**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**BENCH AT AURANGABAD**

**WRIT PETITION NO. 13871 OF 2017**

Ajeet Seeds Pvt. Ltd. Aurangabad .. Petitioner

**Versus**

The Union of India through Assistant
Commissioner of Income Tax Aurangabad.. Respondent

**WITH**
**WRIT PETITION NO. 13872 OF 2017**

Ajeet Seeds Pvt. Ltd. Aurangabad .. Petitioner

**Versus**

The Union of India through Assistant
Commissioner of Income Tax Aurangabad.. Respondent

**WITH**
**WRIT PETITION NO. 13873 OF 2017**

Ajeet Seeds Pvt. Ltd. Aurangabad .. Petitioner

**Versus**

The Union of India through Assistant
Commissioner of Income Tax Aurangabad.. Respondent

**WITH**
**WRIT PETITION NO. 13874 OF 2017**

Ajeet Seeds Pvt. Ltd. Aurangabad .. Petitioner

**Versus**

The Union of India through Assistant
Commissioner of Income Tax Aurangabad.. Respondent

Shri P. M. Shah, Senior Advocate i/by Shri Subhodh P. Shah, Advocate for the Petitioner in all matters.
Shri Alok Sharma, Standing Counsel for the Respondent in all matters.

**CORAM : S. V. GANGAPURWALA AND A. M. DHAVALE, JJ.**

**RESERVED FOR ORDERS ON : 01.03.2018**

**ORDER PRONOUNCED ON : 26.04.2018**

**<u>FINAL ORDER</u> (Per S. V. Gangapurwala, J.) :-**

. The issue involved in all these writ petitions is based on same facts and involve common question, to avoid rigmarole they are decided together.

2. The issue involved in these writ petitions pertains to assessment years 2010-2011, 2011-2012, 2012-2013 and 2013-2014.

3. The petitioner in all these writ petitions had claimed deduction against the expenditure incurred on in-house research and development resorting to Sec. 35(2AB) of the Income Tax Act (for short "I. T. Act"). The assessment is proposed to be reopened by issuing a notice U/Sec 148 of the I. T. Act. The respondent

claims that the petitioner company was not entitled to claim this deduction. The petitioner raised objection to the proposed reopening of the assessment. The objection raised by the petitioner against reopening of the assessment U/Sec. 147 r/w Sec. 148 of the I. T. Act is rejected. Aggrieved thereby present writ petitions.

4. Mr. P. M. Shah, the learned senior advocate for the petitioner strenuously contends that the action is proposed only because of the change in the opinion of the assessing officer. The learned senior advocate submits that, the petitioner company is engaged in business of development and selling seeds. Research and development of new variety of seeds including hybrid seeds is the integral part of the business of the petitioner company. The petitioner has set up a in-house research and development facility at Hanumantgaon, Tq. Gangapur, Dist. Aurangabad. The in-house research and development facility of the petitioner company is recognized by the Ministry of Science and Technology. According to the learned senior advocate, the recognition was renewed from time to time without any break upto 31.03.2019.

5. The learned senior advocate further submits that, objections raised by the petitioner to the proposed action of reopening the assessment are rejected mechanically without application of mind. The notice for reassessment is also beyond the prescribed period of limitation.

6. The learned senior advocate further submits that, notice U/Sec. 148 of the I. T. Act issued to the assessee after expiry of four years of relevant assessment year is without jurisdiction. The learned senior advocate relies on the judgment of the Division Bench of this Court in a case of **Hindustan Lever Ltd. Vs. R. B. Wadkar** reported in ***2004 (3) Mh. L. J. 517***.

