

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 27.10.2017

Pronounced on: 08.12.2017

+ W.P.(C) 2697/2015

SC JOHNSON PRODUCTS PRIVATE LIMITED

..... Petitioner

Through: Mr. C.S.Aggarwal, Senior
Advocate with Mr. Prakash
Kumar, Advocate

versus

**ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE
– 22(2), NEW DELHI**

..... Respondent

Through: Mr. Ruchir Bhatia, Advocate

+ W.P.(C) 10904/2016 & CM No.42721/2016 (stay)

SC JOHNSON PRODUCTS PRIVATE LIMITED

..... Petitioner

Through: Mr. C.S.Aggarwal, Senior
Advocate with Mr. Prakash
Kumar, Advocate

versus

**ADDITIONAL COMMISSIONER OF INCOME TAX,
SPECIAL RANGE-8, NEW DELHI**

..... Respondent

Through: Mr. Rahul Kaushik, Advocate
with Mr. Dhanesh Kumar,
Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

S. RAVINDRA BHAT, J.

1. In both these writ petitions, by the assessee, the relief claimed is a direction to quash the reassessment notices issued by the income tax department (hereafter “the revenue”). The assessee is aggrieved, and submits that the reassessment notices under Sections 147/148 of the Income Tax Act, 1961 (also “the Act”) are vitiated and unsupportable in law.

2. The brief facts are that the assessee filed its return of income for the assessment year (AY) 2007-08 declaring an income of ₹20,26,22,6051-. After selection of its case for scrutiny, the assessing officer completed the assessment, bringing to tax ₹70,47,44,252/- by assessment order dated 24.12.2010. It is alleged that the petitioner received notice on 11 April, 2014, under Section 142 (1) of the Act, to which it responded, pointing out that it was never served with any reassessment notice. It was thereafter served a notice, dated 28 March, 2014, proposing to reassess income for AY 2007-08. The petitioner filed its returns and, at its request, it was furnished with reasons for reopening the completed assessment, on 10.02.2015. It objected to reopening of its assessment, through representation dated 25 February 2015. On 27 February 2015, those objections were rejected.

3. In WP 10904/2016, the facts are that for AY 2008-09, the petitioner had filed its returns declaring an income of ₹23,80,55,757/-. Like for the other year, the case was selected for scrutiny and the assessments were framed, under Section 143 (3) after thorough scrutiny, on 31.12.2010. The sum brought to tax was ₹86,80,81,180/-.

On 30.03.2015 the revenue issued notice for reassessment for AY 2008-09 under Sections 147/148; the petitioner resisted, pointing out that the original assessment was completed under Section 14 (3) of the Act. These were to no avail and the revenue rejected these objections.

4. It is alleged on behalf of the assessee/petitioner and argued by its senior counsel, Mr. C.S. Agarwal that the reasons given, i.e. that a wrong accounting standard was applied, resulting in concealment of the true income, amounts to review of the same material on the record, which is impermissible. It is stated that all material facts were duly disclosed with respect to the computation of book profit under Section 115 JB of the Act. In this regard, it is submitted that copy of annual account for the preceding year i.e. 2006-07 and the Order dated 09.10.2006 in Company Petition No. 73, were part of the record. It is further argued that the A.O. never computed book profit and in the absence of computation of book profit, the allegation that, there is an escapement of income is impermissible. Senior counsel also argued that fresh material surfaced subsequent to the culmination of assessment proceedings. Learned counsel relied on the rulings reported as *Additional Commissioner of Income Tax vs. ICICI Securities Primary Dealership Ltd.* (2012) 348 ITR 299 (SC), *Madhukar Khosla vs. Assistant Commissioner of Income Tax* (2014) 367 ITR 165 (Delhi), *Mohan Gupta (HUF) vs. Commissioner of Income Tax* 2014 (141) DRJ 471 and *Orient Craft Ltd vs. Commissioner of Income-tax* 354 ITR 536 (Delhi). Counsel also relied on *Apollo Tyres Ltd vs. CIT* 255 ITR 273 to say that once returns are filed and the company's accounts are audited and accepted – as long

as they conform to schedule VII of the Companies Act, 1956 (also the "Companies Act"), the revenue cannot question them, under Section 115J of the Income Tax Act. It is urged that the AO's power is to satisfy himself if the accounts were accepted by the authorities and certified; the only scope for adjustment is outlined in Explanation to Section 115J (1A). Beyond that the AO cannot question the net profit.

