

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

**WRIT PETITION NO.3263 OF 2019
WITH
WRIT PETITION NO.3264 OF 2019
WITH
WRIT PETITION NO.3296 OF 2019**

Rich Feel Health and Beauty Private Limited
554/D, Ground Floor, Friends
C. H. Education Charity, LBS
Marg, Mulund West
Mumbai 400 080

...Petitioner

Vs.

1. Income Tax Officer Ward 13(3)(2)
having his office at Room No.227,
Aaykar Bhavan, M. K. Road,
Mumbai- 400 020

2. Assistant Commissioner of
Income Tax, Circle 13(3) (1)
having his office at Room No.229,
Aaykar Bhavan, M. K. Road,
Mumbai- 400 020

3. Pr. Commissioner of Income-tax-13,
Mumbai having his office at Aaykar
Bhavan, M. K. Road, Mumbai 400 020

4. Union of India through the
Secretary, Department of Revenue,
Ministry of Finance, Government of
India, New Delhi- 110 001

...Respondents

Mr. Sukhsagar Syal i/b Mr. Sujit B. Shelar for Petitioner.
Mr. Akhileshwar Sharma for Respondents.

**CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.**

DATE: 15 November 2021.

ORAL JUDGMENT : (Per Amit B. Borkar, J)

Rule. Rule is made returnable forthwith.

2. These petitions arise in similar background of facts. They have been heard together and disposed by this common judgment. We note primary facts from Writ Petition No. 3263 of 2019.

3. Petitioner has invoked the power of this Court under Article 226 of the Constitution of India by challenging notice dated 29/3/2019 issued by respondent No.1 under section 148 of the Income-tax Act, 1961 (said Act, for the sake of brevity) seeking to reopen the assessment for the Assessment Year 2012-2013 and consequential order dated 25/9/2019 passed by respondent No.2 disposing of all objections of Petitioner.

4. Petitioner is a private limited company engaged in the business of selling hair care products, providing consultancy services, treatment in the hair care and beauty sector.

5. Petitioner filed its return of income on 28/9/2012 declaring revenue of Rs.37,02,86,962/- from the sale of products and revenue of Rs.15,34,79,584/- from the provision of services. Return of Income was processed, and intimation under Section 143(1) of the said Act was issued. Subsequently, Petitioner's case was selected for scrutiny assessment by respondents. During the assessment, a notice under section 142(1) of said Act was issued whereby *inter alia* details of advertisement was sought. Thereafter, the Assessing Officer discussed with authorized representative of Petitioner. Assessing Officer vide order sheet entry dated 9/10/2014 called for the copy of the agreement with Brand Equity Treaties Limited containing securities premium and advertisement details. Petitioner provided the same. The assessment order was passed on 12/11/2014 under Section 143(3) of the Act accepting the return of income of Petitioner.

6. On 29/3/2019, respondent No.1 issued a notice under Section 148 of the said Act stating that he had reason to believe that Petitioner's income chargeable to tax for the Assessment year 2013-2014 had escaped assessment. Petitioner, in response to the said notice, filed its return of income on 18/4/2019. Petitioner, thereafter, filed a reply dated 22/4/2019 seeking reasons for reopening of assessment to enable Petitioner to file its objections. Respondent No.1 vide letter dated 1/7/2019 provided reasons to Petitioner. The principal reason was that advertisement and marketing expenditure incurred by Petitioner was not deductible in view of provisions of Section 37 of the said Act, as Petitioner was prohibited from

advertising under the provisions of the Indian Medical Council Act, 1956 read with Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the Regulations, for the sake of brevity). On 25/9/2019, respondent No.2 passed an order rejecting the objections of Petitioner. Section 37 (1) of the Act provides any expenditure incurred for a purpose which is an offence or which is prohibited by law shall not be allowed.

7. Petitioner has therefore filed the present writ petition challenging the notice dated 29/3/2019 issued under Section 148 of the said Act and order dated 25/9/2019 of rejecting the objections of Petitioner.

8. This Court on 6/12/2019 granted time to the advocate for Respondents to take instructions and file affidavit-in-reply and, in the meantime, granted ad-interim stay to the impugned notice.

9. Respondents filed their reply stating that Petitioner had claimed advertisement and marketing expenditure of Rs.5,93,74,322/- under the head of other sources but had not disclosed the nature of expenses and its connection to its business in the original assessment. Subsequently, Assessing Officer ascertained from the site of Petitioner that Petitioner was soliciting the patients directly or indirectly by a physician or by a group of physicians or by institutions or organizations, prohibited as per the said Regulations, 2002. Assessing Officer, therefore, reopened the case of Petitioner

relying on Section 37 of the said Act.

