IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1090 OF 2016

Solvay Specialities India Pvt. Ltd.
Phoenix House, A Wing, 4th Floor,
462, Senapati Bapat Marg, Lower Parel (West),
Mumbai – 400 013. … Petitioner

Versus

1. The Deputy Commissioner of Income Tax
8(2)(2), Room No.615, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

2. The Principal Commissioner of Income-tax-8,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020.

3. Union of India,
Through the Secretary,
Department of Revenue,
Ministry of Finance, Government of India,
North Block, New Delhi-110 001. …Respondents

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Mr.Madhur Agrawal with Mr.Upendra Lokegaonkar i/b Mint and Confreres, Advocate for petitioner.

Mr. Suresh Kumar, Advocate for respondents.

CORAM : DHIRAJ SINGH THAKUR & KAMAL KHATA, JJ.

DATE : 8th FEBRUARY, 2023.

ORDER :

1. In the present petition, the petitioner challenges the notice dated 24th February 2015, issued under section 148 of the Income Tax Act, 1961 ('the Act') by respondent No.1 seeking to reopen the assessment, on the basis of 'his reason to believe' that income chargeable to tax for the assessment year 2010-11 had escaped assessment within the meaning of section 147 of the Act.

2. The reasons recorded for reopening are as under :

> **"REASON FOR RE-OPENING THE ASSESSMENT U/S. 147 OF THE ACT**
>
> On verification of assessment records, it is observed that the assessee company has debited 'Loss on write-off of Fixed Assets' in the P&L a/c of Rs 1.81,32,821/-. This amount has been added back to the total income at the time of Computation of Income. There is no mention of this 'write off due to loss' in Annexure 4 to Clause 14 of Audit Report in Form 3CD, pertaining to depreciation or in the Notes to Accounts. However, the assessee vide his reply dated 13.02.2014 had appended a list of assets written of during the PY 2009-10 wherein he has accepted that the date of capitalization is 10.05.2006 for gross asset value of Rs. 2,66,21,927/- on which the accumulated depreciation is Rs.84,88,990/- and the Net book Value is Rs. 1,81,32,937/-
>
> On physical verification, these assets have not been found, although depreciation at Rs.84,88,990, on the assessee's own admission, has been claimed on these assets during the previous years, since the assessee has taken over the company 'Gharda Chemical's and these assets have been factored for valuation purposes.

> The physical availability or otherwise of assets, is the purview of the assessee and the onus is on him to establish as to the period from which the assets have gone missing. Failing this obligation, the Assessing Officer is compelled to take a stand that any prudent person would do, as stated in Sec 114 of the Evidence Act. Also, the assessee has failed to mention any steps taken to avail insurance or any other step.
>
> In view of the above, I have reason to believe that there is failure on the part of the assessee to disclose truly and fully all details necessary for making a correct assessment and accordingly, I am satisfied that there has been an escapement of income within the scope of Explanation 1 to Section 147 if the Act. Issue notice u/s. 148."

3. Objections to the reopening were filed by the petitioner and came to disposed of vide order dated 27th January 2016.

4. Counsel for the petitioner states that the reopening the assessment was bad and illegal inasmuch as there was no tangible material with the Assessing Officer which would warrant the reopening of the assessment and that the reassessment proceedings were nothing but a 'change of opinion'. It was also urged that not only all the material facts were disclosed to the Assessing Officer during the assessment proceedings under section 143(3) of the Act, but the same had been considered in depth leading to the passing of the order of assessment dated 27th

January 2016. Reliance was placed upon the Apex Court judgment in the case of ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.*** [1] to urge that in the guise of reassessment, the Assessing Officer cannot be permitted to review its earlier order of assessment.

5. Reply affidavit has not been filed by the revenue, however, counsel for the revenue, Mr.Kumar stated that the Assessing Officer, during the regular assessment proceedings, had erroneously granted benefit of depreciation on fixed assets, which, according to the assessee's own admission, upon verification, had been written of 'due to loss', which was otherwise impermissible.

6. We have heard learned counsel for the parties.

7. In the present case, the impugned notice under section 148 has been issued in regard to assessment year 2010-11 on 24th February 2015, and this has been issued within four years from the end of the relevant assessment year. It is, thus, clear that for the reassessment proceeding to succeed, it was not necessary for the Assessing Officer to establish that the assessee had not disclosed fully and truly facts material and necessary for

1 320 ITR 561 (SC)

reopening an assessment, which has since been completed. However, even in a case, where the assessment is sought to be reopened within a period of four years from the end of the relevant assessment year, the Assessing Officer has to have reasons to believe that income chargeable to tax had escaped assessment.

8. In ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.*** (Supra), the Apex Court held :

> "4 ....Therefore, post-1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be *per se* reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief............."

9. Therefore, based upon the reasons recorded, one needs to scrutinize whether there was any tangible material with the Assessing Officer justifying reopening of the assessment or can it be said to be a case of 'review' and 'change of opinion' by the said officer.

