

ORDER SHEET
WPO/367/2015
IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

FLORENCE INVESTECH LIMITED
VS
DEPUTY COMMISSIONER OF INCOME TAX,
CIRCLE-5(2), KOLKATA & ORS.

BEFORE:

The Hon'ble JUSTICE MD. NIZAMUDDIN

Date : 5th July, 2022.

Appearance:
Mr. J.P. Khaitan, Sr. Adv.
Mr. Pranit Bag, Adv.
Mr. Anirudha Agarwalla, Adv.
Ms. Debashri Mukherji, Adv.
...For the Petitioner

Mr. Prithu Dudhuria, Adv.
....for the Respondents

The Court : Heard learned advocates appearing for the parties.

By this writ petition, petitioner has challenged the impugned notice under Section 148 and initiation of proceedings under Section 147 of the Income Tax Act, 1961. Short question of law involved in this writ petition is as to whether in the facts and circumstances of the case impugned notice under Section 148 and initiation of proceeding under Section 147 of the Income Tax Act, 1961 for reopening of the assessment for the relevant assessment year 2009-10 is legal and valid after the scrutiny assessment under Section 143(3) of the Income Tax Act on the alleged ground of escapement of income to tax on the basis of selfsame material documents which were already available to the assessing officer at the

time of scrutiny assessment, on the same issues on which queries were also raised by the assessing officer in course of scrutiny assessment and reply with all supporting documents to the queries raised in course of scrutiny assessment were filed by the assessee/petitioner and considered and allowed by the assessing officer though on those issues there were no discussion in the body of the assessment order ?

Facts as appear from record available and annexed to the writ petition are hereunder:

Assessment order under Section 143(3) of the Income Tax Act, 1961, relating to assessment year 2009-10, was passed on 30th December, 2011 being annexure P-5 to the writ petition.

In course of the scrutiny assessment, it appears from record that queries were raised by the assessing officer with regard to claim of the assessee/petitioner under Section 35(2AB) of the Act and in response to the same petitioner had submitted before the assessing officer audited details of expenses incurred on reserves and development including auditor's certificates as appears at pages 44 to 48 of the writ petition.

It also appears from record that queries were raised by the Assessing Officer in course of scrutiny assessment relating to purchase of unprocessed seeds in question and in response to the said queries relating to purchase of unprocessed seeds, petitioner had submitted the details of purchase of the seeds in question as appears from page 51 to 55 of the writ petition.

A notice under Section 148 of the Income Tax Act, 1961 relating to relevant assessment year was issued on 21st March, 2014, being annexure P-7 to the Writ Petition.

Recorded reasons for re-opening of the assessment relating to aforesaid relevant assessment years being annexure P-9 as appears at page 281 of the writ petition and on perusal of the same, I find that the issues on which the present Assessing Officer wants to re-open the relevant assessment are the same two issues/claims referred hereinabove involved during the course of the scrutiny assessment on which queries were raised by the Assessing Officer and the same were replied by the assessee petitioner with all sufficient material documents which are part of this writ petition also and after considering the same, were accepted by the assessing officer during the course of scrutiny assessment.

It appears from record that challenging the initiation of the impugned re-assessment proceeding under Section 147 and notice under Section 148 of the Act, petitioner had filed detailed objection on 22nd May, 2014 and 21st January, 2015 as appears at pages 282 and 288 of the writ petition and which were rejected by the Assessing Officer by his order dated 19th March, 2015 as appears at page 295 of the writ petition.

Petitioner filed this writ petition on receiving the aforesaid impugned order of rejection of petitioner's objection against the issuance

of impugned notice under Section 148 and initiation of re-opening of assessment under Section 147 of the Act.

By this Writ Petition, Petitioner has challenged the impugned notice under Section 148 and initiation of proceeding under Section 147 of the Act for re-opening of the assessment of the relevant assessment year mainly on the ground of change of opinion by contending that the basis of re-opening of the assessment is on the self-same fact and material upon which predecessor of the present Assessing Officer had already formed an opinion and allowed the very same claim of the assessee/petitioner after considering its reply and supporting documents submitted in response to the queries raised by the Assessing Officer in course of scrutiny assessment. Petitioner submits that the reasons disclosed in the recorded reason for re-opening of the assessment are not based on any new material facts which has come to the notice and knowledge of the Assessing Officer after the order of scrutiny assessment order passed under Section 143 (3) of the Income Tax Act or on the ground of suppression of any material fact or that the same were not disclosed by the petitioner in course of scrutiny assessment.

