Santosh

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

WRIT PETITION NO. 100 OF 2013

Mangalore Refinery and Petrochemicals Limited ...Petitioner

Versus

The Deputy Commissioner of Income Tax, Range 3(2) & ors. ...Respondents

Mr. J. D. Mistri, Senior Advocate, a/w Mr. Madhur Agrawal, and Mr. Rajesh Poojary, i/b Mulla & Mulla, CB & C, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

CORAM: K. R. SHRIRAM & N. J. JAMADAR, JJ
DATED: 18th FEBRUARY, 2022

ORDER:

1. Petitioner is a company engaged in the business of petroleum refinery. For Assessment Year 2005 – 2006 petitioner filed a return of income on 29th October, 2005, in which it disclosed total income of Rs.Nil under the normal provisions of the Act and “book profits” of Rs.891,15,21,678 under Section 115JB of the Income Tax Act, 1961 (“the Act”). The return of income was accompanied with a copy of petitioner’s audited accounts for the year ended 31st March 2005, the Tax Audit Report dated 20th October 2005 in Form 3CA and 3CD and the report in Form 29B dated 20th October 2005 setting out the computation under Section 115JB of the Act.

2. During the course of assessment of proceedings various queries were raised and in particular relating to a sum of Rs.105,45,10,183/- debited to the P&L Account towards "provision for customs duty" and why disallowance should not be made under Section 143B of the Act. Petitioner gave explanation vide its letter dated 14th November 2007. An assessment order came to be passed on 30th November 2007 in which the Assessing Officer has thoroughly discussed the explanation of petitioner on the issue of provision for customs duty of Rs.105,45,10,183/- and held that the same was disallowable under Section 143B of the Act on the ground that there was no actual payment.

3. Petitioner received a notice dated 19th October 2011 issued under Section 148 of the Act stating that Assessing Officer had reason to believe that petitioner's income chargeable to tax for Assessment Year 2005 – 2006 had escaped assessment within the meaning of Section 147 of the Act. Petitioner was also provided reasons for initiating proceedings under Section 147 of the Act, which reasons are reproduced below:

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Name: M/s Mangalore Refinery & Petrochemicals Ltd

AY: 2005-06

PAN: AAACM5132A

Reasons for initiating proceedings u/s 147 of the IT Act

The assessee filed the return of income on 29.10.2005 for an amount of Rs Nil (after adjustment of brought forward loss of Rs 1314.69 crore) and taxes were paid on Book Profits of Rs 891,15,21,678/-. The assessment u/s 143 (3) of the Act was completed on 30.11.2007 assessing the total income from business and profession at Rs Nil (after adjustment of brought forward losses of Rs 1410.64 crore) and book profits of Rs 1405.62 crore.

During the year under consideration, the assessee has debited an amount of Rs 105,45,10,183/- on account of 'provision for custom duty'. The amount was added to the total income of the assessee in terms of provisions of section 43B of the IT Act by the AO in the order u/s 143 (3) of the IT Act. Subsequently, the CIT (A), vide order dated 15.10.2008, for the year under consideration, while continuing the addition, held that the amount of 'provision for custom duty', debited to the profit and loss account and added to the total income of the assessee, to be in the nature of a contingent liability and not an ascertained liability. The Explanation (1) (c) to section 115JB of the IT Act states that the book profits are to be increased by "*the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities*". Hence, any amount in the nature of a contingent liability is required to be added back to the book profits of the assessee.

As the 'provision for custom duty' is in the nature of a contingent liability, the same is required to be added back to the book profits of the assessee in terms of provisions of section 115JB, as discussed above. Since, the amount of provision for custom duty has not been added back to the book profits of the assessee, I have reason to believe that income of Rs 105,45,10,183/- has escaped assessment.

Further, during the year under consideration, the assessee has debited an amount of Rs 42,94,40,678/- on account of 'advance doubtful of recovery' and Rs 20,00,000/- on account of 'provision for non moving inventory'. In view of the fact that the amounts are in the nature of a contingent liability, the same are required to be added back to the book profits of the assessee, as discussed above. As these amounts have not been added to the book profits, I have reason to believe that income amounting to Rs 42,94,40,678/- and Rs 20,00,000/- has escaped assessment.

In view of the same, I have reason to believe that income of Rs 148,39,50,861/- has escaped assessment and there has been a short of levy of tax on Book Profits. Issue notice u/s 148 of the IT Act, 1961.

Sapna Bhatia,
DCIT 3(2), Mumbai

4. As we could see from the reasons there are three items which according to JAO has escaped assessment namely: (a) Rs.105,45,10,183/- debited to the P&L Account towards provisions for customs duty, (b) Rs.42,94,40,678/- debited to the P&L Account towards advance doubtful of recovery and (c) Rs.20,00,000/- debited to the P&L Account towards provisions of non-moving inventory. Objection to reopening was filed by petitioner vide its letter 11^{th} November 2011 and the objection came to be rejected by an order dated 26^{th} November 2012, which is also impugned in this petition.

5. Mr. Mistri submitted that,

> "(a) under the proviso to Section 147 of the Act an assessment completed under Section 143(3) of the Act, cannot be reopened after the expiry of four years from the end of the assessment year unless it is shown that the assessee has either failed to furnish the return or has not made a full and true disclosure of all material facts. Respondent no.1 has not alleged in the recorded reasons that there has been any failure on the part of petitioner to make a full and true disclosure of the material facts. On the other hand, the record shows that there has been a full and true disclosure of the material facts and that the

impugned reassessment proceedings are based on a reappraisal of the same material.

(b) It is well settled by a number of judgments of this Hon'ble Court that an assessment cannot be reopened in the absence of fresh material.