7. According to the learned senior advocate, the proceedings are not based on any new material. Re-assessment on change of opinion of a officer is not valid and is without jurisdiction. The entire issue as to the entitlement of the deduction on expenditure of scientific research U/Sec. 35(2AB) of the I. T. Act is already considered in the earlier original assessment. It was a scrutiny assessment U/Sec. 143(3) of the I. T. Act. The general principle is that, once the assessment is complete, it becomes final. The learned senior advocate further submits that, in the scrutiny assessment a pointed question was asked that is question No. 25 calling upon the petitioner to furnish full details regarding claim of in-house expenses U/Sec. 35 (2AB) of the I. T. Act for research and development. The petitioner was also directed to furnish supportive evidence and to explain that these expenses should be allowed. A comprehensive scrutiny was carried out to ascertain entitlement to claim weighted deduction on expenditure of scientific research. The entire available record was scanned thoroughly. On complete satisfaction, the claim of deduction was

allowed by the assessing officer. The material which was available before the assessing officer was considered and on the basis of the material the assessing officer was convinced that the deduction is to be allowed.

8. The learned senior advocate further submits that, the statutory prescribed authority that is D.S.I.R. has renewed the approval of the in-house research and development facility. There is compliance with the substantive provision of the I. T. Act. Form 3CM is only a matter of form and not a substance. It is prescription under the rules. The compliance of the rule is directory. The assessing authority cannot go behind the approval accorded by the prescribed authority that is D.S.I.R. The learned senior advocate relies on the judgment of the Gujrat High Court in a case of **CIT Vs. Claris Life Science** reported in ***2008 SCC Online Guj. 447*** and the judgment of the **Delhi High Court in a case of CIT Vs. Sandan Vikas** reported in ***(2011) SCC Online Del 101***.

9. The learned senior advocate further submits that, after due application of mind the original assessment order is passed. The issue regarding entitlement to the expenditure of scientific research U/Sec. 35(2AB) of the I. T. Act having been raised by the assessing officer at the time of original assessment U/Sec. 143(3) of the I. T. Act and no addition having been made by the assessing officer that issue of being satisfied with the

explanation of the assessee, reopening of the assessment on the very same issue is a mere change of opinion and hence not permissible. In the original assessment proceedings U/Sec. 143(3) of the I. T. Act, the point directly and substantially at issue was the entitlement of the petitioner to claim deduction U/Sec. 35(2AB). It is not a case of non assessment of item of income chargeable to tax. The petitioner did not hold back any document, nor failed to supply any information. Reopening would not be tenable on mere change of opinion. The learned senior advocate relies on the judgment of the Apex Court in a case of **Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.** (supra). The learned senior advocate further submits that, Sec. 147 of the I. T. Act does not provide a fresh opportunity to the assessing officer to correct an incorrect assessment made earlier in absence of any failure to disclose by the assessee. The learned senior advocate relies on the judgment of the Division Bench of this Court in a case of **Titanor Components Ltd., Goa Vs. Assistant Commissioner of Income Tax, Panji Goa and others** (supra). The learned senior advocate relies on the judgment of the Apex Court in a case of **Gemini Leather Stores Vs. Income Tax Officer, Agra** reported in ***(1975) 4 SCC 375*** to submit that, after placing primary facts before the assessing officer, it is for the assessing officer to make necessary enquiry and draw proper inferences. The Assessing Officer must disclose in reasons as to which facts were not disclosed by the assessess so as to claim re-assessment. To buttress his submissions, the learned senior advocate relies on the judgment of this Court in a case of **Hindustan Lever Ltd. Vs. R. B. Wadkar reported** (supra) and **TAO Publishing Pvt. Ltd. Vs. Deputy Commissioner of Income Tax** reported in ***(2015) 370 ITR 135 (Bom)***. The learned senior counsel relies on the judgment of this Court in a case of **Tata Business Support Services Ltd. Vs. Dy. Commissioner of Income Tax** reported in ***[2015] 232 Taxman 702 (Bom)*** to submit that, failure to place a version favourable to the revenue cannot be a reason to reopen the assessment. The assessee did not hold back any document, nor failed to supply any information.

