

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP-22306-2019 (O&M)
Reserved on: 13.03.2023
Pronounced on: 13.04.2023

FCB Interface Communications Pvt. Ltd.

...Petitioner

Vs.

Assistant Commissioner of Income Tax,
Circle (I), Gurgaon

...Respondent

CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MRS. JUSTICE MANISHA BATRA

Present: Mr. Arijit and Mr. Abhivadya Sood, Advocates
for the petitioner.

Ms. Pridhi Jaswinder Sandhu, Junior Standing Counsel
for the respondent.

Ritu Bahri, J.

CM-7276-CWP-2022

Application is allowed and Annexures P-10 to P-30 are taken
on record.

CWP-22306-2019

The petitioner is seeking writ of certiorari for quashing notice
dated 30.03.2019 (Annexure P-1) issued under Section 148 of the Income
Tax Act, 1961 and order dated 10.07.2019 (Annexure P-2) disposing of the
objections passed by the respondents in relation to assessment year 2012-13.

The petitioner company is engaged in the business of
advertising and marketing communications. The petitioner filed its return

for the assessment year 2012-13 on 28.09.2012 under Section 139(1) of the Income Tax Act, 1961 (Annexure P-3). The petitioner's case was selected for scrutiny and during the proceedings several information/documents were sought from the petitioner by issuing notice under Section 143(2). The petitioner gave its written submission dated 20.02.2015 (Annexure P-4) alongwith relevant extracts of ledger account as well as sample invoices with respect to claim of 'Computer Supplies and related expenses', which formed part of the head 'Other Expenses'. The assessment proceedings were completed under Section 143(3) vide order dated 05.03.2015 (Annexure P-5).

After a period of 4 years i.e. on 30.03.2019, the respondents issued notice under Section 148 informing the petitioner that some income had escaped for the assessment and directed it to file a return. The petitioner, thereafter, filed return in response to notice under Section 148 electronically on 26.04.2019 (Annexure P-6). Vide letter dated 02.05.2019 (Annexure P-7), the petitioner was communicated the reasons for re-opening the assessment for the assessment year 2012-13. Pursuant to the said letter (Annexure P-7), the petitioner filed its objections dated 06.06.2019 as per the procedure laid down in ***GKN Driveshafts (India) Ltd. vs. ITO [2003] 259 ITR 19 (SC)*** (Annexure P-8). The objections were rejected vide order dated 10.07.2019 (Annexure P-2) and, thereafter, proceedings for re-assessment had been initiated by way of notice under Section 143(2) dated 10.07.2019 (Annexure P-9) and in this backdrop, the present writ petition has been filed.

Learned counsel for the petitioner is seeking quashing of the impugned notice for reassessment on the ground that as per Section 143(3)

of the Act, following two conditions are required to be satisfied for re-assessment:-

- “1. the Assessing Officer must have reasons to believe that income chargeable to tax has escaped assessment; and
2. he must also have a reason to believe that such escapement occurred by reason of failure on the part of the assessee either:-
 - i. to make a return of income under Section 139 or in response to notice issued under sub-section (1) of section 142 or section 148; or
 - ii to disclose fully and truly all material facts necessary for his assessment for that purpose.”

Learned counsel for the petitioner submits that re-opening of the assessment under Section 143(3) can only be done after the above said two conditions are fulfilled.

Learned counsel for the petitioner has argued that the scrutiny proceedings were finalized vide order dated 05.03.2015 (Annexure P-5) and a period of 4 years expired on 05.03.2019 and notice for re-assessment was issued on 30.03.2019 (Annexure P-1) i.e. beyond a period of 4 years. He has further argued that in the present case, there is no income which escaped assessment and no income escaped on the part of the failure of the assessee. Hence, proceedings initiated after 4 years are liable to be quashed. He has referred to the Division Bench judgment passed by this Court in **CWP No. 6765 of 2013** titled as **State Bank of Patiala vs. Commissioner of Income-tax**, decided on April 22, 2015.

Pursuant to notice of this petition, reply dated 17.02.2020 was filed by the respondent. The stand taken by the respondent in the said reply

was that vide order dated 05.03.2015 (Annexure P-5), the assessment order under Section 143(3) of the Act, was passed for the assessment year 2012-13 accepting the returned income as declared by the assessee to the tune of Rs. 15,94,63,930/-.