5. It is submitted that Accounting Standard 14 is appropriate and applicable for the facts. It provides, *inter alia*, that,

“37. Any excess of the amount of the consideration over the value of the net assets of the transferor company acquired by the transferee company should be recognised in the transferee company's financial statements as goodwill arising on amalgamation. If the amount of the consideration is lower than the value of the net assets acquired, the difference should be treated as Capital Reserve.

38. The goodwill arising on amalgamation should be amortised to income on a systematic basis over its useful life. The amortization period should not exceed five years unless a somewhat longer period can be justified.”

6. Learned senior counsel submitted that the assessee company accounted for the amalgamation transaction in its books of accounts. This accounting is also in accordance with Generally Accepted Accounting Principles ("GAAP") and was certified / accepted by the statutory auditors. Accordingly, the assessee amortized the goodwill in the books of accounts and claimed them under the head

"Depreciation/ Amortization" in the Profit and Loss account. However, as evident from the copy of reasons provided to the assessee the revenue alleged that the accounting of merger should have been under "pooling of interest method" wherein the difference between the value of investments in the subsidiary company and net assets so acquired should have been adjusted in the reserves and hence, there should not have been any question of creation of goodwill, had the assessee-company followed the "pooling of interest" method instead of the "Purchase" method. Further, the revenue alleged that in absence of compliance to the relevant method, the financial statements of the company does not give a true and fair view and the deviation in accounting is a device deployed to avoid taxes. Such re-opening of amounts to taking a second look, is without any basis, it is urged.

7. Learned senior counsel urged, relying on *Ganga Saran vs. Income Tax Officer* 130 ITR 1 (SC) that the proviso to Section 147 does not empower the assessing officer or the revenue to re-open a completed scrutiny assessment, unless fresh material surfaces, disclosing that the assessee had hidden or concealed the real income. Reliance was placed also on *Calcutta Discount Co. Ltd. vs. Income-tax Officer* (1961) 41 ITR 191.

8. The revenue argues that the assessee tried to make out a case that the amalgamation of two companies namely, M/s Karamchand Appliances Pvt. Ltd. and M/s Roshni Appliances Pvt. Ltd. with the transferor company, namely, M/s S.C. Johnson Products Pvt. Ltd. was by a method of merger called 'purchase method' by which it is not necessary that all the shareholders of the erstwhile transferor

companies would become shareholders in the same ratio in the transferee company. It is argued that the accounting for a merger type of amalgamation is made in terms of the accounting standard AS-14 which reads as follows:

"The object of the purchase method is to account for the amalgamation by applying the same principles as are applied in the normal purchase of assets. This method is used in accounting for amalgamation in the nature of purchase."

9. On the other hand in the 'pooling of interest' method of amalgamation the transferor's assets, liabilities and reserves are recorded by the transferee at the relevant "carrying amounts," i.e. points. The criteria applicable, it is urged is '*pooling of interests method*' in para 3 (e) of AS-14. On the other hand the reason recorded for issue of notice u/s 148 indicate that while the assessee maintains this *de jure* position but actually the merger/amalgamation has *de facto* followed the '*pooling of interests method*' by which there could not have been accounting for goodwill. It is contended that the assessee in effect did not disclose full and true facts in its return of income.

10. Counsel for the revenue argues that the assessee also annexed the order of the Company Court when it has recognized and approved the scheme of amalgamation under sections 391 and 394 of the Companies Act. However, a perusal of paras 1 and 2 of the scheme approved on 09.10.2006, shows that all assets and liabilities of the transferor companies have passed on, in totality, to the transferee company thus indicating that it is a 'pooling of interest' method of

amalgamation. It is thus, argued that clearly, an examination of the scheme of merger, especially the clauses which deals with amalgamation, 3.1 to 3.2.11 (which deal with the transfer of assets), Clause 7 which deals with the shareholding after amalgamation and clause 9 (which deals with the share capital reorganization) all show that the merger was following 'pooling of interest' method.

11. It is stated that in view of this position, clearly the assessee did not disclose the full and true facts and that the *de facto* position is different from the *de jure* position. Therefore the deduction taken by the petitioner for goodwill being the difference between the assets and liabilities was incorrect and a stratagem by the assessee to reduce its profit u/s 115JB of the Act by an amount of ₹103,26,96,924/-.