Petitioner submits that once in course of regular scrutiny assessment, queries pertaining to the same claim were raised by the Assessing Officer and the reply to the same along with supporting material/documents were furnished by the assessee/petitioner and which were considered and accepted by the Assessing Officer after

investigation in that event even if the assessing officer making no discussion in the body of the assessment order, it would be deemed to have been accepted by forming an opinion to allow the said claim of the petitioner and successor Assessing Officer cannot reopen the said assessment by changing his opinion on the self-same materials/documents.

Learned Counsel appearing for the petitioner on the proposition of law regarding change of opinion, has relied on a decision of the Hon'ble Bombay High Court in the case of Marico Ltd. Vs. Assistant Commissioner of Income Tax And Others reported in [2020] 425 ITR 177 (Bom) particularly paragraphs 10, 11 and 12 of the said judgement which are quoted hereunder:

“10. It is undisputed position before us, that query was raised on the very issue of reopening during regular Assessment proceedings. The parties have responded to it and the Assessment Order dated 30 January 2018 makes no reference to the above issue at all. However, once a query has been raised by the Assessing Officer during the assessment proceedings and the assessee has responded to that query, it would necessarily follow, as held by our Court that the Assessing Officer has accepted the Petitioner's/Assessee's submissions, so as to not deal with that issue in the assessment order. In fact, our Court in GKN Sinter Metals Ltd. v. Ms. Ramapriya Raghavan, Assistant Commissioner of Income Tax, Circle 2(1) (371) ITR 225 had occasion to dealt with the similar/identical submissions on behalf of the Revenue viz. that an 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 the Assessing Officer in the regular assessment proceedings. This

submission was negated by this Court by observing as follows (para 237 of 371 ITR):

“According to the Revenue, it could only be when the assessment order contains discussion with regard to particular claim can it be said that the Assessing Officer had formed an opinion with regard to the claim made by the assessee. This Court in Idea Cellular Ltd. v. Deputy Commissioner of Income Tax (2008) 301 ITR 407 (Bom) has expressly negated on identical contention on behalf of the Revenue. The Court held that once all the material was placed before the 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 the Assessing Officer had not applied his mind while passing the assessment order. Moreover in this case, it is evident from the letter dated 6TH August, 2007 addressed by the Assessing Officer to the Petitioner containing the reasons recorded for issuing the impugned notice also record the fact that during the regular assessment proceedings, the Petitioner has been asked to furnish details in support of the claim for exemption under Section 80IA/IB of the Act. The letter further records that the details sought for were furnished and it is now observed that there has been a disproportionate distribution of expenses between various units belonging to the Petitioner for claiming deduction under Section 80IA/IB of the Act. This is a further indication of the fact that the Assessing Officer had during the regular assessment proceedings for Assessment Year 200203 sought information in respect of the allocation of expenses and the explanation offered by the Petitioner was found to be satisfactory. This is evident from query dated 27th December, 2004 and the Petitioner's response to the same on 25th January, 2005 explaining the manner of distribution of common expenses for delaying the process of claiming deduction under Section 80IA/IB of the Act. All this would indicate that Assessing Officer had formed an opinion while passing the order dated 9th March, 2005. This Court in Aroni Commercials Ltd. v. Assistant Commissioner of Income Tax [2014] 367 ITR

405 (Bom) had occasion to consider somewhat similar submission made by the Revenue and negated the same by holding that when a query has been raised with regard to a particular issue during the regular assessment proceedings, it must follow that the Assessing Officer had applied his mind and taken a view in the matter as is reflected in the Assessment Order. Besides, the manner in which an Assessing Officer would draft/frame his order is not within the control of an assessee. Moreover, if every contention raised by the assessee which even if accepted is to be reflected in the assessment order, then as observed by the Gujarat High Court in *CIT v. Nirma Chemicals Ltd.* [2008] 305 ITR 607 (P&H), the order would result into an epic tome. Besides, it would be impossible for the Assessing Officer to complete all the assessments which have to undergo scrutiny at its hand. In the above view, it is clear that once a query has been raised during the assessment proceedings and the Petitioner has responded to the query to the satisfaction of the Assessing Officer as is evident from the fact that the Assessment Order dated 9th March, 2005 accepts the Petitioner's claim for deduction under Section 80IA/IB of the Act. It must follow that there is due application of mind by the Assessing Officer to the issue raised.”