The re-assessment proceedings have been initiated keeping in view that assessee had debited the expenditure of Rs.44,19,750/- on account of computer supplies and related expenses under the head “other expenses” in profit and loss account. Assessee had purchased computers and software for Rs.14,63,750/- upto 30.09.2011 and after allowing depreciation @ 60% (i.e. Rs.8,78,250/-), the balance amount of Rs.5,85,500/- needed to be capitalized. Similarly expenditure of Rs.29,56,000/- was incurred on account of purchase of computers and software from the period 01.10.2011 to 31.03.2012 and after allowing depreciation @ 30% (i.e. Rs.8,86,800/-), the balance amount of Rs.20,69,200/- needed to be capitalized.

Keeping in view the above facts, the case was re-opened after seeking prior approval from the statutory authority vide letter No. Pr. CIT/GGN/Tech/Proposal 147/2018-19 dated 30.03.2019. The statutory notice under Section 148 of the Act dated 30.03.2019 was issued and reasons were provided to the assessee. It is further stated in the reply that the petitioner had raised following objections/grounds during the proceedings of re-opening under Sections 148/147 of the I.T.Act, 1961 which were decided vide order dated 10.07.2019 (Annexure P-2):-

1. Reopening of the assessment barred by proviso of Section 147 of the Act.
- 2.The assessee had made full and true disclosure of all material facts during the assessment.

3.The ld. A.O. examined the expenses during the assessment proceedings.

It is further stated that on perusal of assessment records, it was found that the assessee had provided the ledgers related to the expenses. The said expenses in the ledgers were found to be for “upgradation and development of various softwares” used by the assessee in his business/profession. Any expenditure incurred for upgrading or development of capital assets like softwares cannot be claimed as revenue in nature and needs to be capitalized. The assessee did not provide any explanation as to why the said expenses should be considered as revenue and not capital expenditure and the assessing officer had recorded reasons and same were provided to the assessee before re-opening of the case.

Learned counsel for the petitioner has placed on record a judgment passed by the Supreme Court in ***Principal Commissioner of Income-tax-2 vs. L & T Ltd. [2020] 113 taxmann.com 48 (SC)*** (Annexure P-10) on the proposition that re-assessment proceedings initiated after 4 years from the end of the relevant assessment year only on the basis of change of opinion, are liable to be set aside. He has further referred to a judgment passed by High Court of Gujarat in ***Micro Inks (P.) Ltd. vs. Assistant Commissioner of Income-tax [2017] 79 taxmann.com 153 (Gujarat)*** (Annexure P-11). In that case, the re-assessment proceedings were initiated beyond a period of 4 years and the assessee debited an amount of Rs. 2.36 crores under head 'Interest & Finance charges' on account of loan. The Assessing Officer accepted claim of assessee during scrutiny assessment and treated the said expenditure as business expenditure. Subsequently, the case was re-opened on the ground that

assessee had incurred aforesaid expenditure to establish a subsidiary in USA and, therefore, only 1/5th expenditure i.e. Rs.47.23 lacs was required to be allowed. This change of opinion could not be made a ground to initiate proceedings after a period of 4 years and the writ petition was allowed.

He has further placed on record a judgment passed by the High Court of Delhi in *Commissioner of Income-tax, Delhi-IV vs. Indian Visit.com (P.) Ltd. [2009] 176 Taxman 164 (Delhi)* (Annexure P-29). The High Court of Delhi was examining a case of assessee who was engaged in the travel business. The assessee had incurred certain expenditure on development of its website. The website was used by the clients for payment of money and hence it was held that the website was for the purpose of availing services provided by the assessee and this expenditure has to be regarded as revenue expenditure. In para No. 5 and 6 of this judgment, it was observed as under:-

5. In *Empire Jute Co. Ltd.'s case (supra)*, the Supreme Court observed that if the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assessee's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The Supreme Court observed that in such cases the test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case.

6. In *Alembic Chemical Works Co. Ltd.'s case (supra)*, the

Supreme Court observed that the ideas of 'once for all' payment and 'enduring benefit' are not to be treated as something akin to statutory conditions; nor are the notions of 'capital' or 'revenue' a judicial fetish. The Supreme Court also observed that the 'once for all' payment test is also inconclusive. What is relevant is the purpose of the outlay and its intended object and effect, considered in a commonsense way having regard to the business realities. The Supreme Court also noted that in a given case, the test of 'enduring benefit' might break down.”

