IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1505 OF 2014

Wyeth Limited ….Petitioner

V/s.
The Assistant Commissioner of Income Tax & Ors. …Respondents

Mr. J. D. Mistri, Senior Advocate a/w Mr. Madhur Agrawal i/b Mr. Atul K Jasani for Petitioner
Mr. Suresh Kumar for Respondents

CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ
DATED : 11th FEBRUARY 2022

P.C. :

1 At the outset, Mr. Mistri stated that petitioner has now amalgamated with Pfizer Limited and seeks leave to amend the petition to bring those post filing facts on record. Since the amendment proposed do not alter the nature and character of the petition, we have allowed the amendment to be carried out. Amendment shall be carried out within one week, notwithstanding the disposal of this petition. Mr. Suresh Kumar also had no objection.

2 Petitioner is a company engaged in manufacturing sale and trading of bulk drugs and pharmaceuticals, manufacturing and sale of animal health and nutrition products. Petitioner had filed return of income for A.Y.-2006-2007 on 30th November 2006 declaring total income of Rs.13,43,35,210/- under normal provisions and Rs.82,54,99,551/- under Section 115 JB of the

Income Tax Act 1961 (the Act). Petitioner filed revised return of income on 31st March 2008 declaring total income of Rs.14,52,44,314/- under normal provisions and Rs.82,54,99,551/- under Section 115JB of the Act. The case was selected for scrutiny and order under Section 143(3) of the Act was passed on 29th December 2009 assessing total income of Rs.16,17,34,217/- under normal provisions and book profits of Rs.83,05,88,891/- under Section 115JB of the Act.

3 Petitioner received a notice dated 28th March 2013 from respondent no.1 alleging that respondent no.1 had reasons to believe that petitioner's income chargeable to tax for A.Y.-2006-2007 has escaped assessment within the meaning of Section 147 of the Act. Subsequently, petitioner also received, vide letter dated 16th May 2013 from respondent no.1, the reasons for reopening under Section 148. The reasons are dated 28th March 2013. Petitioner filed its objections and respondent no.1 passed an order dated 14th February 2014 rejecting the objections.

4 Mr. Mistri submitted that before a notice under Section 148 is issued, an approval of the concerned authority is required to be taken under Section 151 of the Act. Mr. Mistri submitted that the approval that has been provided to petitioner and copy whereof has been annexed to the petition is dated 26th March 2013 and has been received by respondent no.1 on 28th March 2013, whereas the reasons for reopening itself is dated 28th March 2013 and, therefore, the approval granted could not have been based on the reasons as recorded. Mr. Mistri submitted, how could the approval be

granted on 26th March 2013 when the reasons itself is recorded on 28th March 2013 and on this ground alone the notice issued under Section 148 has to be quashed and set aside.

5 Mr. Suresh Kumar was confronted with these facts. Mr. Suresh Kumar submitted, relying on paragraph 21 of the affidavit in reply, that respondent no.2 had given the approval to issue notice under Section 148 as per the provisions of section 151 of the Act in accordance with law. Mr. Suresh Kumar submitted that the reasons were recorded on 25th March 2013 and approval dated 26th March 2013 was received in the office of respondent no.1 on 28th March 2013 and, therefore, the approval has been correctly granted. We are unable to accept the submissions of Mr. Suresh Kumar because the documents speak otherwise. There is no evidence whatsoever that the reasons were recorded on 25th March 2013. Even the copy of the reasons for reopening annexed to the petition is dated 28th March 2013. Mr. Vishal Makwane, who has affirmed the affidavit in reply as Deputy Commissioner of Income Tax, is the same person who had recorded the reasons for reopening and also issued notice under Section 148 of the Act. At that time, he was an Assistant Commissioner of Income Tax. The same Mr. Vishal Makwane does not annex any document to indicate that reasons were recorded on 25th March 2013, nor has he explained as to how the reasons provided to petitioner show the date 28th March 2013. Therefore, we have to reject the explanation given in affidavit in reply and hold that sanction was not properly obtained. In our view, on this ground alone the

notice has to be quashed and set aside.

6 The reasons also were attacked by Mr. Mistri, who submitted that as the notice under Section 148 has been issued more than 4 years after the end of the relevant assessment year and scrutiny assessment has been completed under Section 143(3) of the Act, the proviso to Section 147 shall apply and reopening is barred unless respondent is able to show that there was failure to disclose fully and truly material facts necessary for the relevant assessment year. Mr. Mistri submitted that reasons recorded does not indicate any such non disclosure. Mr. Mistri also submitted that reasons recorded only indicate change of mind which cannot be a basis for reopening. Mr. Mistri also submitted that all the three points in the reasons have already considered during the assessment proceedings and even if the assessment order is silent on one or two points, still as held by this court time and again, the Assessing Officer should be considered to have applied his mind, once a query is raised and answers are provided.

7 Mr. Suresh Kumar in his submissions justified the reopening and went into the merits of the case. In short, he reiterated what is recorded in the reasons.

