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

WRIT PETITION NO.3353 OF 2018

Marico Limited … Petitioner

V/s.

The Assistant Commissioner of Income tax
Circle 12(3)(2) and ors. … Respondents

Mr.Nitesh Joshi with Mr.Atul Jasani with Mr.Ashok Boghani i/by M/s Ashok Boghani & Co. for the Petitioner.
Mr.Akhileshwar Sharma for the Respondents.

CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : DECEMBER 21, 2018.

P.C.:-

1. Heard learned counsel for the parties for final disposal of the petition. Petitioner is a limited company. The petitioner has challenged a notice of re-opening of assessment dated 24th September, 2018 issued by the respondent No.1-Assessing Officer to re-open the petitioner's assessment for the assessment year 2011-12.

2. Brief facts are as under:

The Petitioner is engaged in the business of manufacturing fast moving consumer goods. The petitioner had filed return of the income for the assessment year 2011-12. The return was taken in scrutiny by the Assessing Officer who passed order of assessment under Section 143(3) of the Income Tax Act ("the Act" for short) on 29th April, 2015. In the return the petitioner had claimed deductions under Sections 80IB and 80IC of the Act.

3. To re-open such assessment the Assessing Officer had issued impugned notice. In order to do so, he had recorded following reasons:

"Reasons for reopening of the Assessment in the case of M/s Marico Limited for the A Y 2011-12 u/s 147 of the IT Act.

1) In this case, the assessee has filed its return of income on 25.11.2011 declaring total income of Rs. 69,95,70,781/- for A.Y. 2011-12, which was subsequently revised on the same day i.e. on 25.11.2011 at revised total income of Rs.69,97,78,630/-. Thereafter, a further revised return was filed on 29.03.2013 at revised total income of Rs.69,28,57,599/-.

2) The assessment for AY 2011-12 has been completed u/s 143(3) r.w.s. 144C(3) on 29.04.2015 determining income under normal provisions of the IT Act at Rs.1040416024/-(after

allowing deduction fo Rs.1,77,24,25,716/- under sections 80IB (4) and 80IC (2)) and book profit u/s 115JB at Rs.356,05,24,496/- and tax on book profit was determined at Rs.70,96,30,335/- and tax was charged u/s 115JB.

3) On perusal of the records for the A Y 2011- 12 the following issues were found:

(i) The assessee company claimed deduction u/s. 80IB & 80IC from the units located at Pondicherry, Paonta Sahib & Solan. The deduction u/s 80IB (4) is in respect of unit in Pondicherry at Rs.68,99,32,933/- and deduction u/s 80IC includes units in Paonta Sahib, District Sirmur and Baddi unit at Lodhimajra, P. O. Manpura, District solan of Himachal Pradesh amounting to Rs.39,30,87,552/- and Rs.39,69,25,123/- respectively. As per th assessment order of the A.Y. 2011-12, the assessee is manufacturing Parachute brand edible coconut oil, amount other items in Pondicherry and Baddi undertakings. I tis seen from records that though the Pondicherry unit extract oil from copra to a limited quantity, most of the quantity of edible coconut oil sold was processed out of raw coconut oil procured by these units. As per definition of manufacture given in Section 2(29BA) of the IT Act, 1961 the deduction would not be available on sale of the edible coconut oil effected by these tow units, as only refining and packing are the only activity undertaken by them and no edible oil is manufactured as raw coconut is also edible oil and this activity do not amount to manufacturing or production. Similarly, in the case of the product called Hair Oil also, the activity does not amount to manufacture as per the definition of manufacture/produce given in the Act. Further, as per Clause 28 of Form 3CD, some part of the finished goods were produced from others and thus entire quantity of goods cannot be treated as eligible for deduction. It is also to be noted that as per Schedule Q appended to the P & L account, volume of sale of edible oil is many times more than the sale of hair oil and other items. Considering the volume of sales of the assessee of different items, not even 25% of the volume of the sale effected in the above mentioned three units qualify for deduction u/s 80IB (4) or 80IC as claimed and allowed. However,adopting a very moderate calculation, at least 50% of the deduction allowed needs t be withdrawn and added back to the income of the assessee. Therefore I have a reason to believe that the deduction allowed in respect of the three units, (i.e. Pondicherry, Paonta Sahib and Baddi) amounted to Rs.1,47,99,45,608 and 50% of the same at Rs.73,9972,804/- has been escaped from the assessment of income.

(ii) Scrutiny of schedule 'O' appended to the P & L account revealed that an amount of Rs.40.90 crore was charged to the P & L account under the head miscellaneous expenses. This amount includes an amount of Rs.1.00 crore being capital advance written off. Since, this being capital in nature, should have been disallowed. Capital advance won't get any deduction in income tax unless and until the payment made earlier has hit the profit and loss in earlier years as a sale/profit, no expense can be claimed. Therefore I have a reason to believe that the capital advance written of amounting to Rs.1.00 crore has been escaped from the assessment of income.

