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IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 6448/2016

**AKUM DRUGS AND PHARMACEUTICALS LIMITED THROUGH:
DIRECTOR SHRI. SANJEEV JAIN Petitioner**
Through: Mr Arvind Kumar, Advocate

versus

INCOME TAX OFFICER, WARD-2(1) & ANR. Respondent
Through: Mr Dileep Shivpuri, Senior Standing
Counsel and Mr Sanjay Kumar, Junior Standing
Counsel

**CORAM:
JUSTICE S.MURALIDHAR
JUSTICE VINOD GOEL**

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**ORDER
22.05.2017**

Dr. S. Muralidhar, J.:

1.This is a writ petition preferred by the Petitioner challenging the reopening by the Revenue of the assessment for Assessment Year (AY) 2009-10 by invoking Sections 147 and 148 of the Income Tax Act, 1969 ('the Act') and issuing the impugned notice dated 6th May 2015. Also challenged is the order dated 17th June 2016 passed by the Assessing Officer (AO) rejecting the Petitioner' objections to the reopening.

2. It is required to be noted at the outset that the original return filed for the AY in question was picked up for scrutiny by the AO and completed under Section 143(3) of the Act.

3. The reasons for reopening of the assessment concerned the claim of deduction under Section 80 IC of the Act of a sum inclusive of the interest income earned by the Assessee. The reasons for reopening reads as under:

“The assessment in this case for A Y 2009-10 was completed after scrutiny on 31.03.2011 at income of Rs. 835,679/- after allowing for deduction u/s 80IC of Rs. 2,60, 59,569/-. However, subsequently, it has come to notice that the assessee had claimed, and was allowed deduction u/s 80IC on the interest income earned by the eligible units though the same is not eligible for the claim of said deduction being income from other sources.

In this regard, it is seen that the interest income of eligible units, aggregating Rs. 2, 60, 59,569/-, should have been excluded from the deduction allowed u/s 80IC which was not done in the assessment order passed, resulting in allowance of excessive deduction u/s 80IC to the tune of Rs. 2,60,59,569/-.

Keeping in view of above facts, it is clear that the income of Rs. 2,60,59,569/has escaped assessment in the case of the assessee, being a case of allowance of excessive deduction u/s 80IC to which the assessee was not entitled. It is also evident that the income escaping assessment is more than Rs. 1,00,000/- in this case and is covered by the provision of Sec. 149(1)(b) of the of the IT Act. Also, by virtue of Explanation 1 & 2 given below provision to Sec. 147, this is a case where the facts were not fully and truly disclosed by the assessee at the time of original assessment proceedings.

Since, in the instant case, the period of 4 years from the end of the financial year in which the assessment order was passed has expired, the case is covered by the proviso given below section 151 (1) of the I.T. Act, 1961. In view thereof, this proposal is being put up for kind perusal and approval of the Pr. CIT, Delhi-1, New Delhi prior to issue of notice U/s 148 in this case.

Proposal for issue of Notice u/s 148 of IT Act, 1961, in the prescribed proforma is submitted for your kind approval and necessary action please.”

4. As the AO himself noted in the above reasons for reopening, this was after four years from the end of the Financial Year for which the assessment order sought to be re-visited was passed. This meant that in terms of the first proviso to Section 147 of the Act, it was mandatory for the AO to indicate that there was a failure on the part of the Assessee to disclose “fully and truly all material facts necessary for the assessment for AY 2009-10.

5. The mandatory nature of this requirement has been underscored in several decisions including that of the Full Bench of this Court in *Commissioner of Income Tax v. Kelvinator of India Ltd.* [2002]256ITR 1 (Del) which was affirmed by the Supreme Court in *Commissioner of Income Tax v. Kelvinator of India Ltd.* (2010) 320 ITR 561(SC).

6. Mr Dileep Shivpuri, learned Senior standing counsel for the Revenue pointed out that even if there was a disclosure of facts by an Assessee it would have to be both true and full. In other words if it was either one and not the other, the first proviso Section 147 would still be attracted. In theory, this may be correct. But in a given case the Court will have to examine the reasons (and not the counter affidavit of the Revenue in reply to a writ petition) to ascertain if they point to a failure by an Assessee to make a full and true disclosure of material facts. The reasons have to speak for themselves. They cannot be supplanted by subsequent affidavits or written submissions much less oral arguments in Court.

7. In the present case the reasons for reopening do not enable a reader to ascertain in what manner the Assessee failed, when the original assessment took place, to make a full and true disclosure of material facts relevant to the assessment. On the contrary a reading of the original assessment order dated

31st March, 2011 reveals that this aspect of deduction being claimed under Section 80 IC was examined by the AO and allowed only after verifying the certificate and other documents in support of such claim. The operative portion of the original assessment order reads as under:

“The assessee company is engaged in the business of mfg. of pharmaceuticals items at Haridwar. The assessee is claiming exemption u/s 80IC as its units are situated at Haridwar which are eligible for exemption u/s 80IC vide board notification no. 17712004. The assessee company has filed copies of the 80IC certificates in this regard which have been duly examined and found to be correct. The assessment for the assessment year 2005-2006, 2006-2007 and 2008-2009 were also made under scrutiny where in also deduction under section 80IC has been allowed. Accordingly in this year also after verification deduction under section 80IC amounting to Rs. 33,68,85,690/- as claimed by the assessee is allowed.

The taxable income is taken at Rs. 8,35,679/- as per the normal provision of the act. The assessee has also declared net profit of Rs. 48,79,96,017/- as per the audited books of account which after adjustment of interest of Rs.45,177/-, Wealth tax of Rs. 8,318/- and FBT of Rs. 5,27,716/- come to Rs. 48, 75,05,160/-. The same is taken for purpose of payment of tax under section 115JB of the Income Tax Act, 1961”.

8. Therefore, it is not as if the AO who finalised the assessment under Section 143 (3) of the Act was not seized all the material facts and documents concerning the Assessee’s claim under Section 80IC of the Act. Significantly, the AO in the said order stated that “after verification” the “deduction under Section 80 IC amounting to Rs. 33, 68,85, 690 as claimed by the assessee is allowed.”

9. Mr Shivpuri submitted out that the reopening was on the basis of an audit objection and that the Supreme Court has in its decision in **Larsen and Toubro v. State of Jharkhand 2017 SCC OnLine SC 347** emphasized the importance

of the audit objection in the context of reopening of assessments.

10. While this may be true, unfortunately, the reasons given by the AO in the present case do not even refer to such audit objection. The said decision was in the context of Section 19 of the Bihar Sales Tax Act, 1981 and not Section 147 of the Act. In the present case, it is undeniable that the reasons for reopening the assessment do not satisfy the jurisdictional pre-condition mandated by the first proviso to Section 147 of the Act, viz., to indicate clearly the failure on the part of the Assessee to disclose fully and truly all material facts necessary for the purposes of the assessment for AY 2009-10, the reopening cannot be sustained in law.

11. The writ petition is, accordingly, allowed. The reopening of the assessment by the impugned notice dated 6th May, 2015 for AY 2009-10 and the order dated 17th June, 2017 passed by the AO dismissing the objections of the Petitioner are hereby set aside.

12. The writ petition is, accordingly, allowed but with no order as to costs.

S.MURALIDHAR, J

VINOD GOEL, J

MAY 22, 2017

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