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

WRIT PETITION NO. 47 OF 2008

M/s. Cabot India Ltd., Mumbai .. Petitioner
v/s.
The Assistant Commissioner of Income-Tax
Range-1(1), Mumbai & Ors. .. Respondents

WITH
WRIT PETITION NO. 2586 OF 2009

M/s. Cabot India Ltd., Mumbai .. Petitioner
v/s.
The Deputy Commissioner of Income-Tax
Range-1(1), Mumbai & Ors. .. Respondents

Mr. Percy Pardiwala, Senior Counsel a/w Mr. Jitendra Jain and Mr. Atul Jasani for the petitioner
Mr. Suresh Kumar for the respondent

CORAM : S.V. GANGAPURWALA &
A.M. BADAR, J.J.

DATED : 13th JULY, 2017

P.C.

1. These two petitions are based on similar set of facts and involve common question of law, to avoid rigmarole, they are decided together. The facts are referred from Writ Petition No.47 of 2008.

2. The petitioner assails the notice issued by the respondent to it under Section 148 of the Income Tax Act, 1961 (the Act) for the Assessment Year 2002-03. The assessment order therein was passed on 31st January, 2005. Thereafter, the impugned notice purportedly under Section 148 of the Act has been issued on 30th March, 2007 seeking to reopen the assessment on the ground that the interest attributable to capital work in progress has been wrongly allowed as revenue expenditure. So also, the royalty paid by the assessee to one Cabot Corporation was in lieu of technical know how from the foreign company, which was in the nature of enduring advantage to the assessee company. The said royalty payment was capital expenditure and was not allowable as revenue expenditure.

3. Mr. Pardiwala, the learned Senior Counsel for the petitioner strenuously contends that the interest capitalized and the royalty was allowed as revenue expenditure for the previous assessment years i.e. Assessment Years 1993-94 and 2001-02. For the instant year i.e. A.Y. 2002-03 after the return was filed, queries were raised by the Assessing Officer, seeking explanation from the petitioner with regard its claim of interest and also royalty as a revenue expenditure.

The petitioner replied to the same. The Assessing Officer was convinced with the said reply and passed the assessment order accepting the stand of the petitioner. After about two years, the impugned notice has been issued for reopening of assessment. The argument of the learned Senior Counsel for the petitioner is that mere change of opinion cannot be a ground for reopening the assessment. The Assessing Officer after having been convinced by the reply given by the petitioner and accepted the stand of the petitioner that the interest and royalty in fact is the revenue expenditure and thereafter assessment order is passed. It is not a case that any item escaped the assessment. The reopening cannot be as a matter of course nor only on the ground that the new Assessing Officer has a different opinion. The learned Senior Counsel relies on the judgment of the Division Bench of this Court in a case of ***GKN Sinter Metals Ltd. Vs. Ms. Ramapriya Raghavan, Assistant Commissioner of Income-Tax and Ors. (2015) 371 ITR 225*** and the judgment of the Apex Court in a case of ***Commissioner of Income Tax Vs. Kelvinator of India Ltd. (2010) 320 ITR 561.***

4. Mr. Suresh Kumar, learned Counsel for the respondent

supports the order and submits that the Assessing Officer while assessing the return under Section 143 of the Act, had erroneously considered the interest capitalized as revenue expenditure so also royalty as a revenue expenditure. The same was erroneous. The learned Counsel further submits that the claim with regard to interest attributable to capital work in progress was wrongly allowed as revenue expenditure instead of capitalizing the same in capital work in progress as the same is incurred in expansion of capital. The learned Counsel further submits that the petitioner had entered into Foreign Technology Collaboration Agreement with Cabot Corporation, USA for modernization of carbon black plant under energy conservation scheme, to improve its performance. The said technology is acquired under the Foreign Technology Collaboration Agreement and acquiring such technology the petitioner was required to pay only royalty at the percentage of sales. The said royalty amount was wrongly allowed as revenue expenditure. In fact, the royalty payment was capital expenditure. In the assessment order under Section 143(3) of the Act, the said amounts have been wrongly allowed as revenue expenditure. As such, a reasonable belief was made out by the Assessing Officer giving him right to issue notice under Section 148 of the Act.

5. We have considered the submissions canvassed by the respective parties.

6. From the undisputed factual matrix, it is explicitly clear that in the statement of total claim, the petitioner had shown the interest amount incurred during the year and claimed it as allowable expenditure u/s 36(1)(iii) of the Act. So also, with regard to the royalty and note was also given that the similar interest has been allowed in the past scrutiny assessments. The notice was issued to the petitioner u/s 143(2) of the Act on 9th September, 2004 seeking explanation from the petitioner as to why the capital interest should be allowed as revenue expenditure and to explain, give a break up and justify royalty payment debited of Rs.400 lakhs. Pursuant thereto, the petitioner filed a detailed reply on 15th October, 2004 giving its explanation to the said queries raised by the Assessing Officer.

7. The impugned notice is issued to the petitioner on the ground that these items on account of interest and royalty, which are

allowed as revenue expenditure in the assessment order, are on wrong premise.

8. It has been consistently held by the Apex Court and this Court that mere change of opinion cannot be the 'reason to believe' to reopen the assessment. This Court in a case of *GKN Sinter Metals Ltd.* (supra) has extensively dealt with the law in this regard and after referring to the various judgments of the Apex Court and this Court observed that mere change of opinion cannot be the basis of reopening the assessment. In the said case also, the Assessing Officer had raised the query with regard to allocation of expenditure. The petitioner gave its reply. The Assessing Officer accepted the reply and assessment order was passed. Thereafter, notice for reopening the assessment was issued.

9. In the present case the Assessing Officer before passing the assessment order, had raised queries precisely with regard to the interest and royalty being shown as revenue expenditure. The Assessing Officer was satisfied with the reply and thereafter passed assessment order. Notice u/s 148 is issued merely because another Assessing Officer has different opinion.

10. It is not the case that any income has escaped assessment. The notice is issued merely upon the change of opinion of the Assessing Officer, which is not permissible.

11. In the light of the above, the impugned notice is quashed and set aside. Rule is made absolute in the above terms. No costs.

(A.M. BADAR, J.) **(S.V. GANGAPURWALA, J.)**