IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7388 OF 2008

Conopco Inc. ….Petitioner

V/s.

The Union of India & Anr …Respondents

Mr. Percy Pardiwalla, Senior Advocate a/w Mr. Prakash Shah and Mr. Jas Sanghvi i/b PDS Legal for Petitioner

Mr. Suresh Kumar for Respondents

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 17th DECEMBER 2021

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

1 The petitioner is impugning a notice dated 13th March 2008 issued under Section 148 of the Income Tax Act (the Act) and order dated 14th October 2008 passed by respondent no.2 rejecting the objections of petitioner to the proposed re-opening of assessment.

2 Petitioner was issued 420,000 shares of Rs.10/- each in Ponds (India) Limited at the time of its incorporation in 1977.

Petitioner was allotted further 1,59,250 equity shares of Rs.10/- of Ponds (India) Ltd by way of a rights issue at Rs.90/- per share in 1987.

Petitioner was issued 51,39,75,000 equity shares of Rs.1/- each by way of bonus shares from time to time.

Upon merger of Ponds (India) Ltd. with Hindustan Lever Ltd. and thereafter, petitioner was holding 6,00,86,250 shares of Rs/1/- each of Hindustan Lever Ltd. in the following manner:

(i) 63,00,000 equity shares of Rs.1 in lieu of the original 4,20,000 equity shares of Rs.10 each held by petitioner in Ponds (India) Ltd.

(ii) 2,388,750 equity shares of Rs.1/- received by petitioner against 159,250 equity shares of Rs.10/- of Ponds (India) Ltd. issued in 1987 under a rights issue at Rs.90/- per share.

(iii) 51,39,75,000 equity shares of Rs.1/- were issued to petitioner by way of bonus shares from time to time.

Petitioner transferred the aforesaid 6,00,86,250 shares of Rs.1/- of Hindustan Lever Ltd. at the rate of Rs.169.5 per share for a total consideration of Rs.10,184,619,375/- on 19th June 2003 and earned a long terms capital gain of Rs.10,108,653,163/-.

3 On 14th October 2004, petitioner filed a return of income for the assessment year 2004-2005 declaring long term capital gain of Rs.10,108,653,163/-. Petitioner paid Rs.1,010,865,316/- as tax on long term capital gain @ 10% as per the proviso to Section 112 of the Act and surcharge of Rs.25,271,633/- @ 2.5%.

4 Petitioner during the course of assessment proceedings vide letter dated 10th November 2006, clarified the queries raised by respondent no.2 as to why the rate of tax on capital gains in its case should be computed @ 10% and the applicability of first proviso to Section 48. Further, petitioner submitted a without prejudice working of capital gains without considering

the benefit of first proviso to Section 48.

5 Respondent no.2 thereafter passed an assessment order dated 15th November 2006 by computing the income of petitioner. Being satisfied with the submission made, respondent no.2 accepted the contention advanced by petitioner.

6 Thereafter petitioner received the impugned notice dated 13th March 2008 proposing to re-assessing the income of petitioner for A.Y.-2004-2005 on the alleged belief that the income escaped assessment within the meaning of Section 147 of the Act.

7 We have perused the reasons for re-opening which was provided to petitioner by respondent no.2 vide a letter dated 11th September 2008. The main contentions of respondent no.2 are: i) petitioner has admitted to the working of capital gains without considering the benefit of first proviso to Section 48; and ii) tax had to be calculated @ 20% against 10% determined while passing the assessment order.

Thereafter, by its letter dated 29th September 2008, petitioner filed its objections to the notice of proposed re-assessment and also attended a personal hearing on two occasions.

Petitioner's objections were rejected by an order dated 14th October 2008 which is also impugned in the petition.

8 It is settled law that before a proceeding under Section 148 of the Act can be validly initiated certain preconditions which are jurisdictional conditions have to be complied with. One such condition is that Assessing

Officer must have reason to believe that income chargeable to tax has escaped assessment and such reasons must be recorded in writing prior to the initiation of proceedings. The second condition is that reassessment must not be based merely on change of opinion by a succeeding Assessing Officer from the view taken by his predecessor. In our view, both these conditions have not been complied with. In the reasons recorded, respondent no.2 has opined that the rate of tax to be applied to the capital gain that arose to petitioner was 20% in terms of Section 112(1)(c) and not 10% as was determined whilst passing the order under Section 143(3) of the Act.