The above observations apply on all fours to this Petition, so far as the Revenue's submission of no change of opinion is concerned.

11. The further submission of Mr. Walve that in the absence of the Assessing Officer adjudicating upon the issue it cannot be said that the Assessing Officer had formed an opinion during the regular assessment proceedings leading to the order dated 30 January 2018. An adjudication would only be on such issue where the assessee's submissions are not acceptable to the Revenue, then the occasion to decide a lis would arise i.e. adjudication. However, where the Revenue accepts the view propounded by the assessee in response to the Revenue's query, the Assessing Officer has certainly to form an opinion whether or not the stand taken by the assessee is acceptable. Therefore, it must follow that where queries have

been raised during the assessment proceedings and the assessee has responded to the same, then the non-discussion of the same or non-rejection of the response of the assessee, would necessarily mean that the Assessing Officer has formed an opinion accepting the view of the Assessee. Thus an opinion is formed during the regular Assessment proceedings, bars the Assessing Officer to reopen the same only on account of a different view.

12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has reaised the query dated September 25, 2017, during the assessment proceedings and the petitioner had responded to the same by its letters dated December 10, 2017 and December 21, 2017, justifying its stand. The non-rejection of the explanation in the assessment order would amount to the Assessing Officer accepting the view of the assessee, thus taking a view/forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion. and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated March 27, 2019, is quashed and set aside.

The aforesaid judgement of the Hon'ble Bombay High Court has been upheld by the Hon'ble Supreme Court in the case of Assistant Commissioner of Income-Tax Vs. Marico Ltd. reported in [2020] 117 taxman.com 244 (SC).

Mr. Dudhoria, learned Advocate appearing for the respondents opposing the writ petition submits that the Assessing Officer was justified in re-opening the assessment in the facts and circumstances of the case and the reasons for re-opening of assessment by the Assessing Officer cannot be called a change of opinion.

In the facts and circumstances of the case and considering the judgement of the Bombay High Court and Apex Court in the case of Marico Ltd (supra), I am not convinced with the submission of Mr. Dudhoria.

In my considered opinion, the issues on which the Assessing Officer wants to re-open an assessment, it appears from record that the same were already considered by his predecessor/Assessing Officer in course of scrutiny assessment and were accepted and the claim of the assessee/petitioner was allowed after detailed investigation by raising queries and considering the reply and supporting materials submitted by the assessee/petitioner in response to those queries in course of scrutiny assessment, in view of these facts substantiated by record, even if there may not be any discussion in the body of the assessment order passed under Section 143(3) of the Act over which an assessee has no control as to how to an assessing officer is write an assessment order, it shall be presumed that on the aforesaid two issues/claims, in course of scrutiny assessment, Assessing Officer had already formed an opinion before allowing the said claims and action of the successor Assessing Officer re-opening the relevant assessment on the very self-same material without making out any case against the assessee/petitioner that some new material has come to his knowledge or possession which were suppressed or not disclosed by the assessee/petitioner at the time of scrutiny assessment, is nothing but a mere change of opinion and in

facts and circumstances of this case initiation of the impugned proceeding for reopening of assessment under Section 147 of Income Tax Act, 1961 is not sustainable in law and the impugned assessment proceeding is liable to be quashed.

Considering the facts and circumstances of the case as appears from record, submission of the parties and the judgements relied upon by the petitioner and in view of the discussion made above, the impugned notice under Section 148 of the Income Tax Act, 1961 dated 21st March, 2014 relating to assessment year 2009-2010 and all subsequent proceeding on the basis of the aforesaid notice under Section 148 of the Act are quashed.

Accordingly, this writ petition being WPO No. 367 of 2017 is disposed of by allowing the same. No order as to costs.

(MD. NIZAMUDDIN, J)