

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.01.2020

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 28949 of 2013

and

M.P. No. 1 of 2013

Reckitt Benckiser School India Ltd.

(Previously SSL-TTK Limited)

A Company existing under the Companies

Act, 2013 represented by its

Authorized signatory M.Ponraj

and having its registered office at:

Plot F 73/74,

SIPCOT Industrial Park,

Irungattukottai, Sriperumbudur,

Kancheepuram District.

Tamil Nadu.

.... Petitioner

Vs

1. Union of India through the
Central Board of Direct Taxes
CRD-1/3, Vinay Marg,
Chankyapuri, New Delhi - 110 021.

2. Deputy Commissioner of Income Tax,
Company Circle - VI (I), Chennai
'Aayakar Bhawan', New Block,
7th Floor, 121, Nungambakkam High Road,
Chennai - 600 034.

3. Deputy Commissioner of Income Tax,
Company Circle - V (3), Chennai
Room No.407, Main Building,
Aayakar Bhawan, MG Road,
Nungambakkam, Chennai - 600 034.

.... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for records relating to proceedings initiated under Notice bearing No.PAN AAFCS5498E dated 22.03.2013 issued by the Second Respondent and consequent order bearing No. PAN AAFCS5498E dated 03.10.2013 issued by the Third Respondent and to quash the same.

For Petitioner : Mr. R. Jawaharlal
for Mr. R. Saravanakumar

For Respondents : Mr. D. Prabhu Mukunth Arun Kumar
Junior Standing Counsel
for Ms. Hema Murali Krishnan
Senior Standing Counsel

ORDER

In this Writ Petition, the Petitioner has challenged the impugned notice dated 22.03.2013 issued to the Petitioner under Section 148 of the Income Tax Act, 1961. It is the contention of the Petitioner that he had filed a regular returns under Section 139 of the Income Tax Act, 1961 on 30.08.2008. After the returns were filed, regular assessment was completed on 14.11.2011. Before the Assessment was completed on 14.11.2011, the Petitioner was issued with a notice under Section 143(2) of the Income Tax Act, 1961 by the Second Respondent on 12.08.2009 followed by a notice dated 08.03.2010 under Section 142(1) of the Income Tax Act, 1961.

2. The learned counsel for the Petitioner submits that details regarding the computation of income was called from the Petitioner. Clarification was also given by the Petitioner on 24.06.2010 pursuant to which the Assessment Order dated dated 14.11.2011 came to be passed.

3. The learned counsel for the petitioner submits that the invocation of Section 148 of the Income Tax Act, 1961 was without jurisdiction. He submits that the reasons given to invoke the powers vested with the respondent under Section 148 of the Income Tax Act, 1961 vide communication dated 26.04.2013 and ultimate rejection of the objection of the petitioner vide order dated 03.10.2013 was contrary to the decision of the Karnataka High Court in Commissioner of Income Tax Vs. Yokogawa India Ltd., dated 09.08.2011.

4. He submits that the above decision of the Karnataka High Court has been upheld by the Hon'ble Supreme Court, after passing of the impugned order in Commissioner of Income Tax Vs. Yokogawa India Ltd., (2017) 2 SCC 1.

5. The learned counsel for the petitioner further submits that the entire exercise by the respondent was contrary to the law settled by the Supreme Court in Commissioner of Income Tax Vs. Kelvinator of India Ltd., [2010] 320 ITR 561.

6. The learned counsel for the petitioner drew my attention to the decision of the full bench of the Delhi High

Court in Commissioner of Income Tax Vs. Kelvinator of India Ltd., [2002] 256 ITR 1, which was affirmed by the Hon'ble Supreme Court in Commissioner of Income Tax Vs. Kelvinator of India Ltd., [2010] 320 ITR 561. He submits that the position of law has been explained as follows by the Full Bench of the Delhi High Court in paragraph 7 which is reproduced below:-

"7 From a bare perusal of the provisions contained in section 147 of the said Act, as it stood up to 31-3-1989, it is evident that to confer the Act two conditions were required to be satisfied viz., (i) the assessing officer must have reason to believe that income chargeable to the tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either (a) omission or failure on the part of the assessed to make a return of his income under section 139; or (b) omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for his assessment for that year. The afore-mentioned requirements of law must be held to be conditions precedent for invoking jurisdiction of the assessing officer to reopen the assessment under section 147 of the said Act. It is trite that both the conditions afore-mentioned are cumulative. It is also a well settled principle of law that, in the event, it found that any of the said two conditions is not fulfilled the notice issued by the assessing officer would be wholly without jurisdiction. The expression "reason to believe" finds place both in clauses (a) and (b) of section 147 of the Act. Sub-section (2) of section 148 of the Act mandates that before jurisdiction under section 147 of the Act is invoked by the assessing officer he is to record his reasons for doing so or before issuing any notice under section 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the assessing officer could reopen a completed assessment. Since assessment has been reopened on 20-4-1990, section 147 as amended with effect from 1-4-1989, would apply."

