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

WRIT PETITION NO.3460 OF 2019

ASM Industries Pvt. Ltd. ...Petitioner

Vs.

The Assistant Commissioner of Income Tax-9(1)(2)
and Ors. ...Respondents

Mr. Mandar M. Vaidya for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K. R. SHRIRAM &
AMIT B. BORKAR, JJ.

DATED : 23 DECEMBER 2021.

P. C. :

Petition is impugning notice issued under Section 148 of the Income Tax Act, 1961 (said Act) for Assessment Year 2012-2013. It is alleged in the reasons that on perusal of profit and loss account it is noticed that the assessee has paid overseas commission of Rs.44,28,158/- to non resident agents against exports sales. But since assessee has not deducted TDS under Section 195 on the said commission, the amount of Rs.44,28,158/- cannot be claimed as deduction and hence should be disallowed.

2. In this case assessment under Section 143(3) of the said Act was completed on 9/3/2015 and since reopening is proposed beyond 4 years of the relevant Assessment Year, the onus is on respondent to show that the assessee had failed to disclose truly and fully material facts necessary for assessment. Having considered reasons recorded for reopening, we are of the view that respondents have failed to even show that there was failure on the part of assessee to truly and fully disclose material facts. It is quite clear that the reasons for reopening is nothing but change of opinion which is not permissible in law. The reasons itself show that on perusal of profit and loss account it is noticed that the assessee had claimed overseas commission of Rs.44,28,158/- to non resident agents against exports sales. The Assessing Officer has considered the profit and loss account and in his notice dated 12/8/2014 issued under Section 142(1) of the Act has raised following query:

> "11. As per your profit and loss account, it is seen that you have debited commission at Rs.1,07,21,555/-. In this regard, kindly furnish the following details as below:-
>
> a) Furnish name, address and amount to whom commission is paid.
>
> b) Kindly explain whether the transaction was for purchase or sale for which commission was paid.
>
> c) In case of purchase or sale, furnish name and address of the party who has enter into transaction of purchase

> and sale and also furnish the name of the broker/agent who has introduced the said party of purchase or sale for which commission is paid.
> d) What was the total amount of transaction of purchase/sale for which commission was paid ?
> e) What was the percentage of the commission charged ?"

3. Petitioner vide letter dated 2/9/2014 has replied and also provided details and explanation why Section 195 was not applicable. Thereafter the assessment order has been passed on 9/3/2015 under Section 143(3) of the said Act.

4. Mr. Suresh Kumar submitted that the assessment order is silent on query raised and therefore, the Assessing Officer has not considered the same or applied his mind to that issue.

5. As held in ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income-Tax-2(1)***[1] once query is raised during assessment proceedings and assessee had replied to it, it follows that query raised was subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of query raised. There can be no doubt in the present facts that the very issue of payment of

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commission overseas to non resident agents against exports sales was the subject matter of consideration by the Assessing Officer during original assessment proceedings leading to assessment order dated 9/3/2015. It was therefore followed that reopening of the assessment by the impugned notice dated 30/3/2019 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceedings. This change of opinion does not construe justification and/or reasons to believe that income chargeable to tax has escaped assessment.

6. Therefore notice dated 30/3/2019 and order dated 4/11/2019 rejecting the objections to reopening are hereby quashed and set aside. Petition disposed accordingly.

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