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

WRIT PETITION (L) NO. 746 OF 2015

Plus Paper Food Pac Ltd. .. Petitioner.

Vs.

Income Tax Officer & Anr. .. Respondents.

Mr. K. Gopal a/w Mr.Jitendra Singh for the Petitioner.
Mr. Suresh Kumar for the Respondents.

CORAM : S.C. DHARMADHIKARI &
A.K. MENON , JJ.

DATED : 25TH MARCH, 2015.

ORAL ORDER :

1. Heard learned counsel for the parties.

2. Rule. Returnable forthwith. By consent the petition is taken up for final hearing at the stage of admission.

3. This petition is filed seeking writ of mandamus directing Respondent No.1 to withdraw and cancel the notice dated 18.11.2013 issued under section 148 of the Income Tax Act, 1961 and the order dated 4.2.2014 rejecting the objections of the Petitioner. The aforesaid impugned notice and order appears at Exhibit “H” and “M” of the petition. In the meantime, the Petitioner also seeks an order restraining the Respondents from taking steps pursuant to the notice dated 18.11.2013 Exhibit “H” issued under section 148 of the Act.

4. We have heard counsel for the parties. Mr. Gopal, Counsel for the Petitioner submitted that the Assessing Officer had no occasion to pass the impugned order and in any event reject the objections. According to the Petitioner, it had disclosed all

material facts fully and truly, in the course of assessment proceedings including all long term capital gains, trial run expenses and bad debts during the course of original assessment proceedings. He further submitted that during the course of aforesaid proceedings, the Petitioner was called upon to submit the copies of Computation of Income, Balance Sheet, Profit and Loss Account and Audited books of account. After scrutinising the same, the Officer sought details of Long Term Capital Gains, trial run expenses and bad debts, all of which were furnished.

5. According to the Petitioner, there was no occasion for the Respondent No. 1 to believe that any income had escaped assessment. Respondent No. 1 had applied his mind and passed the assessment order on 7.12.2001 being fully satisfied after scrutinising the particulars. The notice under section 148 seeks to reconsider the same issue and this amounts to a change of opinion on the same set of facts and is impermissible in law. Mr. Gopal further submitted that on perusal of the record, it is evident that the Assessing Officer had a change of mind. The material records evidence that no adverse inference could have been drawn against the Petitioner in the facts of the case. He submitted that the order under section 143(3) had been passed after due application of mind. There is no new or tangible material which would justify issuance of the impugned notice and the same is occasioned only as a result of change of opinion.

6. Mr. Gopal relied upon a decision of the Special Bench of the Mumbai Appellate Tribunal in the case of Dy. CIT Vs. Times Guaranty Ltd. (2010) 40 SOT 14 and submitted that on the basis of said decision the Respondent's Officer has sought to draw an adverse inference without any application of mind. He submitted that during the course of original assessment proceedings, the Assessing Officer has called for details which were furnished to the Assessing Officer on or about 19.11.2011 and after considering the same the Assessing Officer passed an order dated 7.12.2011. The learned counsel placed reliance on the CIT Vs. Kelvinator of India Ltd. (2010) 320 ITR 521 (SC) which lays down that reason to believe that income has escaped assessment must be recorded in writing. He submitted that in the facts of present case the Assessing

Officer has not recorded any reason in writing causing him to believe that any income has escaped tax assessment. The Hon'ble Supreme Court had in the case of Kelvinator of India Ltd. the Court held that one needs to give a schematic interpretation to the words “reason to believe” failing which section 147 may give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”. Mr. Gopal therefore, submitted that in the present case there was no new material on the basis of which the reassessment could be justified. He, therefore, submitted that it is a fit case for setting aside the impugned notice.

7. Mr. Suresh Kumar, on behalf of the Respondents, submitted that the impugned notice does not arise as a result of change of opinion. He submitted that within a period of four years, it was permissible to reassess the earlier orders. He relied upon the decision of this Court in the case of Export Credit Guarantee Corporation of India Ltd. Vs. Additional Commissioner of Income Tax and Others wherein the Division Bench of this Court observed that within a period of four years if the Assessing Officer found reason to believe that the income has escaped assessment, it is within his powers to reopen the assessment. He submitted that the impugned notice to reopen assessment has passed the test laid down in the said judgment as also the judgment in the case of Kelvinator India Ltd. According to Mr. Kumar, the Assessing Officer has applied his mind and found that there were reasons which formed a live link with the formation of the belief that the income had escaped assessment. In his view such live link having been established, the Assessing Officer was fully within his powers to issue impugned notice and reopen the assessment.