7. The learned counsel further drew my attention to the decision of the Full Bench of the Delhi High Court in the case of Commissioner of Income Tax Vs. Usha International Limited, [2012] 348 ITR 485, wherein the Full Bench and the Hon'ble Division Bench has summarized law as follows:-

"13. It is therefore, clear from the aforesaid position that:

(1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition reject the stand of the assessee. He forms an opinion. The Reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under section 263 of the Act. This aspect and position has been highlighted in CIT v. DLF Power Ltd. I.T.A. No. 973 of 2011 decided on November 29, 2011-since reported in [2012] 345 ITR 446 (Delhi) and BLB Ltd. v. Asst. CIT Writ Petition (Civil) No. 6884 of 2010 decided on December 1, 2011- since reported in [2012] 343 ITR 129 (Delhi). In the last decision it has been observed (page 135):

"The Revenue had the option, but did not take recourse to section 263 of the Act, in spite of audit objection. Supervisory and revisionary power under section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be correct, when jurisdiction under section 263 is invoked."

Thus, where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.

8. The learned counsel also drew my attention to the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs. Simon Carves Limited, 1976 (4) SCC 435, to buttress the point that the Income Tax Officer ordering re-assessment does not sit as the Court of appeal over the Income Tax Officer making the original assessment, nor was it open to the Income Tax Officer ordering re-assessment to substitute his own opinion regarding the method of computing the income for that of the Income Tax Officer who made the original assessment, especially when the method of computation adopted at the time of original assessment was permissible in law. The fact that the adoption of a different method of computation would have resulted in higher yield of tax would not in such a case justify the re-opening of the assessment.

9. I have considered the arguments of the learned counsel for the Petitioner and the learned Standing Counsel for the Respondents and perused the records.

10. The decisions cited by the learned counsel for the petitioner do not deal with Section 149 of the Income Tax Act, 1961. As per the aforesaid provision, Section 148 of the Income Tax Act, 1961, can be invoked either within four years of the end of the relevant assessment year or after six years or sixteen years as the case may be.

11. The officers who exercise the power under the Act duty bound to take note of the decisions of the Hon'ble Supreme Court, High Courts and Superior Tribunal while passing orders.

12. As far as jurisdictional issue is concerned, none of the decisions cited by the learned counsel for the Petitioner, have dealt with Section 149 of the Income Tax Act, 1961 reads as follows:-

"149. [(1) No notice under section 148 shall be issued for the relevant assessment year-

(a) If four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) [or clause (c)];

(b) If four years, but not more than six years, have elapsed from the end of the

relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;]

[(C) If four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.]

13. Once the assessment has been re-opened, the Assessing Officer can take a prima-facie view that he was entitled to proceed further. However, while passing orders under Section 147 of the Income Tax Act, 1961, the Income Tax Officer he has to keep in mind of the express provisions of Section 147 of the Income Tax Act, 1961, particularly the proviso to Section 147 of the Income Tax Act, 1961 which reads as under:-

"147. If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

[provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity)

located outside India, chargeable to tax, has escaped assessment for any assessment year:]

[Provided [also] that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]"

14. Therefore, I am of the view, it cannot be stated that the impugned notice is without jurisdiction. However the another thing is the answer confirms the proposals in the notice contrary to the laws settling by the Hon'ble Supreme Court under Kelvinator India Limited's case and the decisions cited by the learned counsel.

15. Thus, it cannot be said that the notice issued under Section 148 of the Income Tax Act, 1961 was without jurisdiction. However, if an order is passed by the assessing officer under Section 147 of the Income Tax Act, 1961 contrary to the well-settled principles of law or despite true and full disclosure of all material facts necessary for the assessment, such order would be liable to be quashed.

16. At the same time, if in the course of such reassessment, the 2nd respondent assessing officer finds any other reasons for justifying reopening of the assessment on some other point, he may do so. Such exercise cannot be stifled under Article 226 of the Constitution of India. Otherwise, the Court would be rendering the Explanation III of the Income Tax Act, 1961, redundant which is not intended. At the same time, confirmation of tax in the course of reassessment under Section 147 of the Income Tax Act, 1961 has to again satisfy the well-settled principles of law i.e only if there was a failure on the part of the assessee to truly and fully disclose, all material facts that was required at the time of original assessment.