(iii) Verification of assessment records for the A.Y. 2011-12 revealed that Capital Gain brought to taxation is loss Rs.39,32,873/- only. However, as per the Return of Income the 'a' had offered STCG of Rs.39,32,873/- and LTCG of Rs.8,00,00,000/-. The LTCG was set off against brought forward long term capital loss. However, scrutiny of the assessment order for AY 2011 -11 revealed that Capital Gains of Rs.2,17,829/- ws taxed during that year and no carried forward of losses was available and hence not allowed in the assessment order. Though clause 25 of 3CD Form (filed on 30.09.2011) states that brough forward loss(long Term Capital Loss) as Rs.8,45,53,367/- for AY 2010-11, the assessment order passed on 18.03.2014 states that the Capital Gain as per assessee's revised computation ws Rs.2,17,829/-. Therefore I have a reason to believe that there is no carry forward capital loss available to set off the Long Term Capital Gain of Rs.8,00,00,000/- during the A.Y. 2011-12. Hence Long Term Capital Gain of Rs.8,00,00,000/- has been escaped from the assessment of income.

(iv) Verification of assessment records for the A.Y. 2011-12 indicated that the assessee claimed deduction under sections 80IB (4) and 80IC (2) of the I.T.Act, 1961 which was recalculated by the assessing Officer by reallocating rent & storage charges to undertakings and disallowing other income from the ambit of the claim in respect of the respective units. However, while reallocating rent & storage charges, instead of reducing the these charges, the same was added to the income resulting in the assessee getting more eligible income and thereby was allowed more deduction in respect of Pondicherry, Dehradun-1 and Dehradun-2 undertakings as shown below.

Name of undertaking	Pondicherry	Dehradun-1	Dehradun-2
Income of the unit shown	2458652428	19204857	183131882
Rent & Storage charges added by AO	39923130	2382310	2138101
Total income with rent & storage charges	2498575558	21587166	185269983
Income on reducing the rent & storage charges	2418729298	16822547	180993781
Other income reduced by AO	198799113	6460461	4169950
Net income eligible for deduction	2219930185	10362086	176823831
Income shown as eligible by AO	2299776445	15126705	181100033
Difference	798446260	4764619	4276202
Excess deduction allowed (30% of above)	23953878	1429386	1282861
			26666125

From the above table it is clear that Assessee Company has been allowed excess claim to the tune of Rs.2,66,66,125/- while re-allocating the expenses. Therefore I have a reason to believe that excess deduction of Rs.2,66,66,125/- resulting in under assessment and escaped from the assessment of income.

(v) The income under normal provisions of the Act was arrived by adopting the income from business of Rs.2,52,66,95,615/- based on the revised return of income dated 29.03.2013. While computing income from business, an amount of Rs.42,75,27,823/- (schedule BP -A3 of return of income) was reduced from net profit of Rs.3745533349/- (schedule BP -A 1 of return of income). This amount was reduced treating the same as income/ receipts credited to P & L account considered under other heads of income. However, scrutiny P & L account revealed that, net profit of Rs.374.54 crore was arrived at on the basis of sales of Rs.2347.85 crore (including excise duty of Rs.0.98 crore) and other income of Rs.25.17 crore totaling to Rs.2372.04 crore and adding an amount of Rs.65.47 crore under exceptional items. The exceptional items of Rs.65.47 crore was on account of reversal of provision for excise duty of Rs.29.35 crore, profit on divestment of “Sweekar” brand Rs.50 crore and provision for impairment of “Finance” trademark Rs.(-)13.88 crore. The total expenditure debited to the P & L account amounted to Rs.2062.97 crore. From the amounts credited to the P & L account, as stated above, it could be seen that other than Rs.25.17 crore under other income, no other amount would qualify to be reduced from business income out of Rs.42.75 crore reduced by the assessee. Therefore I have a reasons to believe that an amount of Rs.17,58,00,000/- on account of other income has been escaped from the assessment of income.

(iv) Scrutiny of P & L account for the A.Y. 2011-12 revealed that an amount of Rs.65.47 crore under the head exceptional items was added to the profit before tax arrived at in the P & L account and net profit was arrived 374.54 crore. The exception items of Rs.65.47 crore was on account of reversal of provision for excise duty of Rs.29.35 crore, profit on divestment of “Sweekar” brand Rs.50.00 crore and provision for impairment of “Finance” trademark Rs.(-)13.88 crore. Since the amount of Rs.

