

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1320 OF 2013

Skoda Auto Volkswagen India Private Limited,)
E-1, MIDC Industrial Area, Phase III,)
Village Nogoje, Mhalunge Kharabwadi,)
Chakan, Tal. Khed, Pune, Maharashtra – 410 501)Petitioner

V/s.

1. Assistant Commissioner of Income Tax, Circle)
– I, Aurangabad, having his office at “Jeevan)
Suman”, LIC Building, 2nd Floor, Connaught)
Palace, Town Centre, N-5 Cidco, Jalgaon Road,)
Aurangabad – 431 003)
2. Assistant Commissioner of Income Tax Circle –)
8, Pune, Pratyakshkar Bhavan, Dr. Ambedkar)
Marg, Near Akurdi Railway Station, Pune – 411)
044)
3. Deputy Commissioner of Income Tax (TP-IV),)
Pune, having his office at 3rd Floor, B.O. Bhavan,)
Sector No.47, Plot No.1, Pune Satara Road,)
Paravati, Pune – 411 009)
4. Commissioner of Income Tax, Aurangabad,)
having his office at Aayakar Bhavan,)
Cantonment, Aurangabad – 431 002)
5. Union of India through the Secretary,)
Department of Revenue, Ministry of Finance,)
having its office at North Block, New Delhi – 110)
001)Respondents

Mr. Madhur Agrawal i/b. Mr. Atul Jasani for petitioner.
Mr. Sham V. Walve for respondents.

**CORAM : K.R.SHRIRAM, &
AMIT B. BORKAR, JJ.
DATED : 4th DECEMBER 2021**

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Since pleadings are completed, we decided to dispose of this

petition at the admission stage itself.

Rule.

Rule made returnable forthwith.

2 Petitioner had received a notice dated 23rd March 2011 under Section 148 of the Income Tax Act, 1961 (the said Act) informing petitioner that the Revenue had reasons to believe that petitioner's income in respect of which it was chargeable to tax for Assessment Year 2004-2005 has escaped assessment within the meaning of Section 147 of the said Act.

3 Petitioner responded to the notice with its objections. Before the objections were disposed, various further notices were issued. All these notices were impugned in this petition as originally filed. By an order dated 7th March 2013 ad-interim relief in terms of prayer clause - (d) was granted by this Court with a caution to the parties that the petition may be heard and finally disposed at the admission stage itself. As the order dated 7th March 2013 mentioned that the ad-interim relief shall remain in operation till the next date of hearing and on the next date of hearing, the matter either did not get called out or the stay did not get extended because petitioner failed to request the Court to extend the stay, respondents proceeded to complete the assessment and passed an assessment order dated 28th March 2013. Petitioner has also impugned an order dated 23rd January 2013 passed by the Transfer Pricing Officer to whom a reference was made under Section 92CA (1) of the said Act.

Mr. Agrawal states that this reference to Transfer Pricing Officer was also made in furtherance to the notice dated 23rd March 2011 issued under Section 148 of the said Act.

4 The reasons, that were provided for respondents proposing to reopen the assessment proceedings, would be found in a communication dated 4th July 2011 and the same read as under :

Sub.: Reasons for re-opening of the assessment u/s. 148 for A.Y. 2004-05 – Regarding

Please refer to the above.

On verification of the case records, it is observed that the assessee has paid 157.43 crores and capitalized Rs.121,25,58672/- towards lump sum payment of Technical Know How Fees and claimed depreciation of Rs.41,22,69,995/-. As such, the company has calculated operating loss by considering the actual payment of Technical Know How Fees instead of only depreciation as claimed by assessee. As such, the working profit calculated by the assessee is not correct. The Arm's Length Price is calculated short by Rs.116.20 Crores. Hence the income of Rs.116.20 Crores has escaped income within the meaning of Section 147 of the Act.
Yours faithfully,

(Dr. Satyapal Singh Meena)
Asstt. Commissioner of Income Tax
Circle – 1, Aurangabad

5 As could be seen from the notice dated 23rd March 2011 issued under Section 148 of the said Act, the proposal to reassess is being done after the expiry of four years from the end of the relevant assessment year, viz., 2004-2005. Section 147 of the said Act, as it was then in force, reads as under :

147. Income escaping assessment - 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 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.