17. The Full Bench of the Delhi High Court in case of Commissioner of Income Tax Vs. Usha International Limited, (2012) 348 ITR 485 has summarised the position as follows:-

13. It is, therefore, clear from the aforesaid position that:

- (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;
- (2) Reassessment proceedings will be invalid in case the assessment order

itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

14. In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in CIT v. DLF Powers Limited, ITA 973/2011 decided on 29th November, 2011 and BLB Limited v. ACIT Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. In the last decision it has been observed:

"13. Revenue had the option, but did not take recourse to Section 263 of the Act, inspite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudice can be correct, when jurisdiction under Section 263 is invoked."

15. Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of

reassessment proceedings will be invalid on the ground of change of opinion.

16. Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression 'material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

18. The decisions of the Hon'ble Supreme Court rendered in the case of Commissioner of Income Tax Vs. Yokogawa India Limited, (2017) 2 SCC 1 cited by the learned counsel for the Petitioner over-whelming answer the issue in favour of the Petitioner on merits. The relevant passages from the aforesaid Judgments are extracted below:-

15. The difference between the two expressions "exemption" and "deduction", though broadly may appear to be the same i.e. immunity from taxation, the practical effect of it in the light of the specific provisions contained in different parts of the Act would be wholly different. The above implications cannot be more obvious than from the case of Civil Appeals Nos. 8563 and 8564 of 2013 and civil

appeal arising out of SLP (C) No. 18157 of 2015, which have been filed by loss-making eligible units and/or by non-eligible assesseees seeking the benefit of adjustment of losses against profits made by eligible units.

16. Sub-section (4) of Section 10-A which provides for pro rata exemption, necessarily involving deduction of the profits arising out of domestic sales, is one instance of deduction provided by the amendment. Profits of an eligible unit pertaining to domestic sales would have to enter into the computation under the head "profits and gains from business" in Chapter IV and denied the benefit of deduction. The provisions of sub-section (6) of Section 10-A, as amended by the Finance Act of 2003, granting the benefit of adjustment of losses and unabsorbed depreciation, etc. commencing from the year 2001-02 on completion of the period of tax holiday also virtually works as a deduction which has to be worked out at a future point of time, namely, after the expiry of period of tax holiday. The absence of any reference to deduction under Section 10-A in Chapter VI of the Act can be understood by acknowledging that any such reference or mention would have been a repetition of what has already been provided in Section 10-A. The provisions of Sections 80-HHC and 80-HHE of the Act providing for somewhat similar deductions would be wholly irrelevant and redundant if deductions under Section 10-A were to be made at the stage of operation of Chapter VI of the Act. The retention of the said provisions of the Act i.e. Sections 80-HHC and 80-HHE, despite the amendment of Section 10-A, in our view, indicates that some additional benefits to eligible Section 10-A units, not contemplated by Sections 80-HHC and 80-HHE, was intended by the legislature. Such a benefit can only be understood by a legislative mandate to understand that the stages for working out the deductions under Sections 10-A and 80-HHC and 80-HHE are substantially different. This is the next aspect of the case which we would now like to turn to.

17. From a reading of the relevant provisions of Section 10-A it is more than clear to us that the deductions contemplated therein are qua the eligible undertaking of an assessee

standing on its own and without reference to the other eligible or non-eligible units or undertakings of the assessee. The benefit of deduction is given by the Act to the individual undertaking and resultantly flows to the assessee. This is also more than clear from the contemporaneous Circular No. 794 dated 9-8-2000 which states in para 15.6 that,

"The export turnover and the total turnover for the purposes of Sections 10-A and 10-B shall be of the undertaking located in specified zones or 100% export-oriented undertakings, as the case may be, and this shall not have any material relationship with the other business of the assessee outside these zones or units for the purposes of this provision".

18. If the specific provisions of the Act provide [first proviso to Sections 10-A(1); 10-A(1-A) and 10-A(4)] that the unit that is contemplated for grant of benefit of deduction is the eligible undertaking and that is also how the contemporaneous circular of the department (No. 794 dated 9-8-2000) understood the situation, it is only logical and natural that the stage of deduction of the profits and gains of the business of an eligible undertaking has to be made independently and, therefore, immediately after the stage of determination of its profits and gains. At that stage the aggregate of the incomes under other heads and the provisions for set off and carry forward contained in Sections 70, 72 and 74 of the Act would be premature for application. The deductions under Section 10-A therefore would be prior to the commencement of the exercise to be undertaken under Chapter VI of the Act for arriving at the total income of the assessee from the gross total income. The somewhat discordant use of the expression "total income of the assessee" in Section 10-A has already been dealt with earlier and in the overall scenario unfolded by the provisions of Section 10-A the aforesaid discord can be reconciled by understanding the expression "total income of the assessee" in Section 10-A as "total income of the undertaking".

