

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3553 OF 2019

Glaxosmithkline Pharmaceuticals Ltd.)
252, GSK House, Dr. Annie Besant Road,)
Worli, Mumbai 400 030) ...Petitioner

V/s.

1. Asst./Deputy Commissioner of Income)
Tax Circle 77(1)(1),)
Room No.124, 1st floor, Aaykar Bhavan,)
M. K. Marg, New Marinelines, Mumbai)

2. Principal Commissioner of Income Tax)
Range-7,)
Room No.122, 1st floor, Aaykar Bhavan,)
M. K. Marg, New Marinelines, Mumbai)

3. The Union of India through the Secretary)
Government of India, Ministry of Finance)
New Delhi 110 001) ...Respondents

Mr. Nishant Thakkar i/b Mint & Confreres for Petitioner
Mr. Sham V. Walve for Respondents-Revenue

CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ
DATED : 24th JANUARY 2022

ORAL JUDGMENT (PER K. R. SHRIRAM J.):

1 Petitioner is impugning a notice dated 28th March 2019 issued under Section 148 of the Income Tax Act 1961 (the Act), by which respondents state that they have reasons to believe that petitioner's income chargeable to tax for A.Y.-2012-2013 has escaped assessment within the meaning of Section 147 of the Act. Petitioner is also impugning an order dated 13th

November 2019 rejecting petitioner's objections to the reopening of assessment for A.Y.-2012-2013.

2 Having heard Mr. Thakkar and Mr. Walve and having considered the petition, reply etc., we are in agreement with petitioner that the notice dated 28th March 2019 alongwith order dated 13th November 2019 impugned in the petition have to be quashed and set aside.

3 Admittedly, this is a case where the notice under Section 148 of the Act has been issued after the expiry of 4 years from the end of the relevant assessment year and assessment under Section 143(3) of the Act has also been completed. Hence, proviso to Section 147 of the Act shall apply. Respondents have to show that there was failure on the part of petitioner to truly and fully disclose material facts relevant for the assessment. We have considered the reasons recorded for reopening the assessment and we have no doubt in concluding that respondents have failed in discharging its onus to show that petitioner has failed to disclose truly and fully all material facts. From the reasons itself as well as the documents annexed to the petition, it is quiet clear that there has been full disclosure by petitioner. Jurisdictional Assessment Officer (JAO) has raised 4 heads, under which he feels that income chargeable to tax has escaped assessment. The same for ease of reference are reproduced from the reasons which reads as under:

“Brief details of the information collected/received by the A.O.:-

(1) It is found that the assessee has debited an amount of Rs.29,30,000/- towards security deposit against the interest income under the head of other income in the profit and loss account. The

security deposit being capital in nature is not an allowable expenditure u/s 37 of the Act.

(2) Further, the assessee has debited an amount of Rs.1,15,67,90,000/- under the head Exceptional items to the profit and loss account which included an amount of Rs.22,08,18,000/- towards expenses on reationalisation initiative mainly relating to a manufacturing site. Out of this, an amount of Rs.15,42,60,000/- was added back being the capital expenditure. As the whole amount of Rs.22,08,18,000/- being capital expenditure incurred towards rationalisation initiative mainly relating to a manufacturing site, balance of Rs.6,65,58,000/- was required to be added back to the taxable income.

(3) Again, it is noticed that the assessee has reduced an amount of Rs.2,15,19,017/- towards Sales tax paid but not debited to P&L account in the computation of income. In the clause21(i) of 3CD report (Schedule J) (notes 4a), the auditor has certified that the company has made payments in the nature of deposits aggregating to Rs.2,15,19,017/- under the applicable sales tax laws of various states. Since these payment are in the nature of deposits, the same should not be reduced in the computation of income.

(4) Further, it is noticed from the balance sheet that Export incentive receivable was Rs.97,04,000/- as on 31.03.2011 and Rs.32,56,000/- as on 31.12.2012. Thus, the assessee has claimed a deduction of Rs.64,48,000/- on account of difference of receivable which is not allowable deduction and should have been disallowed.”

4 As regards item (2), JAO states that amount of Rs.15,42,60,000/- only was added back as capital expenditure, whereas the entire amount of Rs.22,08,18,000/- required to be added to the taxable income. This exposes clear change of opinion on the part of JAO.

Coming to item (4), the JAO states the assessee has claimed deduction of Rs.64,48,000/- on account of difference of receivable which is not allowable deduction and should have been disallowed. This also exposes clear change of opinion.