10. The learned senior advocate further contends that, order dated 12.07.2017 rejecting the objection is vitiated, as the objections raised by the petitioner are not even remotely adverted to in the order. The objections raised by the petitioner are not at all dealt with and decided in the impugned order. The impugned order is vitiated on account of lack of application of mind. The learned senior advocate further submits that, the impugned notices for assessment years 2010-2011 and 2011-2012 are barred by limitation in view of proviso to Sec. 147 of the Limitation Act. Those four years expired on 31.03.2015 and 31.03.2016 and notices for reopening of assessment are issued on 26.03.2017 that is beyond four years. It is not a case of failure on the part of the assessee to disclose fully and truly all material facts. In the

reasons recorded for reopening the assessment, the assessing officer does not state that there is failure to disclose fully and truly all material facts at the time of original assessment, hence invoking the jurisdiction after expiry of four years from the end of relevant assessment year is without jurisdiction. The learned senior advocate further submits that, making a claim, which may not be sustainable in law, will not amount to furnishing inaccurate particulars. The learned senior advocate relies on the judgment of this Court in a case of **Sound Casting Pvt. Ltd. Vs. Deputy Commissioner of Income Tax** reported in ***2012 (3) Mh. L. J. 764***. The reason recorded for reopening assessment is that the petitioner has wrongly claimed certain deductions, which it was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts fully and truly. The learned senior counsel relies on the judgment of this Court in a case of **Hindustan Lever Ltd. Vs. R. B. Wadkar** (supra).

11. The learned senior advocate further submits that, on same set of facts and documents which were produced and available at the time of scrutiny assessment U/Sec. 143(3) of the I. T. Act, now there is a change of opinion. Now the approach is that to claim deduction U/Sec. 35(2AB) of the I. T. Act, the approval in Form No. 3CM is a precondition. Undisputedly, the D.S.I.R. approval

from the prescribed authority was never revoked attributing any non-compliance. On the contrary, the said approval was being renewed continuously, from time to time, without any interruption and successively from the year 2000 and now ending with 31.03.2019. Implicit in it, the fact that the requirement of ongoing scientific research in the in-house Research and Development facility is accepted by the prescribed authority. The learned senior counsel further submits that, the approval in Form No. 3CM does not provide for any cut off date. The assessing officer cannot sit in appeal over the approval by D.S.I.R. When there is recognition from the prescribed authority, this by itself is sufficient to hold that the required conditions were satisfied. The concept of cut off date is unknown in the fact and situation.

12. The learned senior advocate further submits that, 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 inference 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. After this discovery, the Income Tax Officer had in his possession all the primary facts and it was for him to make necessary enquiries and draw proper inference as to whether the amounts invested in the purchase of the drafts could be treated as part of the total

income of the assessee during the relevant year. This the Income Tax Officer did not do. It was plainly a case of oversight and it cannot be said that, the income chargable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts.

13. Mr. Alok Sharma, the learned advocate for the department submits that, at the stage of issue of notice, the only question is whether there was relevant material on which reasonable person could have formed a requisite belief. Whether the material would conclusively prove the escapement is not to be considered at this stage. The formation of belief by the assessing officer is within the realm of subjective satisfaction. The learned counsel relies on the judgment of the Apex Court in a case of **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.** reported in ***(2007) 291 ITR 500 (SC)***. It is the duty of the assessee to place truly and fully all the material facts before the assessing officer. Only because the assessing officer could not have made further enquiry into the matter, but the fact that he did not make any further enquiry would not take away the case out of ambit of reopening U/Sec. 147 and 148 of the I. T. Act. The assessee had not disclosed that it did not possess Form No. 3CM and as such did not disclose the material facts truly and fully. The learned advocate relies on the judgment of the Apex Court in a case of **Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another**

