* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

**Reserved on** : 8th November, 2012.
% **Date of Decision** : 28th January, 2013.

\+ **WP(C) No.7482/2011**

ESTER INDUSTRIES LTD. .... Appellant
Through : Mr. R. Santhanam, Adv.

**VERSUS**

UNION OF INDIA AND ORS. …..Respondents
Through : Mr. Sanjeev Sabharwal, sr. Standing counsel with Mr. Puneet Gupta, Jr. Standing Counsel.

**CORAM:**
**MR. JUSTICE S. RAVINDRA BHAT**
**MR. JUSTICE R.V. EASWAR**

**R.V. EASWAR, J.:**

In this writ petition, the petitioner challenges the notice issued under section 148 of the Income Tax Act, 1961 reopening the assessment issued on 6-3-2009 and seeks quashing of the same as also the order passed on 23-9-2011 pursuant to the notice, rejecting the petitioner's objections.

2. In respect of the assessment year 2004-05, the assessment of the petitioner, which is a company engaged in the manufacture and sale of polyester chips and film, to income-tax was first completed on 30-11-2006 under section 143(3) of the Act. It was sought to be reopened by issue of the

impugned notice issued u/s. 148. The reasons for reopening, as recorded by the respondent No.2 are:

> *"On verification of the case records, it has been observed that the following amounts have remained to be added in the computation of income:*
>
> *(i) Provisions for obsolete inventories amounting to ₹33.99 lacs have not been added back although these are unascertained liabilities.*
>
> *(ii) The prior period expenditure of ₹73,54,333/- has been debited to the Profit & Loss a/c out of which only ₹3,87,726/- was added back in the computation of income. The remaining amount of ₹69,67,607/- has remained to be added back.*
>
> *Further, on verification of the case records, it has been observed that the following amounts have remained to be added in the working of book profit u/s 115JB of the IT Act.*
>
> *(i) Set off of unabsorbed business or depreciation which ever is less has been claimed to the extent of ₹8,61,89,000/- although set off is already allowed in earlier years.*
>
> *(ii) Profits for the year has been taken at ₹40,54,88,462/- instead of ₹44,89,09,873/-. The book profit has been taken less to the extent of ₹4,34,21,411/-.*
>
> *In the assessment completed u/s 143(3) of the IT Act, the same has not been added back/disallowed.*
>
> *From the facts discussed above I have reasons to believe that the income of the assessee chargeable to tax has escaped assessment because of the failure on part of the assessee to disclose its income fully and truly."*

The notice was challenged by the petitioner in W.P (C). No. 13093/2009 which was disposed of by this court by quashing the reassessment order which had been passed in the meantime on 11-9-2009 and directing the respondent to first decided the issue of jurisdiction to reopen the assessment and all other pleas. An ex-parte reassessment order was thereafter passed on 28-12-2010, against which another writ petition, i.e., W.P.(C) No. 321/2011 was filed before this court which was disposed of on 18-1-2011 with a direction to the petitioner to file further objections before the respondent along with the case-law in support thereof, to be dealt with by the respondent in accordance with law. The order of this court is reproduced:

> *"Heard Mr. R. Santhanam, learned counsel for the assessee-petitioner and Mr. Sanjeev Sabharwal, learned counsel for the Revenue. Though many a prayer has been made in the writ petition preferred under Article 226 of the Constitution of India including declaring certain provisions of the Finance Act, 2008 to be unconstitutional, yet in course of hearing Mr. R. Santhanam, learned counsel for the assessee-petitioner and Mr. Sanjeev Sabharwal, learned counsel for the Revenue have fairly stated that they have no objection if the assessment order dated 28th December, 2010 contained in Annexure 2 is quashed and the matter is remitted to the Assessing Officer to deal with the objection filed by the assessee-petitioner on a specific date and thereafter proceed in accordance with law and further the assessee-petitioner shall not press the issue of limitation.*
>
> *2. Regard being had to the aforesaid concession, the order of assessment contained in Annexure 2 is quashed and it is directed that the Assessing Officer shall hear the assessee-petitioner on 28th February, 2011 on the question of his objection that has been filed on 11th August, 2010 and pass an order and thereafter proceed as per law, if required. Be*

> *it clarified, when we have said that the issue of limitation shall not be pressed by the assessee-petitioner, it only relates to issue of framing an order of reassessment.*
>
> *3. The writ petition is disposed of accordingly without any order as to costs."*

4. On 23-9-2011 the respondent rejected all the contentions of the petitioner by an order, which is the subject-matter of challenge before us along with the notice u/s. 148.

5. The first contention of the petitioner is that the respondent did not obtain the sanction of the Joint Commissioner of Income Tax as contemplated by section 151(1) of the Act before issuing the notice u/s. 148. A perusal of the sub-section however shows that such sanction is required only if the notice is issued by an officer who is below the rank of Assistant Commissioner or Deputy Commissioner of Income Tax. Herein, we find that the notice was issued by the Deputy Commissioner of Income Tax. No sanction is therefore required to be given by the Joint CIT. The objection is without any merit and is rejected.