Annexure P-30 is the judgment passed by the High Court of Gujarat in the case of ***Principal Commissioner of Income Tax-2 vs. Kitchen Express Overseas Ltd. [2018] 89 taxmann.com 407 (Gujarat)***. In that case, the High Court of Gujarat held that the expenditure incurred on software development services, which were in the nature of maintenance and support services providing essential backup to the assessee and this expenditure has to be taken as a revenue. These services did not give any fresh or new benefit in the nature of a software to be used by the assessee in the course of business but were more in the technical support and maintenance of the existing software and hardware.

Recently, the Hon'ble Supreme Court in the case of ***New Delhi Television Ltd. vs. Deputy Commissioner of Income Tax [2020] 116 taxmann.com 151 (SC)*** (Annexure P-16) was examining a case wherein at the time of making original assessment proceedings, the assessee had disclosed everything with regard to stand guarantee for transaction by NNPLC and it also disclosed factum of issuance of convertible bonds and their redemption. There was no failure on the part of the assessee to

disclose all these facts. Notice issued after a period of 4 years for reassessment was liable to be quashed and set aside. In para Nos. 33 and 34, the Hon'ble Supreme Court observed as under:-

“33. In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew. The other facts relied upon by the revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion that there is non-disclosure of true and material facts by the assessee.

It is interesting to note that whereas before this Court the revenue is strenuously urging that the assessee is guilty of non-disclosure of material facts, before the High Court the case of the revenue was just opposite. We may quote a portion of the

counter-affidavit filed by the revenue in response to the writ petition filed by the assessee before the High Court which reads as follows:-

“...It is evident from these facts that second proviso to section 147 is clearly attracted in this case and first proviso to section 147 is not applicable to facts of this case, i.e. in this case, the only requirement to reopen assessment U/s 147 was that the AO has reason to believe that any income chargeable to tax has escaped assessment. The second condition that the income should have escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for making assessment is not relevant to decide issue before the Hon'ble Court”.

This submission has been repeated a number of times in the counter-affidavit. Therefore, in our opinion, the revenue cannot now turn around and urge that the assessee is guilty of non-disclosure of facts. We are also of the view that the revenue could not be permitted to blow hot and cold at the same time.”

In the present case, notice for reassessment was issued on 30.03.2019 (Annexure P-1) and period of 4 years had expired on 05.03.2019 as the scrutiny proceedings were already finalized vide order dated 05.03.2015 (Annexure P-5). On facts, the assessee had purchased computers and software for Rs.14,63,750/- upto 30.09.2011 and after giving benefit of depreciation @ 60% (i.e. Rs.8,78,250/-), the balance amount of Rs.5,85,500/- was to be capitalized. Similarly, expenditure of

Rs.29,56,000/- was incurred on account of purchase of computers and software from the period 01.10.2011 to 31.03.2012 and after allowing depreciation @ 30% (i.e. Rs.8,86,800/-), the balance amount of Rs.20,69,200/- was to be capitalized. This information of purchase was with the Assessing Officer at the time of passing of initial assessment order on 05.03.2015 (Annexure P-5). The petitioner company is engaged in the business of advertising and marketing communications and while making the assessment vide order dated 05.03.2015 (Annexure P-5), the return was accepted and all the above said expenditures were admissible as revenue expenditure. After more than 4 years, the only reason for initiating re-assessment proceedings vide notice dated 30.03.2019 (Annexure P-1) is that only 30% to 60% depreciation could be given and rest of the amount is to be taken as capital. This change of opinion cannot be made a ground for re-assessment. Once, the Assessing Officer had accepted the return and treated above said expenditures as revenue as these were incurred only to facilitate the business of the assessee who is engaged in the business of advertising and marketing communications. Further, the expenditures were disclosed at the time of making original assessment which were rightly treated as revenue. The above-referred judgments on this issue are very clear and applicable to the facts of the present case that after a period of 4 years, only on account of change of opinion, re-assessment proceedings cannot be initiated. In *Kitchen Express Overseas Ltd.'s case (supra)*, it has also been held that any expenditure incurred on purchase of software, software developments and services to facilitate existing infrastructure is to be taken as revenue and not capital.

Hence, writ petition is allowed and initiation of re-assessment proceedings are set aside on both the counts i.e. delay and merits.

(RITU BAHRI)
JUDGE

13.04.2023
Divyanshi

(MANISHA BATRA)
JUDGE

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No