reported in ***(1993) 203 ITR 456 (SC)*** and another judgment in a case of **Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd.** reported in ***(2010) 187 Taxman 312 (SC)***. The learned advocate further submits that, the petitioner can raise all the contentions on merits about the effect of not possessing form No. 3CM in the proceedings before the Assessing Officer. The petitioner has remedy against the same. In view of that, this Court in the writ jurisdiction would not entertain the grievance of the petitioner. The learned advocate relies on the judgment of the Apex Court in a case of **Commissioner of Income Tax Vs. Chhabil Dass Agarwal** dated **August 08, 2013** in **Civil Appeal No. 6704 of 2013** and the judgment in a case of **GKN Driveshafts (India) Ltd. Vs. I.T.O.** reported in ***(2003) 259 ITR 19 (SC)***. The learned advocate also relies on the judgment of this Court **dated 22nd July, 2014 in Writ Petition No. 6900 of 2013** with other connected writ petitions to submit that, the effect of not possessing certificate under Form No. 3CM is best determined by the authorities and would not be considered in a petition under Article 226 of the Constitution of India. The learned advocate relies on the judgment of the Division Bench of this Court at its principal seat at Bombay in **Writ Petition No. 373 of 2012 dated April 02, 2012** and states that, full and true disclosure must mean what the statute says. This Court in the said judgment dated April 02, 2012 in W. P. No. 373 of 2012 reproduced observations of the Apex Court in a case of **Indian Hume Pipe Co. Ltd. Vs. The Assistant Commissioner of Income Tax, Central Circle 22 and others** dated **08th November, 2011 in Writ Petition No. 1017 of 2011** which reads thus :

> "Full and true disclosures must mean what the statute says. These disclosures cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with the Assessing Officer. The assessee must act with candor and the disclosure must be full and true. A full disclosure is a disclosure of all material facts which does not contain any hidden material or suppression of fact. A true disclosure is a disclosure which is truthful in all respects. Just as a power of the Revenue to reopen an assessment beyond a period of four years is restricted by the conditions precedent spelt out in the proviso to Section 147, equally an assessee who seeks the benefit of the proviso to Section 147 must make a full and true disclosure of all primary facts."

14. The learned advocate further submits that, this Court would not invoke its writ jurisdiction to interdict a proceeding U/Sec. 148 of the I. T. Act unless it is a case of without jurisdiction. He relies on the judgment of this Court at its principal seat at Bombay in **Writ Petition No. 2860 of 2012 dated 18th June, 2014**. The learned advocate further submits that, unless and until petitioner has a certificate in Form No. 3CM, the petitioner would not be entitled for the benefit of

deduction U/Sec. 35(2AB) of the I. T. Act while granting a certificate in Form No. 3CM various guidelines are to be observed and it is only if all the conditions are satisfied, then only the certificate in form No. 3CM is issued and if the petitioner possess the certificate under Form No. 3CM, then only the petitioner would be entitled for deduction U/Sec. 35(2AB) of the I. T. Act.

15. We have considered the submissions canvassed by the learned counsel for respective parties.

16. This Court would invoke its writ jurisdiction, only if the issuance of notice is without jurisdiction or that while deciding the objection filed by the petitioner to the notice U/Sec. 148 of the I. T. Act, the principles of natural justice are not adhered to or *ex-facie* notice U/Sec. 148 of the I. T. Act is barred by limitation.

17. It is a settled proposition of law that reopening of assessment cannot be at a mere change of opinion, more particularly when a scrutiny assessment is made U/Sec. 143(3) of the I. T. Act. However, if all the material facts are not fully and truly disclosed, then even if the scrutiny assessment U/Sec. 143(3) of the I. T. Act, is made, the reopening of assessment would be permissible.

18. At this stage, in the writ jurisdiction, we would not embark

upon the findings about the effect of not possessing certificate in Form No. 3CM. The petitioner can agitate all these grounds at the time of re-assessment. We would only restrict ourselves to the question as to whether the assessing officer was justified in reopening the assessment U/Sec. 147 and 148 of the I. T. Act.