9 Mr. Suresh Kumar submitted that in the original assessment order, Assessing Officer overlooked the fact that petitioner admitted that there was common assessment of Rs.7,74,33,712/-. The fact is that the revised working that was filed by petitioner was on without prejudice basis. It is also clear from the computation annexed to the return of income that petitioner had paid the income tax @10% as per the proviso to Section 112(1) of the Act and the assessment was completed accordingly. It is also clear that in so doing, Assessing Officer examined all the relevant provisions of the Act including Section 48 and Section 112 of the Act and completed the assessment by applying the rate of income tax as per proviso to Section 112(1) of the Act. It is also clear from the reason that during the assessment proceedings, Assessing Officer had asked why capital gain should not be taxed @20% as provided under Section 112(1)(c)(ii) and in

response to the said query, petitioner vide letter dated 10th November 2006 submitted explanation and revised (without prejudice) working of the capital gain without considering the benefit of first proviso to Section 48. It is also clear from the reasoning given by respondent no.2 that the issue now sought to be raised in the purported reassessment proceedings was very much examined by Assessing officer and after giving due consideration to the submissions made by petitioner, he completed the assessment proceedings. We must also note that in the petitioner's letter dated 10th November 2006 submitting the revised working of the capital gain on without prejudice basis, petitioner's have stated *"if your goodself continues to believe that the provisions of the first proviso is similar to indexation under the second proviso to Section 48, and therefore the option of applying the tax rate of 10% under Section 112 is not available then, without prejudice to the above submissions, we enclose herewith a revised working of capital gains without considering the benefit of the first proviso to Section 48. In such a situation, your goodself will accept that the capital gain would be liable to tax @ 10% under the provisions of Section 112"*.

10 Therefore, it is quite clear that the reassessment proceedings are initiated purely on change of opinion with regard to the rate of tax payable by petitioner on the long term capital gain made by it on the sale of shares of Hindustan Lever Ltd. The issue of applicability of first proviso to Section 48 as well as rate of tax under Section 112 were discussed and considered at the time of the said assessment proceedings under Section 143(3).

11 Mr. Suresh Kumar also submitted that as stated in the affidavit in reply, there was a decision of the ITAT-Mumbai where, it was opined that income of a non-resident by way of capital gain is taxable by rate of 20%. As held in ***First Source Solutions Limited V/s. The Assistant Commissioner of Income Tax – 12(2) (1) and Anr.***[1] and followed by this court's order in ***Ananta Landmark Ltd. Vs. Deputy Commissioner of Income Tax Central Circle 5 (3) & Ors.***[2] the reasons of re-opening the assessment has to be based / examined only on the basis of reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to re-open the assessment. These reasons cannot be improved upon and/or supplemented much less substituted by an affidavit and/or oral submissions.

12 Once a query has been raised by Assessing Officer through the assessment proceeding and the assessee has responded to that query, it would necessarily follow that Assessing Officer has accepted petitioner's submissions so as not to deal with that issue in the assessment year. Even if, the assessment order passed under Section 143(3) of the Act does not reflect any consideration of the issue, it must follow that no opinion was formed by Assessing Officer in the regular assessment proceedings. It is also settled law that once all the material was placed before Assessing Officer and he chose not to refer to the deduction / claim which was being allowed in the assessment order, it could not be contended that Assessing Officer had

1 438 ITR 139
2 2021 (131) taxmann.com 52(Bom)

not applied his mind while passing the assessment order. When a query has been raised, as has been done in this case, with regard to a particular issue during regular assessment proceedings, it must follow that Assessing Officer had applied his mind and taken a view in the matter as is reflected in the assessment order. It is clear that once a query has been raised in the assessment proceedings with regard to rate at which capital gains should be taxed under Section 112(1)(c)(ii) and petitioner has responded to the query to the satisfaction of Assessing Officer as is evident from the fact in the assessment order dated 15th November 2006, accepts petitioner's submissions as to why taxation should be only 10% under Section 112 read with Section 148 of the Act, it must follow that there is due application of mind by Assessing Officer to the issue raised. Non rejection of the explanation in the assessment order would amount to Assessing Officer accepting the view of petitioner, thus taking a view / forming an opinion. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view.

13 In the circumstances, petition is allowed in terms of prayer clause (a) which reads as under:

> *"(a) that this Hon'ble Court 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 thereof quash and set aside the impugned notice dated 13th*

March 2008 issued by respondent no.2 under Section 148 of the Act and the order dated 14th October 2008 passed by respondent no.2."

14 We clarify our examination was limited only to jurisdiction of Assessing Officer to re-open the assessment. We have not made any observations on the merits of the case.

15 Petition disposed.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**