6 Therefore, the proviso to Section 147 applies. Respondents have to make out a case that income chargeable to tax has escaped assessment by reason of the failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment. As could be seen from the reasons quoted above, the reasons do not indicate which are those material facts that petitioner has failed to truly and fully disclose.

7 Mr. Walve relied upon a judgment of this Court in ***Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax, Circle 6 (2)***¹ to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. We would certainly agree with Mr. Walve but as held in

¹ (2015) 55 taxmann.com 59 (Bombay)

Crompton Greaves Ltd. (Supra), this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled down from the reasons in support of the notice seeking to reopen assessment, that will certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. The Court held “However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act”. Mr. Walve also submitted that explanation 1 to Section 147 provides that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

8 Petitioner had in its annual report mentioned about the technical know how fee, royalty and technical assistance fee that it had paid to Skoda Auto a.s. and Volks Wagen AG. Petitioner had also filed Form 3CEB in which it had disclosed about details and description of international transactions in respect of know how and patents and it had disclosed the details regarding royalty paid and lump sum fees for know how paid to

Skoda Auto a.s. and fees for technical services paid to Volks Wagen AG. Before the original assessment order was passed, the Transfer Pricing Officer also had raised all these queries and passed his transfer pricing order dated 19th December 2006 which Mr. Agrawal states has been challenged separately before the Commissioner of Income Tax (Appeals). Even in this order by the Transfer Pricing Officer passed on 19th December 2006 under Section 92CA (3) of the said Act, the Transfer Pricing Officer has considered the royalty, technical know how amounts paid and passed his order. This order of the Transfer Pricing Officer has been considered by the Assessing Officer while passing the original assessment order dated 29th December 2006 under Section 143 (3) of the said Act. Therefore, there can be nothing which has not been truly and fully disclosed and we cannot accept the submissions of Mr. Walve that explanation 1 to Section 147 provides that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer is no defence. Petitioner has not only filed its account books and other evidence but those have been considered by the Transfer Pricing Officer whose order also has been considered by the Assessing Officer while passing the original assessment order.

9 In our view, the reasons recorded for reopening is nothing but a change of opinion which is not permissible in law. We find support for this view in the judgment of this Court in ***Ananta Landmark Private Limited V/s.***

Deputy Commissioner of Income Tax and Ors².

10 In the circumstances, we are satisfied that the notice dated 23rd March 2011 issued under Section 148 of the said Act has been issued after illegally assuming jurisdiction under Section 148 of the said Act. Therefore, we are inclined to and hereby allowed the petition in terms of prayer clause - (a), which reads as under :

(a) that this Hon'ble Court may be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the petitioner's case and, after examining the legality and validity of the impugned notice dated March 23, 2011 issued under Section 148 of the Act (being Exhibit – N hereto), the impugned notices dated June 08, 2011 and January 04, 2012 issued by Respondent No.1 (being Exhibits P & S hereto) impugned notices dated May 04, 2012, August 13, 2012 and December 13, 2012 issued by Respondent No.2 (being Exhibits U, X & Y hereto) and impugned order date January 17, 2013 passed by Respondent No.1 (being Exhibit AB hereto), impugned order dated January 23, 2013 passed by Respondent No.2 (being Exhibit Ac hereto) and impugned order dated March 28, 2013 passed by Respondent No.1 (being Exhibit AK hereto) and quash and set aside the same.

11 Petition disposed with no order as to costs.

(AMIT B. BORKAR, J.)

(K.R. SHRIRAM, J.)

2. 2021 (131) taxmann.com 52 (Bombay)