19. The returns filed by the petitioner were assessed U/Sec. 143(3) of the I. T. Act. While issuing notice U/Sec. 142(3) of the I. T. Act, a specific query was raised by the Assessing Officer with regard to the deductions claimed by the petitioner U/Sec. 35(2AB) of the I. T. Act on account of expenditure incurred for in-house research and development. The petitioner had replied to the said query stating that the company had renewal of recognition of the in-house R & D unit by the authority and it was renewed from time to time upto March 31, 2016. According to the petitioner the Government of India, Ministry of Science and Technology, Department Scientific and Industrial Research, Technology Bhavan, New Delhi had granted renewal of recognition of in-house Research and Development Unit from time to time. The same was with regard to renewal of recognition of in-house R. & D. unit. Whereas vide Form No. 3CM recognition is granted by the same authority giving the details and specifically stating the order of approval of in-house research and development facility U/Sec. 35(2AB) of the I. T. Act. What is the effect of the petitioner's not being granted certificate in Form No. 3CM is for the authorities to consider, however, it

appears that, the petitioner had not disclosed that it was not granted certificate under Form No. 3CM for the relevant period. Form No. 3CM is required for the approval of R. & D. facility U/Sec. 35(2AB) of the I. T. Act. The petitioner did not disclose that, after the year 2009, the petitioner could not get Form No. 3CM for approval of R. & D. facility U/Sec. 35(2-AB) of the I. T. Act, though it had certificate of registration of the in-house research and development unit. The petitioner ought to have fully and truly disclosed that after the year 2009, the petitioner could not get Form No. 3CM for the purpose of Sec. 35(2AB) of the I. T. Act. The said information was not provided by the petitioner.

20. In view of that, reopening the assessment cannot be said to be mere change of opinion. However, the effect of not possessing Form No. 3CM on the deduction for the expenditure for in-house research and development would be a subject matter, which will be required to be dealt by the Assessing Officer at the time of assessment pursuant to the notice of reassessment. We would not preempt any decision, as the same would be within the realm of the assessing officer. The assessing officer would be the best judge to consider the said aspect upon reopening of the assessment and the petitioner would have every opportunity to put forth its stand.

21. The Deputy Commissioner of Income Tax while rejecting

the objection of the petitioner to the notice U/Sec. 148 of the I. T. Act has observed as under :

> "4. The contents of the objection raised are perused minutely and considered along with the citations mentioned therein. But, the same is not acceptable for the reason that with effect from 01.04.1989 i.e. financial year 1989-90, only condition before issue of notice u/s. 148 is that the Assessing Officer should have the reason to believe that the income chargeable to tax has escaped assessment, irrespective of any failure on the part of the assessee. At the outset, it does not require to be established factum of escapement. At the stage of issue of notice the only question that arises is whether on the basis of the material, prima facie, there is escapement. Whether the material would conclusively prove the escapement or not is not the concern at the stage of issue of notice as has been held int he following cases :-
>
> . Raymond Woolen Mills Ltd. (1999) 236 ITR 34 (SC).
> . Central Provinces Mananese Ore Co. Ltd. (1991) 91 ITR 66 (SC)
> . Sri Krishna Pvt. Ltd. (1996) 221 ITR 538 (SC)
>
> 5. In the present case, the A.O. has elaborately recorded the reasons before issue of notice u/s. 148 which has been duly supplied. The A. O. has clearly narrated the facts and material on which the 'reason to believe' for escapement of assessment is drawn. The belief is based on relevant material and reasons were formed in good faith.
>
> 6. In view of the above facts, your objection is hereby rejected and disposed off. You are, requested, to attend the assessment proceedings without any further loss of time."