12. Countering the petitioner's argument, based on *Apollo Tyres (supra)*, counsel for the revenue argues that the Supreme Court held that the accounts prepared as per the provisions of the Companies Act and ratified by the Board of Directors should not be interfered with. It is pointed out, that the court did not say that the company should say one thing and do another. Both the methods specified above are sanctioned by the Companies Act; yet the assessee stated that it followed one method but actually followed the other which goes to prove that the facts declared by it are not full and true; rather it revealed a misleading picture. The approval of the Scheme of amalgamation by the Companies Court meant that the assessee felt that the interest of the shareholders and of creditors is well protected. It is submitted that the approval of the scheme does not *ipso facto* bar the revenue from examining the impact of provisions of the Income

Tax Act.

13. The revenue relies on the Explanation to Section 147 of the Income Tax Act which states as under:

"Production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

Reliance is also placed on Explanation 2(c) to section 147 of the Act, which states as follows:

"Explanation 2- For the purposes of this section, the followingshall also be deemed to be cases where income chargeableto tax has escaped assessment, namely:-

.....

(c) Where an assessment has been made but-

(i) Income chargeable to tax has been under assessed; or..."

The revenue also cites *Sri Krishna (P) Ltd.* (1996) 221 ITR 538(SC) where it was held that:

"Every disclosure is not and cannot be treated to be a full and true disclosure. A disclosure may be a false one or true one. It may be a full disclosure or it may not be. A partial disclosure may often be a misleading one. What is required is a full and true disclosure of all material facts necessary for making assessment for that year. This calls for

examination of the decisions of the court analyzing and elucidating section 147 and 148. The obligation on the assessee to disclose the material facts – or what are called primary facts- is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full - 'fully and truly'. A fake assertion, or statement, of material fact, therefore, attracts the jurisdiction of the ITO under section 147."

Analysis and Conclusions

14. It is apparent from the facts that the completed assessments for the two years, had taken into account the documents and materials. Those assessments were undeniably after scrutiny, finalized under Section 143 (3). Both assessments were completed in December 2010. While framing a similar assessment, for AY 2009-10, the AO noticed that the assessee had adopted a wrong method, of “purchase”, while calculating depreciation, instead of the “pooling of assets” method, in terms of a different accounting standard. The assessee argues that there is absolutely no material on the record to justify re-opening of an otherwise valid assessment and the citing of a more appropriate method cannot mean that there was concealment of material facts.

15. Long ago, in *Calcutta Discount*, (*supra*) the Supreme Court had ruled as follows:

"There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet the possible contention that when

some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents." His omission to bring to the assessing authority's attention those particular items in the account books, or the particular portions of the documents, which are relevant, amount to "omission to disclose fully and truly and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessor's duty to disclose all of them - including particular entries in account books, particular portions of documents, and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn ?

It may be pointed out that the Explanation to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to

disclose "inferences" - to draw the proper inferences being the duty imposed on the Income-tax Officer.

We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this."

16. In *Phool Chand Bajrang Lal vs. ITO* (1993) 203 ITR 456 it was held that:-

"From a combined review of the judgments of this court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under section 147 (a) read with section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier

available but acting on fresh information. Since the belief is that of the Income- tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income- tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

17. It is therefore clear that if the *rationale* for re-opening is purely factual, unless fresh facts or material having a “live link” with the issue, that can lead to inference of concealment of material facts cannot be gone into; the earlier assessment order becomes conclusive. However, if the AO comes across material subsequently, such as fresh facts, or materials which pertain to a previous assessment or assessment orders (as in the present case) where it is felt that returns were “dressed up” or improper claims were made, that escaped inquiry, reassessment is warranted. In such cases, the materials can also include subsequent years’ assessments, which receive scrutiny during the course of whose proceedings the AO has occasion to see if the same, or same pattern of returns or claims were made. If so, the notice of reassessment would be justified.

18. In the present case, there is no doubt that this court had, while accepting the scheme for amalgamation, facially accepted the method which the assessee indicated. At that stage, neither did the court conduct any detailed inquiry into the question of the appropriateness of the method, nor was it competent to return findings that would have been conclusive. This event was relied upon by the assessee to argue that the court, under the Companies Act, had accepted the method. However, that *ipso facto* could not have barred any inquiry by the AO. Indisputably, the AO did not proceed further, but merely accepted the assessee's arguments. In these circumstances, the materials produced for AY 2009-10 triggered the reassessment notices in the present case. Having regard to the law declared in *Calcutta Discount (supra)* and *Phool Chand Bajrangi Lal (supra)* it is held that there is no infirmity with the impugned reassessment notices.

19. In view of the foregoing discussion, it is held that the writ petitions lack in merit and have to fail. They are accordingly dismissed.

S. RAVINDRA BHAT, J

SANJEEV SACHDEVA, J

DECEMBER 08, 2017