8 The reasons for reopening raised three issues and it read as under:-

> *"................*
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> *1. During the year assessee made onetime payment to M/s Atul Ltd to get itself released and discharged in respect of all the obligations of the company as lessee under the lease deeds including all the enviornmental claim or liabilities, if any, related to the surrendered leased land. Thus the payment made is capital in nature, as the benefit derived by the assessee is enduring in nature as the unexpired lease portion of the lease hold land surrendered by the assessee is 54*

years. Thus there is an under assessment to the extent of Rs.10 crores with tax effect of Rs.3.366 crore.

2. As per the schedule of the depreciation, it is observed that the depreciation on the block of Officer Equipments have been claimed @15% where as the allowable rate is 10%. Therefore the assessee has claimed excess depreciation to that extent of Rs.4,17,294/- with the tax effect of Rs.1,40,461/-.

3. As per the clause 22(b) of the TAR the assessee has shown prior period expenses of Rs.30,15,135/-. However, these expenses have not been disallowed by the assessee while computing the total income. Thus there is an under assessment to that extent with tax effect of Rs.10,14,489/-.

………………..”

9 As regards the first ground, that is capitalising the payment made to Atul Ltd., first of all, we do not understand how this amount paid as compensation could ever be capitalised in the books of petitioner. Be that as it may, during the assessment proceedings the details have been provided to the Assessing Officer regarding surrender of the lease and payments made to Atul Ltd. To the petition is annexed a letter dated 9th December 2009 addressed by Petitioner to ACIT to which a 7 pages note is annexed to explain why payment of Rs.10 crores towards lease land at Valsad is to be considered as revenue in nature and allowable under Section 37(1) of the Act. Also annexed to the petition is a letter dated 24th December 2009 addressed by petitioner to ACIT once again explaining the back ground regarding surrender of lease to Atul Ltd and also providing a copy of the lease agreement. In the said letter, petitioner has also referred to almost 7 replies addressed to the notices received from respondent no.1. Therefore, this has been a subject of consideration during the assessment proceedings.

10 As held in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax 2(1)***[1] once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

11 As regards the second ground, that is claiming 15% depreciation on the block of office equipments against allowable rate of 10%, there can be no non disclosure on the part of petitioner at all. The assessment order dated 29th December 2009 contains a computation of depreciation. The Assessing Officer in the assessment order states; "*I have perused assessee's contention and the facts on this issue. However, as held above, the claim of assessee is not acceptable and the depreciation is recomputed as per the stand taken by the Department in earlier years as the issue has not yet been decided at various appellate stages. The annexure-1 to this order gives the computation of depreciation which comes out to be RS.4,79,67,132/-. In view of the above, assessee's claim for depreciation will be reduced by Rs.2,40,941/-*", and calculates depreciation at 15% for office equipments. Therefore, there can never be a situation of failure to disclose truly and fully all material facts by petitioner. The Hon'ble Apex Court in ***Indian & Eastern Newspaper Society vs. Commissioner of Income-tax***[2] has held that even if

1. (2014) 44 taxmann.com 304 (Bombay)
2 [1979] 119 ITR 996

according to respondent no.1 there was an error discovered on a reconsideration of the same material (and no more) does not give power to the Assessing Officer to re-open the assessment. Paragraph no. 14 of the said judgment read as under :

> *14. Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. Any different view taken by him afterwards on application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147 (b). Reliance is placed on Kalyanji Mavji and Co. v. CIT, (1976) 102 ITR 287, where a Bench of learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income-tax Officer must fall within Section 34 (1) (b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels further than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kamal Kumar Singh's case (supra), A. Raman and Co.'s case (supra) and Bankipur Club Ltd. v. CIT, (1971) 82 ITR 831, and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji's case (supra) suggesting the contrary do not, we say with respect, lay down the correct law.*

This view has been followed by a Full Bench of the Karnataka High Court in ***Dell India (P.) Ltd. vs. Joint Commissioner of Income Tax, LTU, Bangalore***[3]**.**

12 As regards the third ground, that is prior period expenses, petitioner has, in its letter dated 15th December 2009 addressed to the ACIT after referring to personal hearing as well as 7 earlier communications and notice issued by respondent no.1 under Section 142(1) of the Act, explained why

3 [2021] 432 ITR 212 (Karnataka)

the amount of Rs.30,15,135/- reported by the Tax Auditor was part of the amount of Rs.1,13,73,436/- as provisions for employee retention strategy and was rightly considered as disallowable in computing business income and hence the amount has not been separately disallowed as prior period expenditure.

Therefore, once again this has been subject of consideration during the assessment proceedings and as noted earlier, once a query raised during the assessment proceeding and assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. Change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

13 For reasons recorded above, 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 any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned notice and passing of the impugned order and after going through the same and examining the question of legality thereof, quash, cancel and set aside the impugned notice (Exhibit J) and impugned order (Exhibit O)."*

14 Petition disposed.

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**