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

WRIT PETITION NO. 3338 OF 2018

Asian Paints Ltd. .. Petitioner

v/s.

Dy. Commissioner of Income Tax-LTU,
Mumbai & Ors. .. Respondents

Mr. Madhur Agarwal a/w Mr. Atul Jasani for the petitioner
Mr. Suresh Kumar for respondent nos. 1 and 2

CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.

DATED : 17th JANUARY, 2019

P.C.

1. At the request of the parties, the petition is taken up for final disposal at this stage.

2. This petition under Article 226 of the Constitution of India challenges notice dated 28th March, 2018 issued under Section 148 of the Income Tax Act, 1961 ("the Act" for short) by the Assessing Officer–respondent no.1. The impugned notice dated 28th March, 2018 seeks to reopen the assessment for Assessment Year 2011-12.

3. The petitioner carries on business of manufacturing and selling

paints. In the previous year relevant to subject assessment year, the petitioner had evolved a marketing strategy called "Colour Idea Stores". This was with the intent of increasing its sales by sharing the cost of renovating the shop of the dealers. This renovation of shops of dealers was with the desire to increase its sales by providing a dedicated area for its products and having counters such as "Try and Decide" exclusively for their paints.

4. For the subject assessment year, the petitioner filed its return of income on 24th November, 2011 declaring a total income of Rs.972.95 crores. In its return of income, the petitioner claimed expenses incurred on "Colour Idea Stores" as a part of its advertisement and sales promotion expenses. Thereafter, the Assessing Officer took up the petitioner's return of income for scrutiny assessment and sought details of break up of the advertisement and sales promotion expenses and passed an order dated 18th March, 2015 under Section 143(3) of the Act assessing the income at Rs.1058.42 crores.

5. On 28th March, 2018, the impugned notice was issued seeking to reopen the assessment for Assessment Year 2011-12. The reasons in support of the impugned notice reads as under :-

"In this case, the assessee filed original return of income of A.Y. 2011-12 on 24.11.2011 declaring total income at Rs.972,95,45,281/- under normal provision of Income Tax Act, 1961 (the "Act") and 1122,83,00,000/- u/s 115JB of the Act. Subsequently, the assessment was completed u/s 143(3) r.w.s. 144C(3) of the Act on 18.03.2015 determining total income at Rs.1058,42,40,442/- under normal provision of the Act and at Rs.1122,83,00,000/- u/s 115JB of the Act. Since, the tax on income assessed under normal provision of the Act was more than the tax on Book Profit computed under MAT provision, income assessed under normal provision of the Act at Rs.1058,42,40,442/-.

2. During the Course of the assessment proceedings for A.Y. 2015-16, it is seen that the assessee company has incurred an amount of Rs.32,44,46,533/- towards "Colour Idea Store" and debited the expense in the profit & loss account as "Advertisement & Sales promotion Expenses". In this regard, during assessment proceedings, the assessee was asked to furnish the details of expenses along with the copy of the agreement and other documentary evidences. Further, the assessee was also asked to justify the allow ability of the expense as revenue expense.

3. In response, the assessee furnished its submission and also furnished the copy of agreement. On perusal of the copy of the agreement submitted by the assessee, it emerges that the expenses incurred towards "Colour Idea Stores" by the assessee company is capital in nature. The assessee company furnished a copy of agreement dated 6th March, 2014 entered between M/s. Anantha Corporation and M/s. Asian Paints Ltd. The relevant paras of the agreement is reproduced here under :-

"Whereas :

– Asian Paints has been inter alia carrying on the business of manufacturing, selling and distributing paints, varnishes, primers and the like as manufacturers, seller and distributors throughout India.

– Asian Paints is desirous of promoting its brands and products through a network of retail outlets wherein the end

consumers can have a complete experience of the Asian Paints colours and can understand the various products, their attributes, educate themselves through the colour consultants and other literature on paints.

– For the aforementioned purpose Asian Paints intends to enter into an agreement with its dealers, whereby the dealer shall provide Asian Paints a space in the dealer's shop to be exclusively used by Asian Paints for installing its décor, designs, creative and concepts (“Designed Shop Area”)

– The Dealer is in the business of sale and distribution of paints for several years with familiarity, experience, and goodwill in the retail market and has represented to Asian Paints that it has the necessary Infrastructure, financial resources inter alia space shop storage facilities, personnel and experience to undertake the intended arrangement and business of paints.

