IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2213 OF 2014

Pacific Energy Private Limited)
Company incorporated under the)
Companies Act, 1956 and having its)
registered office at 301, Capri, Green)
Fields Estate, A. B. Nair Road, Juhu,)
Mumbai 400 049) ..Petitioner

Vs.

1. The Income Tax Officer, Ward)
8(2)(4), having his office at Room No.)
213, 2nd floor, Aaykar Bhavan, M. K.)
Road, Mumbai 400 020)

2.The Additional Commissioner of)
Income-tax – Range 8(2) having his)
office at Aaykar Bhavan, M.. K.Road,)
Mumbai 400 020)

3. The Union of India, through the)
Secretary, Department of Revenue)
Ministry of Finance North Block, New)
Delhi – 110001) ..Respondents

Mr. P. J. Pardiwalla, Senior Advocate a/w Mr. Madhur Agarwal i/b Mr. Atul K Jasani for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
NEELA GOKHALE, JJ
DATED : 6th OCTOBER 2023

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

1 This petition challenges the notice dated 8th April 2005 seeking to reopen the assessment for A.Y.-1999-2000 under Section 148 of the Income Tax Act, 1961 (the Act). The original return of income was accepted under

Section 143(1) of the Act. Petitioner paid the tax on the basis of book profits under Section 115 JA of the Act.

2 The reasons in support of the impugned notice proceeds on the basis that an amount of Rs.17.15 Lacs chargeable to tax has escaped assessment while computing income under the normal provisions of the Act. Petitioner in the objection filed to the impugned notice, inter alia, pointed out that even if the revenue's case as set out in the reasons is accepted there would be no change in the income offered to tax and the tax payable on the book profits in terms of Section 115JA of the Act would be higher than the income computed under the normal provisions of the Act. Besides, petitioner has placed reliance upon Section 152(2) of the Act which states that proceedings under Section 147 of the Act will be dropped if the assessee is able to establish that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account. It was submitted that, therefore, the proceedings are without jurisdiction.

3 When the petition was admitted on 28th October 2014, respondents' counsel had submitted that by virtue of Explanation 2(c)(iv) to Section 147 of the Act on computation of income under the normal provisions of the Act, there has been excessive loss claimed by petitioners and the same would be deemed to be escaped income chargeable to the tax. According to him, the said provisions would come into play for the purposes of reopening of the assessment under Section 147 of the Act.

The court, however, prima facie, felt that taking into account Section 152(2) of the Act, the notice was without jurisdiction.

4 Mr. Suresh Kumar submitted that if the excessive loss has been claimed by petitioner, that could be carried forward and that would be deemed to be escaped income chargeable to tax.

5 Section 152(2) of the Act provides that where an assessment is reopened under section 147, the assessee may, if he has not impugned any part of the original assessment order for that year either under sections 246 to 248 or under section 264, claim that the proceedings under section 147 shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made.

6 Affidavit of Director of petitioner Leena Kaushik Makhecha affirmed on 5th April 2022 has been filed, wherein it is stated that petitioner had claimed total loss of Rs.10,73,749/- consisting of business loss of Rs.7,39,333/- and capital loss of Rs.3,34,416/- for A.Y.-1999-2000 under the normal provision of the Act and offered to tax book profit of Rs. 1,13,25,826/- and tax there on at Rs. 11,89,213/-. It is also stated that there is no change in the book profit computation of petitioner and petitioner would still be assessable to tax as per book profit and the taxable income and the tax payable remain the same. It is also averred in the affidavit that on the basis of the computation of income as per the reasons recorded, the

loss claimed by petitioner in the original return of income is wiped off and is converted into a small total income. Though petitioner is eligible to carry forward and set off the loss for a period of 8 years, in the subsequent years petitioner has not claimed any benefit of set off or loss and petitioner has filed return of income up to A.Y.-2005-06 without claiming setoff of the loss.

7 Mr. Pardiwalla submitted that since petitioner has not claimed set off of the loss, there is no loss to the revenue on account of the inadvertent error in computing the cost of acquisition of the share sold during the year. There is no affidavit filed denying any of these averments by petitioner.