8. Having considered the rival contentions of the parties and having examined the facts we proceeded to consider the reasons adopted by the Assessing Officer for issuing the impugned notice dated 4.2.2015 which appears at Exhibit “M” of the petition. The assessment order dated 7.2.2011 records that the assessee had submitted the details required and called for during the course of assessment proceedings. The submissions of the assessee were recorded and the order dated 4.2.2015 came to be passed. We thereafter proceeded

to examine the notice dated 18.11.2013 issued under section 148(1) of the Act and the correspondence thereafter. On 28.11.2013 the Petitioner filed a letter to Respondent No. 1 enclosing a copy of return of income for the assessment year 2009-10 which was filed on 29.9.2009 and requested the Assessing Officer to treat the said return as the Petitioner's response to notice under section 148(1). Vide a separate letter of the same date, the petitioner also sought reasons recorded by the Assessing Officer for issuing notice under section 148 of the Act.

9. In response to the said request, almost after 11 months the assessee's request for reasons, vide a letter of 10.10.2014, the Assessing Officer contended that on perusal of the records it was observed that the assessee has claimed set off of brought forward unabsorbed depreciation pertaining to assessment year 1997-98 and 1999-2000 amounting to Rs. 2,70,12,040/- alongwith Long Term Capital Gain along with Rs. 6,18,54,185/-. He contended that since this amount are pertaining to 8 years ago, the same could not be set off against long term capital gain. The omission according to the Assessing Officer has resulted in incorrect set off of unabsorbed depreciation of Rs. 2,70,12,040/-, thereby leading to a short levy of tax of Rs. 61,20,928/-. Further, it was stated that the assessee had “claimed deduction of bad debts written off of Rs. 36,72,286/- and the amount of loss brought forward or unabsorbed depreciation whichever is less as per books of account amounting to Rs. 1,74,88,918/- from the Net profit of Rs. 3,83,53,319/-” while computing income. According to the Assessing Officer, the claim of unabsorbed depreciation of Rs. 1,74,88,918/- in computation of book profit was not in order and the assessee had not made full and true disclosure of income and its particulars in the return or during assessment proceedings. Hence the Assessing Officer had reason to believe that income has escaped assessment and income chargeable to tax has been under assessed.

10. The Petitioner's accountant filed objections to reopening vide letter dated 24th November, 2014, a copy of which appears at Exhibit “L” to the petition. The Petitioner questioned the Assessing Officer's contention that various

data, facts and particulars mentioned in the reasons for reopening were not submitted earlier. According to the Petitioner all information was provided while filing the return which found to be the basis of the assessing officer's proposed reopening of the assessment. It was contended that the proposed reopening only based on available records, there is no new material and that reopening under section 147 is bad in law. It was further pointed out that the Assessing Officer had used very same material provided during the assessment proceedings and has as an after thought, contended that income was under assessed. The Petitioner contended that what is being attempted is review of assessment under the guise of reopening which is not permissible in law.

11. The objections were disposed of by a communication dated 4.2.2015 in which the Assessing Officer repeated his earlier contentions. The Assessing Officer relied upon observations in paragraph 10 of the judgment in the case of Export Credit Guarantee Corporation Ltd. in Writ Petition No. 502 of 2012 and contended that he was acting within his jurisdiction to reopen the assessment.

12. Section 147 of the Income Tax, 1961 is entitled “Income escaping assessment”. That section reads as under :

“147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year);

Provided that where an assessment under subsection (3) of section 143 or the section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant

assessment years, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year;

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity located outside India, chargeable to tax, has escaped assessment for any assessment year.

Provided also that the Assessing Officer may assess or reassess such income, other than income involving matters which are subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1 – Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 – For the purpose of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely -

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(ba) where the assessee has failed to furnish a report in respect of any international taxation which he was so required under section 92E.

(c) where an assessment has been made, but -

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

(d) where a person is found to have any asset (including financial interest in any entity located outside India.

Explanation 3.- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.- For the removal of doubts, it is hereby clarified that the provisions of this section , as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

13. In the instant case, the notice under section 148 has not been issued after the expiry of four years, but within four years. Therefore, the assessee must have reason to believe that income chargeable to tax has escaped assessment and which alone will enable him to assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this

section or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. In the present case, what is referred to by the Assessing Officer is Explanation-2 (c)(i). What we find from a reading of the impugned notice and the order rejecting the objections is that the Assessing Officer invokes the deeming fiction in Explanation 2. He, therefore, holds that the reasons recorded by him would show that assessment has been made but income chargeable to tax has been underassessed or such income has been assessed at too low a rate. There is also reference made to excessive loss or depreciation allowance or any other allowance which has been computed under this Act. Therefore, the argument of Mr. Suresh Kumar is that there are reasons to believe that income chargeable to tax has escaped assessment. He would also submit that in the light of Explanation- 2 and the deeming fiction therein it is valid ground to presume that the loss or the depreciation allowance has to be recomputed. That has not been properly computed and rather there is an underassessment in respect thereof in the prior assessment.