– The Dealer has further represented to Asian Paints that he is in lawful possession of the premises situated at 32, Mill Road, Coimbatore, Tamil Nadu- 641001 for 50 years (approx.), having a total area and measuring approximately 2861 sq.feet free from all encumbrances in respect of which the Confirming Party is an Owner thereof;

– The Dealer has approached Asian Paints and agreed to stock, promote and sell the products of Asian Paints from the Designated Shop Area, by installing Asian Paints Decor, design, creatives and concepts;

– Based on the above representation of the Dealer, Asian Paints hereby agrees to associate with Dealer and the Dealer agrees to promote Asian Paints products through the Designated Shop Area, make displays and the Dealer has agreed to this business arrangement on the terms and conditions appearing hereunder;

***NOW THIS AGREEMENT WITNESSETH THAT** for and in consideration of the mutual covenants and promises hereinafter set out the parties hereto agree as follows;*

*(1) **TERM :***

– This Agreement is for a period of 5 years commencing on 1st February, 2014 and terminating on 31st January, 2019 unless otherwise terminated in writing by the parties. This Agreement may be renewed for such period and upon such terms and conditions as may be mutually agreed to by both the parties.

*(2) **COMMERCIAL UNDERSTANDING :***

– The Parties hereby agree that the said arrangement under this Agreement is for brand promotion activity of Asian Paints and through which the Dealer shall also benefit by way of consumer mileage.

– For the above purpose, the parties agree by way of sharing of costs incurred for the setting up of the Designated Shop area and the parties shall share the cost in certain proportion subject to Asian Paint's commitment being up to Rs.45,00,000/- (Rupees Forty Five Lacs only).

– The parties agree that the total estimated cost for the purpose of setting up the Designated Shop Area shall be approximately Rs.60,00,000/- (Rupees Sixty lacs only).

The dealer contribution will be 25% of the total cost and total liability of Asian Paints shall be subject to a maximum of Rs.45 lakhs.

– Upon the instructions of Asian Paints, the Dealer shall pay Asian Paints a sum amounting to 255 of the entire construction cost in terms of the Bills of Quantity (BOQ) as detailed in the Annexure herein. The payment required to be made by the Dealer under this arrangement shall be as under:

	7.5 lacs
Store Handover date:	*Balance amount payable by Dealer*

In addition to the above, the Dealer shall share 50% per cent of the cost (Labour + Material) towards the repair / rectification of décor elements that may be incurred during the term of the Agreement, unless there is a generic defect in which case Asian Paints will bear the entire cost.

*(3) **OBLIGATION AND CONVENANTS OF THE DEALER :***

– The Dealer shall provide a minimum of 25 sq.meter area in his shop as the Designated Shop Area to Asian Paints, as identified by Asian Paints to install its décor, displays, designs, visuals in the Dealer's shop which is intended to give the end consumer a complete experience, a look and feel of the paints would in an innovative way. This area shall inter alia display

the "finishes books", brochures, literatures and advertisements, counters called as 'Try & Decide counter', 'Be inspired Area' and Choose Your Finish Bar'. Apart from the above counters, the Dealer shall also provide Asian Paints a separate contractor transaction area called as the 'Decorator Express Area' measuring a minimum of 10 sq. meters.

– The Dealer shall hand over peaceful and vacant possession of his Shop premises to the contractors and the consultants of Asian Paints so as to enable them to do the necessary demolition, construction / fabrication and installation work in terms of this Agreement.

– The Dealer shall get his Shop premises and the Designated Shop Area constructed designed and decorated in accordance with and in the manner suggested by Asian Paints and its consultants / contractors.

– The Inspiration Area shall be continuous and must have easy access to the customer.

– The Dealer must not use the Designated Shop Area in any other manner than as specified by Asian Paints.

– Any other product or display material shall be kept out of the Designated Shop Area unless specified by Asian Paints.

– The Designated Shop Area shall not be used for display of any other companies' products for either stocking or display.

– The dealer shall adhere to the design & process of construction / fabrication as mutually agreed before the work commences. Any change in the same can be done only at the behest of Asian Paints.

– The dealer shall permit and cooperate in any every manner with the consultants and contractors of Asian Paints and their men / employees and agents to execute the construction / fabrication work inter alia the designing erection and installation of graphics, decors, visuals etc.

– The Dealer shall not share the design of the shop or any other plans with anyone not employed by Asian Paints unless specified under written instructions of Asian Paints.

– All running & operational costs including but not limited to any electric bills, water and sewerage taxes if any for the term of the Agreement shall be borne by the Dealer.

– The Dealer shall use the décor elements as per the training manual provided to the Dealer by Asian Paints and the Dealer shall not change, after or append any décor elements installed by

Asian Paints during the subsistence of this Agreement.

– The Dealer shall maintain the décor elements and ensure safeguard of the same against any damages, (normal wear and tear excepted).