Notice to reopen the assessment for items (2) and (4) is found entirely on the assessment records and according to JAO the Assessing

Officer, who passed the assessment order did not do what he was supposed to do. It is settled law that the assessment cannot be reopened on account of change of opinion.

5 As regards item (1), this is based on audit objections. After completion of assessment under Section 143(3) of the Act respondents had issued a communication to petitioner mentioning about the various objections raised by the audit department and one of that relates to this amount of Rs.29,30,000/- towards interest expenditure. Petitioner by its letter dated 14th January 2019 explained to respondents that the amount of Rs.29,30,000/- was not debited towards security deposit but was debited towards interest paid on security deposit. In their reply, petitioner has explained that the amount of Rs.29,30,000/- being debited under the head of other income in the profit and loss account and is reduced from interest income represents interest expenditure incurred for security deposits. It was also brought to the notice of respondents that the interest on security deposit has been inadvertently considered as security deposits in the audit findings and, therefore, the amount of Rs.29,30,000/- representing interest expenditure is deductible as a revenue expenditure and not capital in nature.

We are in agreement with the explanation offered by petitioner. Moreover, this point has been raised because of audit objections. The Assessing Officer cannot be stated to be satisfied that he had reasons to believe that this item has escaped assessment. The Income Tax Officer must

determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer. (*Indian and Eastern Newspaper Society V/s. Commissioner of Income Tax, New Delhi*¹.)

Further there is nothing under this head to indicate that there was failure on the part of petitioner to truly and fully disclose any fact. JAO has relied on the documents already filed before the Assessing Officer.

6 Coming to item (3), JAO relying on the same primary facts which are disclosed before the Assessing Officer, is considering the same material on record in which one view has been conclusively taken by the Assessing Officer with an intention to take another view which is not permissible in law. Moreover, JAO's view that the payment of Rs.2,15,19,017/- were in the nature of deposits and hence could not have been deducted to profit and loss account in computation of income, is erroneous. We have to note this also has been raised on the basis of audit objections which, as noted earlier was not permissible in order to arrive at a conclusion that concerned officer

1. 119 ITR 996 (SC)

has reasons to believe that there was an escapement of income.

According to JAO, during A.Y-2012-2013, the petitioner has deducted the amount of Rs.2,15,19,017/- towards sales tax paid but not debited to profit and loss account and since the payments were in the nature of deposits, it was not required to be reduced in the computation of income.

7 In respect of statutory liability, the general principle laid down by the courts is that a statutory liability arises in the year to which the relevant taxable event pertains. In case of an assessee following mercantile system of accounting, the statutory liability relates back to the year in which base event giving rise to such statutory liability takes place and the fact that the assessee has disputed the liability in appeal or that no entries were made in the books of account would not result in cessation of such liability. Therefore, these tax demands although not debited to the profit and loss account should be deductible in the A.Y.-2012-2013 being the year of payment.

It will be useful at this stage to quote the following paragraph from the judgment of the Apex Court in *Kedarnath Jute Mgf. Co. Ltd. Vs. Commissioner of Income Tax*²

“ In Commissioner of Income-tax v. Royal Boot House [(1970) 75 ITR 507 (Cal.)] it was held that where the assessee followed the mercantile system of accounting and, without disputing the liability to pay the Sales Tax had made a provision for its payment in its account even though he had not actually paid the tax over to the authorities, the assessee was entitled to deduction in respect of the provision for sales tax from his income under Section 10(2)(xv) of the Act. It was, pointed out that under the provisions of the Sales Tax statutes, the liability to pay the tax was not dependent upon assessment or demand but was an obligation to pay the tax either annually,

2. (1971) 82 ITR 363 (SC)

quarterly or monthly, as the case might be. This case was and has been sought to be distinguished by the Revenue on the ground that the liability to pay the Sales Tax had not been disputed and the assessee had made a provision for its payment in its account. As will be presently seen this distinction is without substance and does not affect the true legal position.