(1)13.88 crore represents only a provision for impairment of "Finance" trademark, the same should not have been allowed to be adjusted out of the exceptional items otherwise would have amounted to Rs.79.35 crore. Therefore I have a reason to believe that provision of Rs.13,88,00,000/- has been escaped from the assessment of income.

4) Since 4 years from the end of the relevant year has expired in this case, the requirement to initiate proceedings u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration.

5) It is true that the assessee has filed a copy of annual report and audited P & L A/c and balance sheet alngwith return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made. It is pertinent to mention her that even though the assessee has produced books of accounts, annual report, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material with due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the Act.

6) It is pertinent to mention here that reason to believe that income has escaped assessment for the year under consideration have been recorded in the above referred paragraph 3 in sub pars (i) to (vi). I have carefully considered the assessment record containing the submission made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed material facts necessary for his assessment of the year under consideration thereby necessitating reopening u/s 147 of the Act.

7) In view of the above, I have reason to believe that income amounting to Rs.117,12,38,929/- chargeable to tax has escaped

assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts within the meaning of section 147 of the Income-tax Act, 1961 for the A.Y. 2011-12. Hence, it is a fit case for issue of notice u/s 148 of the I.T.Act, 1961."

8) In the light of the above reasons you are requested to explain with proper documentary evidences as to why the above additions/ disallowances should not be made in your case.

9) Apart from the above during the course of these reassessment proceedings, an information has been received in your case that an amount of Rs.6,94,64,809/- has been credited in the bank account of Shri K.G.Paraman during the F Y 2010-11. In response to the notice u/s 133(6) of the IT Act you have submitted that total amount of Rs.8,79,24,950/- has been paid to Shri K G Paraman towards purchase of Copra, Labour charges, service charges and reimbursement charges. From these contradicting figures the undersigned has a belief that your purchase expenses are inflated to that extent. This issue also has been taken up for verification during the reassessment proceedings within the provisions of the explanation 3 to the section 147 of the IT Act.

10) You are, therefore, requested to furnish explanation on the above issues along with proper documentary evidences on or before 26/07/2018. Failure to furnish explanation or not furnishing satisfactory explanation adverse views shall be taken in respect of the above referred issues while passing order u/s 143(3) r w s 147 of the IT Act, 1961."

4. Upon being supplied the reasons recorded by the Assessing Officer, the petitioner objected to the notice of re-opening under a letter dated 20th August, 2018. Such objections were rejected by the Assessing Officer by passing an order dated 24th September,

2018 upon which this petition has been filed.

5. Upon hearing learned counsel for the parties and upon perusal of the documents and record, what we gather is that the notice of re-opening of assessment has been issued beyond the period of four years from the assessment year. The reasons recorded by the Assessing Officer are elaborate and refer to various issues on which he wishes to carry out the re-assessment. However, the central theme which passes though all these issues is that the Assessing Officer had gathered the information and material from the record of the assessment. For example in Paragraph No.3 of the reasons which contains several sub-paragraphs which are different elements of the grounds for re-assessment begins with the expression “On perusal of the record for the assessment year 2011-12, the following issues were found”. Thus, with reference to various issues arise on the basis of the perusal of the record of the assessment year in question. Clearly, therefore, there is no material alien to the record which the Assessing Officer has referred to for issuing the impugned notice. Further, almost for every ground which is part of various

sub-paragraphs of Paragraph No.3, he has referred to either scrutiny or verification of the case records. In clear terms, therefore, the Assessing Officer was acting on the information available from the record of the assessment.

6. As is well known, in an instance where the Assessing Officer exercises power of re-assessment beyond the period of four years from the end of relevant assessment year, an essential requirement is that the escapement of income chargeable to tax is due to the failure on the part of the assessee to disclose truly and fully all material facts. This is part of Section 147 of the Act itself and is on number of occasions by various judgments of High Court and Supreme Court held to be mandatory pre-requirement. In view of such settled law, it is not necessary to refer to any judgment. Revenue is unable to bring to our notice any aspect or element which did not form part of the record and on the basis of which from the reasons recorded, it can be culled out that the Assessing Officer had formed a belief that income chargeable to tax had escaped assessment. In clear terms therefore, there was no failure on the part of the assessee to

disclose truly and fully all material facts.

7. Counsel for the revenue however submitted that one of the issues raised by the Assessing Officer is that the activity carried on by the assessee does not amount to manufacturing activity. In the present petition, it is not necessary for us to comment on this aspect of the matter. What is important however is such belief also the Assessing Officer has formed on the basis of material already on record. Looked from any angle, the Assessing Officer cannot justify issuing the notice of re-opening of assessment beyond the period of four years from the end of relevant assessment year.

8. Under the circumstances, impugned notice is quashed. Petition allowed and disposed of accordingly.

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**

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