reasons in support of the impugned notice. This of course alongwith

other submissions on the merits of their claim for the deduction under Section 80IB of the Act in respect of Unit No.II.

12. According to us, the reasons in support of the impugned notices cannot be said to be without jurisdiction and would be a subject matter of enquiry during the reassessment proceedings.

13. In the result, we partly allow the petition as under:

(a) The Assessment Order dated 30 November 2010 passed under Section 143(3) r/w 147 of the Act alongwith the demand notice dated 30 November 2010 are quashed and set aside.

(b) The show cause notice dated 30 November 2010 proposing to improve penalty is quashed and set aside.

We do not disturb the impugned notice dated 26 March 2010 and the order dated 23 November 2010 disposing of the petitioner's objections. However the petitioner's contention that the impugned notice is without jurisdiction is left open to be urged before the Assessing Officer during the reassessment proceedings. It is made clear that the petitioner's submissions in support of the above would be independently considered by the Assessing Officer without in any manner being influenced by any observation herein.

14. Petition disposed of as partly allowed with the above directions. No order as to costs.

[G.S. KULKARNI, J]

[M.S. SANKLECHA, J.]