6. The second contention is that the disallowance of the provision of Rs. 33.99 lacs for obsolete inventories, disallowance of the unabsorbed loss of Rs.8.61 crores and the disallowance of prior period expenses of Rs. 69.67 lacs were scrutinised and discussed in detail in the assessment order passed u/s.143(3) and therefore it cannot be said that there was no scrutiny, justifying the reassessment. On these three issues, Mr. Sabharwal, the learned standing counsel for the revenue, did not seriously dispute the contention.

7. On the question of disallowance of the deferred tax liability being brought to tax under the provisions of section 115JB as retrospectively amended with effect from 1-4-2001 by the Finance Act, 2008, the petitioner sought to attack the vires of the amendment, the contention being that the amendment takes away the right of the petitioner to adopt the Accounting Standards-2 (AS-2) which has been made mandatory by a notification issued for the purposes of section 145. The following authorities are cited in support: (i) *J.K. Industries & Anr. Vs UOI & Ors.* (2007) 213 CTR (SC) 301 and (ii) *State of Tamilnadu vs Shyamsundar* (AIR 2011 SC 3470).

8. We note that the order of this court passed on 18-1-2011 records the concession of the petitioner that though the question of vires of certain provisions of the Finance Act, 2008 was under challenge, he would have no objection if the assessment order dated 28-12-2010 is set aside and the respondent is directed to deal with the objections of the petitioner and pass fresh orders, with the further concession that the plea of limitation would not be raised. Even on merits, the challenge to the vires has to be rejected. It is well-settled that it is within the legislative competence to give effect to certain amendments retrospectively and no grounds were made out before us to show how the retrospectivity of operation of the provision to disallow the provision for deferred tax liability – clause (h) of Explanation 1 below section 115JB – was bad. No arguments were advanced before us on the point except an assertion. The judgment of the Supreme Court in J.K. Industries (supra) concerns the vires of AS-22 and has nothing to do with the provision now under challenge. It was not shown how the judgment in State of T.N. vs Shyamsunder (supra) was applicable to the present case. In fact, beyond a

certain point, the contention was not pursued – perhaps realising the futility of the attempt.

9. The original assessment was made on 30-11-2006 under section 143(3). The Finance Act, 2008 inserted clause (h) of Explanation 1 to section 115JB retrospectively from 1-4-2001. The effect of this clause was to increase the book profit by "the amount of deferred tax and the provision therefor". It is not in dispute that one of the reasons to believe as recorded by the respondent is that in view of the retrospective amendment, the deferred tax liability, for which a provision had been made in the accounts, was to be added back to the book profit. The assessment was reopened within four years from the end of the relevant assessment year. The assessing officer has to show some "tangible material" which could form the basis for his belief that income chargeable to tax has escaped assessment. That material is the retrospective legislative amendment. Under the pre-1989 law of reassessment, information as to the true state of law could form a valid basis for reopening the assessment: *Maharaj Kumar Kamal Singh v CIT* (1959) 35 ITR 1 (SC). A retrospective amendment of the law can even permit action for rectification of the assessment on the ground of mistake apparent from the record: *M.K. Venkatachalam vs Bombay Dyeing & Manufacturing Co. Ltd.* (1958) 34 ITR 143 (SC). But just because action for rectification is permissible, it does not follow that no action can be taken for reopening, for, the powers under sections 147 and 154 are not mutually exclusive; there could be some overlapping, and so long as the conditions for the applicability of the sections are satisfied, the action taken thereunder has to be validated and it is no answer to say that action should be taken under another section. Under this

principle, it is held that one of the reasons for reopening in the present case being the retrospective amendment, the notice is valid.

10. The last argument of the petitioner is based on section 129. It is contended that the petitioner filed its objections to the notice before a particular officer, but the order rejecting those objections were passed by another officer which is opposed to the section and hence the order is invalid. The section reads as under:

> *"129. Change of incumbent of an office Whenever in respect of any proceeding under this Act an income- tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the income-tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor: Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be reopened or that before any order of assessment is passed against him, he be reheard."*

The section only deals with the situation where there is a change of incumbent of the office. If there is, unless the assessee specifically demands that the earlier proceedings be reopened and he be reheard by the successor-in-office, it is open to the successor-in-office to proceed with the matter from the stage at which the matter was left by his predecessor. This plea taken in the course of the arguments before us has not been taken in the affidavit. It involves questions of fact. The respondents have had no opportunity of countering it in their counter-affidavit. As a matter of law, the section does not place a prohibition on the successor-in-office passing the order on the objections filed by the petitioner before the predecessor-in-office. All that it provides is an

opportunity to the assessee to demand that the earlier proceedings be reopened and he be reheard. No attempt was made before us to show that such a demand was made by the petitioner before the successor-officer. The plea is thus devoid of merit in any case.

In the result, the writ petition is dismissed with costs ₹25,000/-.

**(R.V. EASWAR)**
**JUDGE**

**(S. RAVINDRA BHAT)**
**JUDGE**

**JANUARY 28, 2012**
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