– Besides the above-mentioned activities, Asian Paints shall, through the Designated Shop Area, offer other services such as colour consultancy & colour visualizer and such other services to customers as may be introduced by Asian Paints from time to time. The cost of the colour consultant appointed by Asian Paint's Contractor will be borne as follows:

Year	***Cost borne by dealer***	***Cost borne by APL***
1	*50% of the total expenses*	*50% of the total expenses*
2	*50% of the total expenses*	*50% of the total expenses*
3	*50% of the total expenses*	*50% of the total expenses*
4	*50% of the total expenses*	*50% of the total expenses*
5	*50% of the total expenses*	*50% of the total expenses*

The Dealer also agrees that the amount payable by him will be taken by means of an auto Debit Note every month, immediately starting from the handover date.

– The Dealer shall cooperate, avail and facilitate Asian Paints in order to enable Asian Paints to offer services to its end consumers in every manner possible. The usage of these services will be as per the terms & conditions specified by Asian Paints from time to time.

– The Dealer shall be under a strict obligation, not to alter / tamper/ make changes in the construction, fabrication, designs, displays made and installed by Asian Paints during the subsistence of this Agreement unless otherwise permitted by Asian Paints. Any such changes, alterations or distortions or failure to make and sustain the arrangements in respect of the Designated Shop Area shall entail termination of this Agreement and the Dealer shall be liable to make good every loss and damage sustained by Asian Paints in this regard.

– The Dealer shall provide an unrestricted and unlimited access to any of the Asian Paints employees, agents and representatives and the records thereto at all reasonable times.

– The Dealer shall not charge in excess of the MRP declared by Asian Paints upon its products for the facilities provided to the

customers in the Designated Store Area.

– The Dealer shall not be entitled to inter alia any special privileges, prerogatives, benefits discounts, rebates or schemes as compared to other dealers by virtue of this Agreement.”

2.2. On perusal of the agreement, it clearly emerges that the assessee company and the dealer of the assessee has entered into an agreement to create a 'fixed assets' for promoting their business Interest under the concept of “Colour Idea Store”. As per the agreement, the assessee company and dealer shares the expenses incurred for the same. Further, the logic of the assessee that the 'assets' is not at the premise assessee, it is submitted that, nowhere, in the act, there is any per-condition of owning the premise for capitalizing the furniture & fixture.

2.3. In view of above, the expenses for “Colour Idea Store” incurred by the assessed company was disallowed as revenue expenditure and allowed as capital expenditure to be capitalized as “Furniture & Fixture”. Accordingly, the amount of Rs.32,44,46,533/- was disallowed and depreciation of Rs.3,24,44,653/- (10% of 32,44,46,533/-) was allowed to the assessee. The net dis-allowance works out to Rs.29,20,01,880/-.

3. As discussed with the assessee,it is also found that the assessee has incurred expenses of Rs.3,24,09,060/- under head “Colour Idea Concept” in A.Y. 2011-12 and debited it to P&L A/c Rs.282,35,00,000/- under the head “Advertisement & Sales promotion Expenses” includes 'Colour Idea Concept' expenses of Rs.3,24,09,060/-. As discussed above in para 2 above, the expenses on account of “Colour Idea Concept” is a capital in nature, therefore, the amount of Rs.3,24,09,060/-) should be disallowed and depreciation of Rs.32,40,906/- (10% of 32,44,46,533/-) to be allowed to the assessee. Accordingly, the net excess allowance works out to Rs.2,91,68,154/-.

4. On perusal of assessment record of assessee for A.Y. 2011-12, it is seen that during the course of assessment proceedings for A.Y. 2011-12, the assessee has not submitted the bifurcated details of “Advertisement & Sales promotion Expenses”. Therefore, it is a new information and evidence for the Assessing Officer found during the course of assessment proceedings of A.Y. 2015-16.

5. In view of the above, the undersigned has reason to believe

> *that the income exceeding Rs.1,00,000/- has escaped assessment within the meaning of Section 147 of the Act.*
> *6. In view of the same, notice u/s 148 is issued after approval of CIT-LTU, Mumbai vide letter No.CIT(LTU)/Asian Paints/147/2017-18 dated 27.03.2018."*

6. The petitioners filed its objections to the reopening notice by letter dated 1st August, 2018. These objections were rejected by order dated 18th September, 2018 of the Assessing Officer.

7. From the reasons recorded in support of the impugned notice dated 28th March, 2018, the following undisputed facts emerge :-

(a) the impugned notice is beyond the period of 4 years from the end of the relevant assessment year;

(b) the regular assessment proceedings were completed under Section 143(3) of the Act;

(c) the material which forms the basis for the impugned notice is an assessment order passed for Assessment Year 2015-16; and

(d) the order for Assessment Year 2015-16 came to be passed on the basis of an agreement dated 6th March, 2014 between the petitioner assessee and its dealers.