19. For the aforesaid reasons we answer the appeals and the questions arising therein, as formulated at the outset of this order, by

holding that though Section 10-A, as amended, is a provision for deduction, the stage of deduction would be while computing the gross total income of the eligible undertaking under Chapter IV of the Act and not at the stage of computation of the total income under Chapter VI. All the appeals shall stand disposed of accordingly.

19. Therefore, I do not find any merits in interfering with the reassessment procedure hitherto undertaken by the 2nd respondent assessing officer. At the same time, it is made clear that while passing orders under Section 147 of the Income Tax Act, 1961, the 2nd respondent assessing officer will have to pass an appropriate order on merits considering the decision of the Hon'ble Supreme Court rendered in Commissioner of Income Tax and Another Vs. M/s. Yokogawa India Ltd. and the other well-settled principles of law. It is made clear that the order to be passed cannot be based on change of opinion if there was true and full disclosure by the Petitioner at the time of filing of the return.

20. In the light of the above discussion, I dispose this present Writ Petition by directing the Petitioner to participate in the adjudicatory mechanism before the concerned Respondent. The respondent shall pass appropriate orders after considering the submission of the Petitioner and after taking note of the decisions of the Hon'ble Supreme Court. Such exercise shall be done within a period of three months from the date of receipt of a copy of this order. The Petitioner shall also be heard in the aforesaid proceeding. The Petitioner may substantiate its point of view by way of written submission during the hearing.

21. This Writ Petition stands disposed with the above observations. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

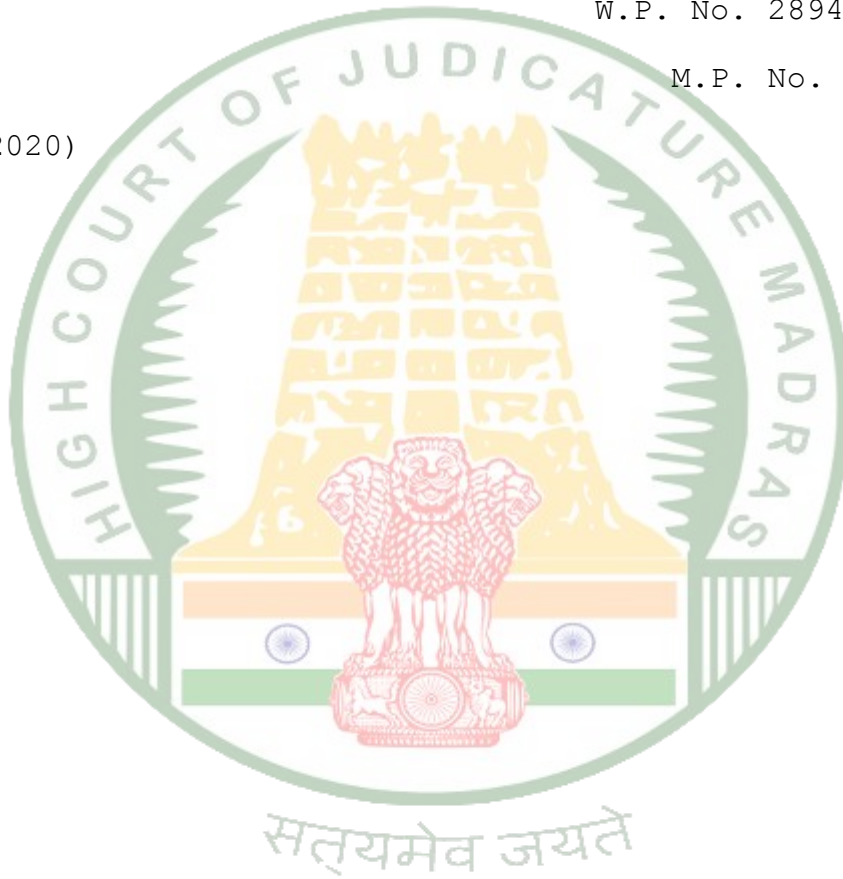
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MG (CO)
CB(06/03/2020)



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