10. We have heard Mr. Sukhsagar Syal i/b Mr. Sujit B. Shelar for Petitioner and Mr. Akhileshwar Sharma for Respondent. Mr. Sukhsagar Syal for Petitioner submitted that the assessment could not be reopened on a mere change of opinion. Assessing Officer in original assessment had applied his mind to the fact of Petitioner incurring advertisement and marketing expenditure. Petitioner had fully and truly disclosed material facts in the original assessment. There is no fresh/tangible material on record to reopen the assessment nor reason to believe that the income had escaped assessment. The bar under the said Regulation, 2002 is attracted only to restrict a registered medical practitioner. Petitioner being a company, such bar is not attracted.

11. Per contra Mr. Akhileshwar Sharma for Respondent submitted that advertisement expenses were disclosed under the head other sources in the original assessment. Petitioner has not disclosed the nature of expenses and their connection to the business. He submitted that the Assessing Officer subsequently ascertained from the site of Petitioner that Petitioner is soliciting patients, prohibited as per Regulation of 2002. He, therefore, submitted that Petitioner would get an opportunity to make out the case before the Assessing Officer, and there is no need to interfere at this stage.

12. On careful scrutiny of the documents placed on record,

particularly notice dated 14/8/2014, it appears that the Assessing Officer had applied his mind in the original assessment to the fact that Petitioner had incurred advertisement and marketing expenditure. It also appears from the contents of the notice dated 14/8/2014 that Petitioner was called upon to differentiate between the nature of expenses shown under the head depreciation and amortization *vis-a-vis* advertisement and marketing expenses shown in Profit and Loss Account. It was claimed by revenue in the original assessment that a substantial portion of the brand building was done by way of advertisement and marketing. Further vide order sheet entry dated 9/10/2014, Petitioner was called upon to file a copy of agreement with BCC (Time of India) containing details of securities premium and advertisement. The requisite details, including a copy of agreement, actual advertising invoices, were filed and the issue was discussed with the Assessing Officer at length before passing the order under Section 143(3) of the Act.

13. It is not in dispute that in Writ Petition No.3264/2019 and Writ Petition No.3263/2019, the assessment is sought to be reopened after a period of 4 years. The criteria's for reopening of assessment after a period of 4 years are no longer *Res-Integra* in view of the judgment of Division Bench of this Court in the case of ***Ananta Landmark (P) Ltd. vs Deputy Commissioner of Income Tax***¹ wherein this Court held that where assessment was not sought to be reopened on reasonable belief that income had escaped assessment on account

1 (2021) 131 taxmann.com 52 (Bombay)

of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but was a case wherein assessment was sought to be reopened on account of change of opinion of Assessing Officer about manner of computation of deduction under Section 57, reopening was not justified. It is also held that when the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled to a change of opinion for commencing proceedings for reassessment. It is also held that when on consideration of the material on record, one view is conclusively taken by the Assessing Officer, it would not be open for the Assessing Officer to reopen assessment based on the very same material and to take another view.

14. In Writ Petition No.3296/2019, the primary issue involved is identical. The only difference is that the proceeding for reassessment is within four years. This Court in the case of ***Jainam Investments vs Assistant Commissioner of Income Tax***² in paragraph 13 held that the Assessing Officer could not reopen the assessment even within a period of 4 years merely on the basis of change of opinion and the Assessing Officer has no power to review the assessment which has been concluded unless there is tangible material to come to the conclusion that there is escapement of income from assessment.

15. In the facts of the present case, in view of notice dated

2 *Writ Petition No.2760/2019*

14/8/2014 and order sheet entry dated 4/10/2014, it is clear that the Assessing Officer in the original assessment was aware of the issue of expenses incurred on advertisement and marketing by the Petitioner. Once the Assessing Officer had applied his mind in the regular assessment proceedings of Petitioner having incurred advertisement and marketing expenditure, it is not open for the Assessing Officer to reopen the assessment. This Court in *Aroni Commercial Limited vs Dy. CIT*³ and in *Marico Limited vs. The Assistant Commissioner of Income Tax*⁴ had taken a similar view. The pronouncements of the coordinate Bench of this Court are binding on us.

16. We are therefore satisfied that the Assessing Officer could not have reopened the assessment merely on the basis of change of opinion and could not have issued a notice of reopening of assessment to Petitioner.

17. Since we are setting aside notices on the ground of change of opinion, it is unnecessary to go into other contentions raised by Petitioner, which are kept open to be adjudicated in appropriate proceedings. We, therefore, pass following order:

ORDER

Notice dated 29/3/2019 issued by respondent No.1 (Exhibit F) and consequential order dated 25/9/2019 (Exhibit K) in Writ Petition No.3263/2019, Notice dated 29/3/2019 issued by respondent No.1 (Exhibit H) and

3 (2014) 362 ITR 403

4 (2019) 111 Taxmann.com 53

consequential order dated 25/9/2019 (Exhibit M) in Writ Petition No.3264/2019 and Notice dated 31/3/2019 issued by respondent No.1 (Exhibit F) and consequential order dated 25/9/2019 (Exhibit K) in Writ Petition No.3296/2019 are quashed and set aside.

18. Rule is made absolute in the above terms.

(AMIT B. BORKAR, J)

(K. R. SHRIRAM, J.)

RAJESHWARI
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