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

WRIT PETITION NO.3284 OF 2019

Asian Paints Limited ….Petitioner

V/s.

Assistant Commissioner of Income Tax LTU-2 and Ors. ….Respondents

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Mr. Madhur Agrawal i/b. Mr. Atul K. Jasani for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 29th OCTOBER 2021

P.C. :

1 At the outset, we have to note that no reply is filed by respondents though on 6th December 2019 (almost two years ago) time was granted upto 11th February 2020 to file reply. We were not inclined to grant any further time.

2 Petitioner is impugning a notice dated 13th March 2019 and order dated 5th November 2019 on the ground that the notice issued under Section 148 of the Income Tax Act (the said Act) itself was without jurisdiction.

3 Admittedly, respondents have decided to reopen the assessment four years after the assessment order and therefore, the proviso under Section 147 (2) will be applicable. Section 147 reads as under :

> *Section 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 (hereinafter 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.

4 The reasons recorded for reopening for Assessment Year 2012-2013 are as under :

M/s. Asian Paints Ltd.

A.Y. 2012-13

Reason recorded for re-opening

In this case, the assessee filed original return of income of A.Y. 2012-13 on 27.11.2012 declaring total income at Rs.1243,35,59,510/- under normal provision of Income Tax Act, 1961 (the "Act") and 9,58,39,02,545/- u/s 115JB of the Act. Subsequently, the assessment was completed u/s 143(3) r.w.s. 144C(3) of the Act on 25.04.2016 determining total income at Rs.1373,62,39,166/- under normal provision of the Act and at Rs. 9,58,39,02,545/- 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. 1373,62,39,166/-.

2. From the assessment record of assesse for A.Y. 2012-13, it was seen that during the course of assessment proceedings for A.Y. 2012-13, the assessee had not submitted the bifurcated details of expenses debited to P & L Accounts for Rs. 338,59,00,000/- under the head "Advertisement & Sales promotion Expenses" which includes 'Colour Idea Concept' expenses of Rs. 8,15,48,504/-. Thus, the assessee had not disclosed all fully and truly material facts necessary for the assessment.

3. On perusal of assessment order for A.Y. 2015-16, it is seen with respect to query regarding allowability of expenditure on 'Colour Idea Store' the assessee submitted that *every year we are incurring various expenditure on advertisement and sales promotion expenses. The expenditure on advertisement and sales promotion expense includes expenditure incurred on 'Colour Idea Store'.* From the order for A.Y. 2015-16, it is clear that the assessee had incurred expenses under the head "Colour Idea Concept" prior to the date of agreement 06.03.2014 also. Therefore, it an aptly be summarized that the agreement dated 06.03.2014 was only a regularisation of an ongoing arrangement between the assessee and its Dealers and these expenses had been incurred in earlier assessment years also including A.Y. 2012-13.

4. Therefore, while passing assessment order for A.Y. 2015-16, the expenses for "Colour Idea Store" incurred by the assesse 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 disallowance worked out to Rs. 29,20,01,880/-.

5. In light of the above facts of the case, it is also found that the assessee has incurred expenses of Rs.8,15,48,504/- under head 'Colour Idea Concept' in A.Y. 2012-13 and debited it to P&L A/c Rs. 338,59,00,000/- under the head "Advertisement & Sales promotion Expenses" which includes 'Colour Idea Concept' expenses of Rs.8,15,48,504/-. As discussed above in para 2 above, the expenses on account of 'Colour Idea Concept' is capital in nature, therefore, the amount of Rs. 8,15,48,504/- should be disallowed and deprecation of Rs. 81,54,850/- (10% of 8,15,48,504/-) to be allowed to the assessee. Accordingly, the net excess allowance works out to Rs. 7,33,93,654/-.

6. Therefore, this 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)/Approval/u/s. 147/148/Asian Paints/2018-19 dated 08.03.2019.

Dated: 13.03.2019

sd/-
(Dr. DHARM SINGH)
DCIT(LTU)-2,Mumbai

TRUE COPY
(ATUL K. JASANI)
ADVOCATE

5 According to respondents, petitioner had incurred expenses of Rs.8,15,48,504/- under the head "colour idea concept" in Assessment Year 2012-2013 and debited it to P&L account Rs.3,38,59,00,000/- under the head "advertisement and sales promotion expenses" which includes "colour idea concept" expenses of

Rs.8,15,48,504/-. According to respondents, during the assessment proceedings petitioner had not submitted the bifurcated details of expenses debited to P&L accounts for Rs.3,38,59,00,000/- under the head "advertisement and sales promotion expenses" which includes "colour idea concept" expenses of Rs.8,15,48,504/-. Hence, petitioner had not disclosed all fully and truly material facts necessary for the assessment. Admittedly, the assessment was completed under Section 143 (3) read with Section 144C (3) of the said Act, 1961 on 25th April 2016.

6 On the allegation that petitioner had not fully and truly disclosed material facts, this allegation according to us is far from truth. Respondents, by a notice dated 17th April 2015 issued under Section 142(1) of the said Act had called upon petitioner to furnish details, explanation and documents for 53 items mentioned in the annexure. Item 11 reads as under :

> *11. Party wise details with complete address of all persons to whom advertisement and sales promotion expenses paid and purpose of its payment. Also furnish details of TDS deducted on these payments.*

7 By its letter dated 11th May 2015, petitioner submitted an exhaustive response with 51 annexures. In the response, petitioner has provided details of advertisement and sales promotion expenses including documents and break up to respondents. Therefore, to allege that petitioner

had failed to disclose all fully and truly material facts necessary for the assessment, not having submitted a bifurcated details of expenses, debited it to P&L accounts for Rs.3,38,59,00,000/- under the head "advertisement and sales promotion expenses" is incorrect.

8 To confer jurisdiction under Section 147 where assessment is sought to be reopened after four years from the end of the relevant assessment year, two conditions were required to be satisfied, firstly the Assessing Officer must have reasons to believe that income, profits or gains chargeable to income tax has escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions have to be satisfied before the Assessing Officer could assume jurisdiction for issue of notice under Section 148 read with Section 147, where the assessment is being reopened after the expiry of a period of four years from the end of the relevant year. In this case, as we have held that the allegation in the reasons recorded for reopening that petitioner has not disclosed all fully and truly material facts necessary for the assessment is incorrect, one of the condition for reopening the assessment before the Assessing Officer could assume jurisdiction for issuing notice under Section 148 has not been satisfied. On this ground alone, it can be concluded that

the notice is issued without jurisdiction.

9 The tangible material to initiate assessment proceedings, as stated in the reasons for reopening, is an agreement dated 6th March 2014 post the period with which the impugned notice is concerned. When the reopening for the Assessment year 2011-2012 was challenged in this Court, this Court, on identical facts, in its order dated 17th January 2019 in Writ Petition No.3338 of 2018, while setting aside the notice issued under Section 148, held that an agreement post the period with which the impugned notice is concerned 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 2011-2012. Paragraph 12 of the said order reads as under :

> *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. 201516 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 201112. 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.*

We are in respectful agreement with the view expressed by the Court in Writ Petition No.3338 of 2018 and apply the same principle in the case at hand.

10 Even in that case, the Court observed that the allegation of failure to disclose all fully and truly material facts necessary for assessment also was not correct and even in that case and we add, in the case at hand, there is a change of opinion and an attempt to review the assessment order. Paragraphs 10 and 11 of the said order read as under :

> *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 201112 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.*
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> *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.*

11 In the circumstances, the impugned notice is quashed as being without jurisdiction.

12 Petition disposed.

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