8. On the aforesaid facts, Mr. Agarwal, learned Counsel appearing

in support of the petition submits that the impugned notice is without jurisdiction for the following reasons :-

(a) The impugned notice has been issued beyond the period of 4 years from the end of the relevant assessment year in respect of an assessment completed under Section 143(3) of the Act. Thus, in the absence of any failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment, the notice is hit by the first proviso to Section 147 of the Act;

(b) The Assessing Officer, during the course of assessment proceedings had an occasion to consider the petitioners' submission dated 16th September, 2014 in response to the query of the Assessing Officer, wherein a specific reference was made to the advertisement and sales promotion expenses by giving its breakup. This breakup indicated that the expenses incurred towards “Colour Idea Stores” amongst other expenses. This break up was considered as the assessment order under Section 143(3) of the Act, disallowed certain expenditure which was claimed as a part of the advertisement and sales promotion expenses. Thus, indicating the application of mind to the appellant's claim while passing an order under Section 143(3) of the Act; and

(c) Lastly, the concept of “Colour Idea Stores” is that the petitioner assessee undertake to share a part of the renovation expenses of its dealers' shops so as to attract customers to purchase its products. These shops, where renovation is carried out are not owned by the petitioner and, therefore, there could be no question of same being classified as a capital expenditure as held by the Supreme Court in ***Commissioner of Income Tax Vs. Associated Cement Companies Ltd. (1988) 172 ITR 257***. Thus, it is submitted that the Assessing Officer had no reason to believe that income chargeable to tax has escaped assessment.

9. On the other hand, Mr. Suresh Kumar learned Counsel appearing in support of the petition submits as under :-

(a) that the impugned notice is within jurisdiction as the Assessing Officer had not formed any opinion on this issue while passing the assessment order dated 18th March, 2015 under Section 143(3) of the Act; and

(b) the Assessing Officer should be allowed to complete the assessment proceedings where the contentions on merits would be considered and justice done.

10. As noted above, the impugned notice dated 28th March, 2018 for reopening of assessment has been issued beyond the period of 4 years

from the end of the relevant assessment year i.e. AY 2011-12 in respect of assessment completed under Section 143(3) of the Act. Thus, the first proviso to Section 147 of the Act would clearly arise for consideration and application, if there has been no failure on the part of the petitioner assessee to disclose fully and truly all material facts necessary for assessment. In the present facts, we note that in its return of income the petitioner had claimed the expenditure incurred on “Colour Idea Stores” as a part of its Advertisement and Sales Promotion expenses. During the regular assessment proceedings under Section 143(3) of the Act, the Assessing Officer had occasion to examine the petitioner's claim for expenses in respect of “Colour Idea Store” as a part of its advertisement and sales promotion expenses. Thus, there was a complete disclosure of all primary material facts on the part of the petitioner. (*See Calcutta Discount Co. Vs. ITO, 41 ITR 191*). Therefore, no failure to disclose all fully and truly material facts necessary for assessment. Thus, on the above ground itself the impugned notice is hit by the proviso to Section 147 of the Act and is without jurisdiction.

11. In any case, the application of mind to these facts on the part of the Assessing Officer can be inferred from the fact that the statement

constituting the breakup of the total expenditure incurred on sales and promotions was considered in the assessment order as some of the expenses forming part of the breakup of sales and promotions expenses had been disallowed in the assessment order dated 18th March, 2015 passed under Section 143(3) of the Act. This would clearly indicate that the impugned notice has been issued on account of change of opinion and it is an attempt to review the Assessment Order dated 18th March, 2015 passed under Section 143(3) of the Act.

12. Besides, we do note that the Assessing Officer is entitled to rely upon the order passed in assessment proceedings for the subsequent year, as tangible material to initiate reassessment proceedings. However, the tangible material so obtained must be processed i.e. its applicability to the assessee for the subject assessment year is to be examined so as to form a reasonable belief that income chargeable to tax has escaped assessment. The tangible material in the assessment order for A.Y. 2015-16 was the agreement dated 6th March, 2014. This is an agreement post the period with which the impugned notice is concerned. This, by itself could not form the basis for the Assessing Officer to have come to a reasonable belief that income chargeable to tax has escaped assessment for the subject assessment year 2011-12.

Thus, in these facts, the Assessing Officer has not himself come to the reasonable belief that income chargeable to tax has escaped assessment Therefore, on this ground also the impugned notice is unsustainable.

13. So far as the last submission on the part of the petitioner viz. that as the asset is not owned by the petitioner, the expenditure cannot be on capital account, is not examined in the context of the present facts. This as it is not necessary, as earlier submissions are sufficient to dispose of the petitioner's challenge to the impugned notice dated 28th March, 2018 seeking to reopen the assessment proceedings for Assessment Year 2011-12.

14. For the above reasons, the impugned notice is quashed as being without jurisdiction.

15. Petition allowed. No order as to costs.

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