*Now under all sales tax laws including the statute with which we are concerned, the moment a dealer makes either purchases or sales which are subject to taxation, the obligation to pay the tax arises and taxability is attracted. Although that liability cannot be enforced till the quantification is effected by assessment proceedings, the liability for payment of tax is independent of the assessment. It is significant that in the present case, the liability had even been quantified and a demand had been created in the sum of Rs.1,49,776/- by means of the notice dated 21st November, 1957 during the pendency of the assessment proceedings before the Income Tax Officer and before the finalisation of the assessment. It is not possible' to comprehend how the liability would cease to be one because the assessee had taken proceedings before higher authorities for getting it reduced or wiped out so long as the contention of the assessee did not prevail with regard to the quantum of liability etc. An assessee that follows the mercantile system of accounting is entitled to deduct from the profits and gains of the business such liability which had accrued during the period for which the profits and gains were being computed. It can again not be disputed that the liability to payment of sales tax had accrued during the year of assessment even though it had to be discharged at a future date. In *Pope The King Match Factory v. Commissioner of Income-tax*, [(1963) 50 ITR 495 (Mad.)], a demand for excise duty was served on the assessee and though he was objecting to it and seeking to get the order of the Collector of Excise reversed, he debited that amount in his accounts. on the last day of his accounting year and claimed that amount as a deductible allowance on the ground that he was keeping his accounts on the mercantile basis. The Madras High Court had no difficulty in holding that the, assessee had incurred an enforceable legal liability on and from the date on which he received the Collector's demand for payment and that his endeavor to get out of that liability by preferring appeals could not in any way detract from or retard the efficacy of the liability which had been imposed upon him by the competent excise authority. In our judgment, the above decision lays down the law correctly."*

8 In the circumstances, the entire basis for reopening is change of opinion and as held in various judgments an Assessing Officer cannot reopen an assessment even within a period of 4 years merely on the basis of a change of opinion (***Jainam Investments Vs. ACIT Central Circle-8(1)***)

***Mumbai & Anr.*³⁾**.

9 Therefore, we are holding that the petition has to be 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 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 impugned notice under Section 148 of the Act (Exhibit H) and the impugned order (Exhibit K) issued by respondent no.1.”

10 At this stage, Mr. Thakkar states that there has been an error committed by the Assessing Officer as regards item (4) namely the export incentives deduction of Rs.64,48,000/-. Mr. Thakkar states that during the assessment proceedings, petitioner had, by its letter dated 24th February 2016, in reply to the notice issued under Section 142(1) of the Act, brought to the notice of the Assessing Officer that there was an error at the time of making assessment and the amount of Rs.64,48,000/- has to be added as income and not reduced as stated in the original returns filed. Mr. Thakkar states that perhaps this point was missed by the Assessing Officer while passing the assessment order dated 21st April 2016 and offers to pay tax on this amount for the said period. Revenue audit in its objections had observed as under:

“Omission to do so has resulted in under assessment of income of Rs.64,48,000/- with consequent short levy of tax of Rs.20,92,054 [19,34,400 (30%) 96,720 (5%), 60,934 (3%)] and interest under Section 234B of Rs.9,62,345. Thus the total short levy of tax works out to Rs.30,54,398 [20,92,054 (Tax), 9,62,345 (int 234B)]”

3. (2021) 131 taxmann.com 327

Mr. Thakkar relies upon *Gemini Leather Stores Vs. Income Tax Officer*⁴ where the court held that the assessment cannot be reopened by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts as the Income Tax Officer had material facts before him when he made the original assessment. The Court held that he cannot take recourse to reopen to remedy the error resulting from his own oversight. The relevant portions in this judgment of the Apex Court reads as under :

“..... In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income-Tax Officer discovered. After this discovery the Income-tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income-tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income tax officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147 (a) to remedy the error resulting from his own oversight.”

Mr. Thakkar states that though JAO cannot take recourse to reopen to remedy the error resulting from his own oversight, petitioner in fairness is ready and willing to pay the amount as mentioned earlier provided it is not construed as an admission of liability and no penalty proceedings for this are initiated.

⁴ (1975) 100 ITR 1 (SC)

11 Mr. Walve states that the court may pass such directions as it deems fit.

12 Petitioner is therefore, directed to pay the amount of Rs.30,54,398/- as mentioned in the revenue audit objections. Respondents are directed to raise the demand on petitioner for this amount and petitioner shall pay the amount within time prescribed in the demand. We are making it clear that as noted earlier, the entire 148 notice is quashed and set aside and we have held that assessment could not have been reopened at all by respondents. We have only included this portion in this order in view of the without prejudice offer made by Mr. Thakkar and that cannot be construed as an admission of any liability by petitioner. We also clarify that in view of our observation as above, no penalty proceedings can be initiated by respondents under this head.

13 Petition disposed. No order as to costs.

(N. J. JAMADAR, J.)

(K.R. SHRIRAM, J.)