10. In ***Kalyanji Mavji & Co. Vs. Commissioner of Income Tax, West Bengal-II*** [2]**,** it was held :

> On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of s. 34(1) (b) to the following categories of cases:
>
> > (1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;
> >
> > (2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the Taxing Authority;
> >
> > (3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
> >
> > (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

2 (1976) 102 ITR 287 (SC)

> If these conditions are satisfied then the Income-tax officer would have complete jurisdiction to re-open the original assessment. It is obvious that where the Income-tax officer gets no subsequent information, but merely proceeds to re-open the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, s. 34(1) (b) would have no application.

11. The Supreme Court, however, in ***Indian Eastern Newspaper Society Vs. Commissioner of Income Tax*** [3] held that the view expressed by a two Judge Bench of the Apex Court in ***Kalyanji Mavji*** (Supra) that income escaping assessment due to "oversight, inadvertence or mistake" by the Income Tax Officer must fall within section 34(1)(b) of the Indian Income Tax Act, 1922 did not lay down correct law in the light of the view expressed by the Apex Court in ***Maharaj Kamal Singh v. Commissioner of Income Tax*** [4] and ***Commissioner of Income Tax v. Raman & Company*** [5].

12. It is equally settled as held in ***Income-tax Officer Vs. Lakhmani Mewal Das*** [6] that the duty and responsibility of the assessee is only to make a full and true disclosure of the primary facts while it is for the AO to draw the correct inference from those primary facts and that it is not the responsibility of the assessee

3 1979 ITR 996 SC
4 [1959] Sup. 1 SCR 10
5 [1968] 1 SCR 10

6 [1976] 103 itr 437

to advise the Income-tax Officer with regard to the inference which he ought to draw from those primary facts.

13. In the present case, it can be seen that a return of income was filed by the petitioner for the assessment year 2010-11 declaring a loss of Rs.4,27,46,522/-. In the computation of income, the petitioner added back an amount of Rs.1.81 Crore to the business income and did not claim the said amount as deduction in computing its taxable income.

> The case set up by the petitioner is that for the financial year 2009-10, relevant to the assessment year 2010-11, the petitioner carried out a physical verification of its assets and realized that the assets worth Rs.1.18 crores, which were shown in the books of the petitioner, were not available with the petitioner, and accordingly, it wrote off Rs.1.81 crores in the profit and loss account for the said financial year. Return of income was then filed declaring a loss of Rs.4,27,46,522/-. In the computation of income, the petitioner added back the said amount of Rs.1.81 crore with the business income and did not claim it as a deduction in computing its taxable income but claimed depreciation on the basis of written down value of the assets. The return was

accompanied by a computation of the total income, balance-sheet, audit report under section 44AB in Form No.3CB and 3 CD, and Profit and Loss Account.

14. On 13th February 2014, pursuant to the queries raised during personal hearing, the assessee claims that it submitted details regarding the list of assets written off during the relevant financial year. It was, thus, urged that all the material had been placed before the Assessing Officer, including the fact that the petitioner had written off fixed assets of the value of Rs.1.81 Crore as also the fact that it had made a claim on account of depreciation.

15. From the aforementioned facts, it is, thus, clear from the record that the Assessing Officer did enquire into the claim of depreciation and had called for certain details with regard to the assets written of, which were supplied with the Assessing Officer, and only then, the Assessing Officer passed the order of assessment under section 143(3) of the Act and did not make any disallowance in regard to the claim of depreciation. All the material facts, therefore, were certainly before the Assessing Officer and notwithstanding the fact that the order of assessment

does not specifically discuss the issue, yet must be deemed to have been considered and allowed.

16. In ***Kelvinator of India Limited*** (Supra), a Full Bench of the Delhi High Court held :

> " ....We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind."

17. It can also be seen from the reasons recorded that there was no new material which had come to the notice of the Assessing Officer and the entire reference in the reasons recorded is only to the material on record.

18. In ***Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*** [7], the Court, in the background of section 147 of the Act, observed :

> "..................all that the Income-tax Officer has

7 [1998] 234 ITR 170

said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.

It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Section 147/148 of the Act.”

19. Testing the facts of the present case on the touchstone of the judgments (Supra), it can be seen that there was no new material in the possession of the Assessing Officer. Nothing new had happened, neither was there any change in the applicable law, which would have warranted the reopening of the case. It clearly suggests that in the garb of reopening the assessment, the Assessing Officer was reviewing the earlier order of assessment. In the absence of any new tangible material available with the Assessing Officer, and in view of the fact that there is a general presumption that an order of assessment under section 143(3) has been passed after proper application of mind and considering the fact that in the present case, the Assessing Officer had sought clarification with regard to the assets which had been written off, details whereof were submitted during the course of the proceedings, it certainly goes to show that the issue with regard to depreciation had been gone into by the said Assessing Officer without making any disallowance as regards the claim of the depreciation.

20. In the light of the above, we have no hesitation in holding that the reassessment proceedings were nothing but a case of

'change of opinion', which does not comply with the jurisdictional foundation under section 147 of the Act.

Be that as it may the impugned notice dated 24th February 2015 as also the impugned order dated 23rd January 2016 disposing of the objections are set aside.

21. The petition is allowed accordingly. No costs.

[KAMAL KHATA, J.] **[DHIRAJ SINGH THAKUR, J.]**