8 Respondent no.1, in our view, failed to appreciate that he had no jurisdiction to reopen the assessment because no income had infact escaped assessment. As stated in petitioner's letter dated 27th January 2014, even if it is stated that Respondent no.1 is right in his allegations that petitioner had offered said quantum of long term capital loss, that would still have no impact because petitioner continues to be liable to pay tax on the basis of profits computation as per Section 115 JA of the Act. We do not agree with respondent no.1 that even if, no income had escaped assessment as on the date of the issue of the notice, one had to take into account the position that may arise as a result of further additions that may or may not be made in the final assessment order. Respondent no.1 should have realised that he had no jurisdiction to proceed on the basis that some hypothetical income may be detected as a result of further investigations that may be conducted.

9 In the recorded reasons, respondent no.1 has alleged that petitioner has over stated the amount by taking cost of acquisition of the 2,00,000 shares of Gammon India Limited at Rs.242.01 instead of Rs.248.88 per share. The fact is, respondent no.1 has not disputed that in the return and computation of income filed by petitioner, the complete facts relating to cost of acquisition of the shares has been disclosed by petitioner. The return makes it clear that the said 2,00,000 shares were purchased in FY 1995-1996 for Rs.4,97,75,438/- which works out to Rs.248.88 per share. Therefore, there is no fresh tangible material to reopen the assessment. Further, since petitioner has paid tax on the basis of book profits in terms of Section 115 JA of the Act and the fact that even if revenue's case as set out in the reasons is accepted, there would be no change in the income offered to tax and the tax payable on the book profits in terms of Section 115 JA of the Act would be higher than the income of computation under the normal provision of the Act. The provisions of Section 152(2) of the Act states proceedings under Section 147 of the Act will be dropped if the assessee is able to establish that he had been assessed on an amount or the sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account.

10 In the circumstances, it is rather clear that the notice is issued without jurisdiction. It will be apposite to reproduce paragraphs 9 to 12 of Judgment of Hon'ble Gujarat High Court in ***Motto Tiles (P.) Ltd. Vs. Assistant***

Commissioner of Income Tax, Morbi Circle[1] and it reads as under:

> *'9. However, on behalf of the petitioner, it has been pointed out that in terms of the reasons recorded, the income chargeable to tax to the extent of Rs.81,18,000/- has escaped assessment. In the return of income filed by the petitioner, the petitioner has disclosed loss of Rs.77,51,810/- and the petitioner has been assessed at an income of Rs.35,96,518/- on the book profit under section 115JB of the Act. It has, accordingly, been contended that even after making the proposed addition, there would be no difference in the taxable income of the petitioner and it will still be governed by the provisions of section 115JB of the Act.*
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> *10. The learned counsel for the petitioner has also drawn the attention of the court to the provisions of section 152(2) of the Act, which provides that where an assessment is reopened under section 147, the assessee may, if he has not impugned any part of the original assessment order for that year either under sections 246 to 248 or under section 264, claim that the proceedings under section 147 shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made. It was submitted that in view of the above provision, the proceedings are even otherwise required to be dropped because even if the income which is alleged to have escaped assessment is taken into account, the petitioner would not be assessed at a higher amount.*
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> *11. Insofar as the second contention raised on behalf of the petitioner is concerned, the controversy stands squarely concluded by the decision of this court in the case of India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1) (supra) wherein, the court in a case where the assessee had declared a loss of Rs.1.44 crores under the normal computation and the assessment was framed on book profit of Rs.2.89, had held that even if the expenditure of Rs.116.86 lakhs is disallowed, there would be no resultant change in the petitioner's tax liability since the petitioner had already paid much higher tax and had allowed the petition. It appears that the revenue has accepted the said decision and has not challenged the same before the higher forum. The learned counsel for the respondent has urged that the decision requires reconsideration. Having regard to the facts and circumstances of the case, as well as the fact that the revenue has accepted the said decision, the court does not find any reason to refer the matter for consideration to a Larger Bench.*
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> *12. In the light of the decision of this court in the case of India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1) (supra), having regard to the fact that even if the entire amount which is proposed to be added by the Assessing Officer is sustained, there would be no addition to the tax liability of the petitioner and the petitioner would still be governed by the provisions of section 115JB of the Act and assessed on the same book profit, it*

1. (2016) 73 taxmann.com 176 (Gujarat)

> *cannot be said that there was sufficient material before the Assessing Officer to form the belief that income chargeable to tax has escaped assessment. The impugned notice issued under section 148 of the Act, therefore, cannot be sustained."*

11 Therefore, Rule made absolute. The impugned notice dated 8th April 2005 together with impugned order dated 4th February 2014 rejecting petitioner's objections are quashed and set aside.

12 Petition disposed.

(NEELA GOKHALE, J.) **(K.R. SHRIRAM, J.)**