22. The reasons for reopening of assessment U/Sec. 148 of the I. T. Act recorded by the Assistant Commissioner of Income Tax

are as under :

> " During the assessment proceedings for AY 2014-15 in the case of the assessee, ARs of the assessee appeared with Form No. 3CM numbered T.U.IV-15(236)/35(2AB)/3CM217/2007. However, after perusal of the same it is observed that **the facility is approved w.e.f. 1st Apr 2005 to 31st March 2009 for the purpose of section 35(2AB).**
>
> The prescribed authority for the purpose of Section 35(2AB) is Secretary, Department of Scientific and Industrial Research, Government of India. The assessee has not produced any document of approval of the facility by such prescribed authority for the period of 1st Apr 2009 to 31st March 2010. The document that is produced was valid only till 31st March 2009 and the same has not been renewed by the prescribed authority beyond 31st March 2009 meaning thereby that the prescribed Authority does not approve the assessee for the purpose of claiming deduction u/s 35(2AB). However, the assessee has wrongly claimed deduction u/s 35(2AB).
>
> A letter was issued to Dr. Girish Sahnia, Secretary, Department of Scientific & Industrial Research, New Delhi-110001 details regarding approval of facility in respect of provisions of section 35(2AB) of the Income Tax Act in the case of Ajeet Seeds Pvt. Ltd.
>
> Reply received from Ministry of Science and Technology Department of Scientific and Industrial Research Technology Bhavan, New Delhi on 24/01/2017 to the above mentioned letter is as under :-
>
> Please refer to your letter No. ABD/ACIT/Cir-1/Ajeet Seeds/2016-17/317 dated 28.12.2016 on the subject cited above. I am directed to convey as follows :
>
> . "The in-house R&D unit of M/s Ajeet Seeds Ltd. Aurangabad was accorded approval u/s 35(2AB) of IT Act 1961 from 01.04.2005 to 31.03.2009 and Form 3CM No. TU/IV 15(236)35(2AB)/3CM/217/2007 dated 02.04.2007 was issued to company.

- R&D expenditure of the company for approved period was not reported to DGIT(E) because R&D expenditure was not reflected properly in audited portion of respective years annual reports, which is mandatory as per departments' guidelines.
- Company's request for extension of approval u/s 35(2AB) could not be considered because the company was not adhering the condition of properly reporting of R & D. expenditure in audited portion of Annual Report.
- Company's requested for reporting of R&D expenditure for FY 2009-10 & 2010-11 could not be considered because during this period R&D center of the company was not approved u/s 35(2AB) of IT Act, 1961."

> It is clear from the reply in above letter that the claim of deduction u/s 35(2AB) made by the assessee company for year under consideration is invalid.
>
> In view of the above facts, I have reason to believe that the income to the extent of claim of deduction u/s 35(2AB) made by the assessee has escaped assessment in terms of the provisions of Section 147 of the Act which amounts to Rs. 6,53,46,723/-."

23. The recording of reasons while issuing the notice U/Sc. 148 of the I. T. Act and while rejecting objection of the petitioner is with regard to the effect of the petitioner's not possessing Form No. 3CM and the fact that the petitioner had not disclosed this fact at the time of scrutiny assessment U/Sec. 143(3) of the I. T. Act.

24. The petitioner had failed in its duty to report to the assessing officer the Form No. 3CM being available only upto 2009 and thereafter not possessing the said Form No. 3CM and same is again issued only from the year 2016.

25. Considering the above, it cannot be said that the reopening of assessment is only based on change of opinion. However, it is observed that, the petitioner failed to fully and truly disclose the fact that it did not possess Form No. 3CM U/Sec. 35(2AB) of the I. T. Act. If the petitioner would have disclosed said fact at the time of scrutiny assessment U/Sec. 143(3) of the I. T. Act and still the assessing officer would have allowed the deduction, then the petitioner would have been justified in challenging the reopening of the assessment. However, the same is not the fact as observed supra.

26. For the aforesaid reasons, we decline to exercise our writ jurisdiction. However, we make it clear that, we have not dealt with the merits of the contentions qua the requirement of Form No. 3CM to claim deduction U/Sec. 35(2AB) of the I. T. Act. The same would be decided by the assessing officer on its own merits, naturally after considering contentions of the petitioner.

27. The writ petitions as such are dismissed. No costs.

**[A. M. DHAVALE, J.]** **[S. V. GANGAPURWALA, J.]**

bsb/April 18