(c) The impugned reassessment proceeding is clearly based on a 'change of opinion'.

(d) The impugned reassessment proceeding is based on a misconception that income has escaped assessment."

6. Mr. Mistri also took us through the documents annexed to the petition to show that there has been full and true disclosure and the objections raised in the reasons for reopening have been in the active consideration of the Assessing Officer and the attempt to reopen is relying on the same preliminary facts to take a different view.

7. Mr. Suresh Kumar submitted the reasons recorded by Assessing Officer clearly indicate that there has been income chargeable to tax which has escaped assessment and there was reason to believe so. He submitted that there is a clear link between formation of opinion that income chargeable to tax has escaped assessment and the reason recorded, which in turn is based on the material available on record. The information is clear and based on facts. Mr. Suresh Kumar also submitted that the fact that income had escaped assessment can be seen from the face of the record as the provisions of customs duty liability amounting to Rs.105,45,10,183/-, advance doubtful of recovery of Rs.42,94,40,678/- and provisions for non-moving of inventory of Rs.20,00,000/- was erroneously not added to book profits determined for Assessment Year 2005 - 2006 even though such provisions were not ascertained liabilities.

8. We have heard the Counsels and considered the petition, the documents annexed to the petition and also the affidavit-in-reply.

9. The Proviso to Section 147 of the Act provides that where an assessment under Section 143(3) has been made for the relevant assessment year, no action shall be taken under Section 147 after the expiry of four years of 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 disclose fully and truly all material facts necessary for its assessment for that assessment year. Reason recorded for reopening does not state that there has been failure to disclose truly and fully all material facts. In our view, a full disclosure has been made in the return as under:

"(i) Re: Rs.105,45,10,183 debited to the P&L A/c towards "provision for customs duty".

(a) In S.No.16 of Annexure – XI [Clause 21(i)(B) of From 3CD] of the tax audit report dated 20.10.2005 annexed to the return, the said sum was shown as "*Provision for customs duty concession availed pending future export obligation*" together with note 6 which read *"Provision for customs duty concession availed pending future export obligation adjusted with export obligation completed on various dates up to 30.09.2005."*

(ii) Re: Rs.42,94,40,678 debited to the P&L A/c towards "advance doubtful of recovery":

(a) This was disclosed in Schedule Q to the audited accounts annexed to the return under the heading "Provision for doubtful debts";

(b) In the computation of normal income, the said amount was added back (disallowed) by way of item (h).

(iii) Re: Rs.20,00,000 debited to the P&L A/c towards "provisions for non-moving inventory":

(a) This was disclosed in Schedule Q to the audited accounts annexed to the return under the heading "Provision for Non-moving stores & spares";

(b) In the computation of normal income, the said amount was added back (disallowed) by way of item (g)."

Thus there has been a full and true disclosure of the material facts by petitioner. It may be noted at the cost of repetition that in the recorded reasons, it has not been alleged that there has been any failure on the part of the assessee to make a full and true disclosure of the material fats.

10. Assessing Officer has also asked petitioner to specifically explain the facts relating to the sum of Rs.105,45,10,183/- debited to the P&L Account towards provisions for customs duty and why a disallowance should not be made under Section 143(3) of the Act. Petitioner has explained the full facts vide its letter dated 14th November 2007. In fact, the amount of Rs.105,45,10,183/- has been offered to tax by petitioner in the succeeding Assessment Year 2006 – 2007 and assessed. It is only thereafter the Assessing Officer has passed the assessment order dated 30th November 2007 in which he has thoroughly discussed the explanation of the assessee on the issue of provision for customs duty in para 5 of the assessment order and held that the sum was disallowable under Section 143(b) of the Act on the ground that there was no actual payment.

11. In computing the total income under the normal provisions of the Act, the Assessing Officer started from the business income as returned by petitioner, which included self-disallowance of Rs.42,94,40,678/- and Rs.20,00,000/-, debited to the P&L Account towards advance doubtful of recovery and provision for non-moving inventory, respectively.

12. Therefore there has been a true and full disclosure of all material facts by petitioner. It is true that in the assessment order self-disallowances have not been discussed but at the same time it has been a subject of consideration during the assessment proceedings since the Assessing Officer has started from the business income as returned by pettiioner, which included self-disallowances of Rs.42,94,40,678/- and Rs.20,00,000/-, debited to the P&L Account. Therefore, there can never be escapement of income. Respondent no.1 - Assessing Officer also applied his mind to the computation of "book profits" under Section 115JB of the Act. In the assessment order, respondent no.1 has held that petitioner's deferred tax liability of Rs.512,47,42,000/- had to be added to the book profits. He computed the book profit at Rs.140,362,63,678/- and computed total tax payable by petitioner at Rs.110,06,18,525/-.

13. Therefore, in our view, there has been a full and true disclosure of the material facts by petitioner and it is a clear case of change of opinion to take a different view relying on the same set of documents. Change in opinion cannot construe "reason to believe".

14. Even in the order impugned rejecting the objections, respondent no.1 has not disputed that there has been no failure on the part of petitioner to make a full and true disclosure of the material facts and has proceeded on an erroneous assumption that reopening is permissible even if there is no failure to make a full and true disclosure of the material facts.

15. In the circumstances, petition is allowed in terms of prayer Clause (a), which reads as under:

> "**(a)** this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction, under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 19th October, 2011 issued by Respondent no.1 under Section 148 of the Act to reopen the assessment for the assessment year 2005 – 2006 together with the order dated 26th November, 2012 dealing with the Petitioner's objections."

[N. J. JAMADAR, J.] **[K. R. SHRIRAM, J.]**