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

WRIT PETITION NO. 3575 OF 2019

Rashtriya Chemicals and Fertilizers Limited,
Mumbai …. Petitioner
v/s.
The Assistant Commissioner of Income Tax,
LTU, Circle 1, Mumbai and ors. …. Respondents

Mr. Niraj Sheth i/b. Mr. Atul K. Jasani for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : JANUARY 04, 2022

P. C. :-

1. Petitioner is impugning a notice dated 15/03/2019 issued under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') for AY 2012-13 and order dated 25/11/2019 rejecting petitioner's objections to the issuance of notice under section 148 of the said Act.

2. This is a case where the notice has been issued after the expiry of four years from the relevant assessment year and as the assessment under section 143(3) of the Act has also been completed, proviso to section 147 of the Act shall apply. Under section 147, there is a bar in re-opening the assessment after the expiry of four years where assessment under section 143(3) of the Act has been completed unless there has been failure on the part of petitioner to truly and fully disclose all material facts required for

assessment. The onus is on the respondents to prove that there was such failure on the part of petitioner.

3. We have considered the reasons recorded for re-opening and there is a failure on the part of respondents to even disclose what was the material fact that petitioner failed to disclose. Using the words "as there is a failure on the part of assessee to disclose fully and truly all material facts necessary for its assessment during the year under consideration" would be of no assistance to respondents since it is clear that it has been made only as an attempt to get out of the restrictions imposed by proviso to section 147 of the Act. In fact, in the order dated 25/11/2019 rejecting the objections which is impugned in this petition respondents in fact says that he has not made out a case of failure on the part of petitioner to disclose. According to respondent, to confer jurisdiction under Section 147(a), two conditions were required to be satisfied, firstly, the Assessing Officer must have reasons to believe that income, profits or gains chargeable to income tax has escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions has to be satisfied before the Assessing Officer could assume jurisdiction for issue of notice under Section 148 read with Section 147(a). But under the substituted Section 147

existence of only the first condition suffices. In other words, if the Assessing Officer has reason to believe that income has escaped assessment, that was enough to confer jurisdiction to reopen the assessment. For this view of the Assessing Officer, that for issuing notice to reopen assessment, the Assessing Officer must only be satisfied that he had reasons to believe that income, profits and gains chargeable to income tax has escaped assessment and the second condition that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment is not required, Mr. Suresh Kumar in fairness agreed that that view of the Assessing Officer was incorrect. Mr. Suresh Kumar, as an Officer of the Court, agreed that both these are preconditions which are required to be fulfilled when assessment is sought to be reopened after four years. A Division Bench of this Court in ***Sesa Goa Limited V/s. Joint Commissioner of Income Tax and Ors.***[1] has held :-

> " *The power to reopen an assessment is not unbridled or unrestricted. The power is subject to the proviso embodied in the section itself. The proviso prescribes restrictions on the power of reopening the assessment by limiting the time period to four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee …….. to disclose fully and truly all material facts necessary for the assessment of the income for that assessment year". …………. Section 147 of the Act is the source of power of the Assessing Officer for reopening of the assessment. Section 148 contains procedural restrictions for issuance of a notice for exercise of the power of reopening of an assessment conferred under Section 147. Section 149 prescribes the time limit for issuance of a notice under Section 148. In our opinion, the conditions laid down under Section 147 of the Act for the purposes of reopening the assessment must be satisfied before the*

1 (2007) 294 ITR 101 (Bom)

notice can be issued. The conditions laid down in Section 147 are the jurisdictional facts necessary for the purpose of exercise of the power under Section 147. The jurisdictional facts prescribed under section147 must exist before a notice under section 148 can be issued. …….. In other words, if the basic jurisdictional facts required for reopening of an assessment under section 147 of the Act do not exist it would not be competent for the Assessing Officer to issue a notice under Section 148. Even where the jurisdictional facts prescribed under Section 147 exist and all conditions laid down under Section 147 and the proviso thereto are satisfied, the notice under Section 148 can be issued only after the Assessing Officer has recorded his reasons for doing so under Sub-section (2) of Section 148 and has further obtained the necessary sanction for issuance of the notice as required under Section 151 of the Act. ….. The restriction …….. of a period of four years, …….

In the present case, the reasons which have been recorded by the Assessing Officer for reopening of the assessment do not disclose that the assessee had failed to disclose fully and truly all material facts necessary for the purpose of assessment. No doubt in the last paragraph of the reasons, the first respondent has stated :

> *I am satisfied that due to furnishing the false particulars of the income by way of incorrect certificate which means failure on the part of the assessee to disclose fully and truly all material facts required for the assessment income of Rs.6,10,10,272 had escaped assessment.*

The said statement is clearly made only an attempt to take the case out of the restriction imposed by the proviso to Section 147 of the Act. "

4. Paragraph 2.1 of the reasons recorded for re-opening assessment reads as under :-

" 2.1 It is seen that the assessee had claimed deduction u/s 35AD amounting to Rs.189,76,44,660/- relating to the expenditure capitalized in respect of Ammonia Plant at Thal which was revamped and commissioned in April 2012. It was seen that during the scrutiny assessment the assessee was allowed to claim the entire deduction without examining the conditions stipulated in the provision as the assessee was not eligible to claim the same since the

> *operations had not commenced during the previous year 2011-12. This irregular claim and allowance of deduction to the extent of Rs.189.76 crore needs to be examined. "*

5. Therefore, it is quite obvious that there is nothing but change of opinion which is not permissible as held in ***Ananta Landmark Pvt. Ltd v/s. Deputy Commissioner of Income Tax Central Circle 5(3), Mumbai and ors[2].*** In the circumstances, we are satisfied that the notice dated 15/03/2019 under section 148 of the Act is issued without jurisdiction and requires to be set-aside. Consequently, the order dated 25/11/2019 impugned in the petition also requires to be set-aside.

6. Petition is allowed in terms of prayer clause (a) which reads as under :-

> *" a. to issue a Writ of Certiorari or a Writ in the nature 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 dated 15th March 2019 (Exhibit "H") issued by Respondent No.1 under section 148 of the Act to reopen the assessment for the assessment year 2012-13 as well as the impugned order dated 25th November 2019 (Exhibit "R") rejecting the Petitioner's objections for the assessment year 2012-13; "*

7. Petition disposed. No order as to costs.

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

2 Writ Petition No.2814 of 2019 dated 14/09/2021