14. We are unable to agree with Mr. Suresh Kumar and for more than one reason. The Hon'ble Supreme Court has held that on going through the changes made to section 147 of the Act, it is clear that prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the two conditions which have been noted in the case of *Commissioner of Income Tax vs. Kelvinator of India Limited (2010) 320 ITR 561*, but in section 147 of the Act from 1st April, 1989, they were given a go-by and one condition has remained viz. that where the Assessing Officer has reason to believe that income has escaped assessment he has jurisdiction to reopen the assessment. Though the power to reopen is much wider, but the interpretation that the words “reason to believe” must receive an interpretation which is in consonance with the scheme of the law. There cannot be arbitrary powers to the Assessing Officer to reopen assessment on the basis of mere change of opinion. The Assessing Officer has no power to review. He has only a power to reassess. In the garb of reopening the assessment review cannot take place. This view of the Hon'ble Supreme Court binds us. We have tested the impugned orders and the notice in the present case on

this touchstone. In a somewhat similar situation, a Division Bench of this Court in the case of *Titanor Components Limited, Goa vs. Assistant Commissioner of Income Tax, Panaji, Goa and Ors. 2011 (5) Mh.LJ 141*, referred to the amended section 147 after 1st April, 1989 and all its provisions and explanation and held as under :

"4. According to the learned Counsel, the Revenue is entitled to issue such a notice if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee (a) to make a return under section 139 or (b) in response to a notice issued under subsection (1) of section 42 or section 148 or (c) to disclose fully and truly all material facts necessary for that assessment year. Since the first two conditions are not pleaded by the Respondents, it is the submission of the Petitioner that the notice is wholly unwarranted and invalid since there is no allegation whatsoever that the Petitioner has failed to disclose all material facts necessary for assessment. This submission can be considered only with reference to the reasons put forth by the Respondents for issuing the notice. The letter dated 27-1-2005, inter alia, states that the Assessment Officer has reason to believe that income has escaped assessment because the Petitioner has wrongly claimed deduction under section 80IA in respect of income which was not derived from the income of the Petitioner's Unit of Kundaim. Further, that long term capital gains have been wrongly claimed by the assessee which have been wrongly considered for the set off of the Unit of Kundaim which has resulted in escapement of income. Nowhere has the Assessing Officer stated that there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Having regard to the purpose of the section, we are of the view that the power conferred by section 147 does not provide a fresh opportunity to the Assessing Officer to correct an incorrect assessment made earlier unless the mistake in the assessment so made is the result of the failure of the assessee to fully and truly disclose all material facts necessary for assessment. Indeed, where the assessee has fully disclosed all the material facts, it is not open for the Assessing Officer to reopen the assessment

on the ground that there is a mistake in assessment. Moreover, it is necessary for the Assessing Officer to first observe whether there is failure to disclose fully and truly all material facts necessary for assessment and having observed that there is such a failure to proceed under section 147. It must follow that where the Assessing officer does not record such a failure he would not be entitled to proceed under section 147. As observed earlier, the Assessing Officer has not recorded the failure on the part of the Petitioner to fully and truly disclose all material facts necessary for the assessment year 1997-98. What is recorded is that the Petitioner has wrongly claimed certain deductions which he was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts fully and truly. It is only in the latter case that the Assessing Officer would be entitled to proceed under section 147. We are supported in this view by a decision of a Division Bench of this Court in Hindustan Lever Limited vs. R.B. Wadkar, Assistant Commissioner of Income Tax, 2004 (5) Mh.LJ 353 = (2004) 268 ITR 0332 where in a similar case the Division Bench held that the reason that there was a failure to disclose fully and truly that all material facts must be read as recorded by the Assessing Officer and it would not be permissible to delete or add to those reasons and that the Assessing Officer must be able to justify the same based on material record. The Division Bench observed as follows :

"He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence."

15. In the present case, the order dated 4 February, 2015, Annexure M proceeds on the footing that the case records indicate that the issues involved in reassessment proceedings were never examined by the Assessing Officer. The Assessing Officer without looking into the issues allowed the claim which is not permissible. However, beyond making a reference to the judgment of the Division Bench of this Court in *Export Credit Guarantee Corporation*

of India Limited vs. Additional Commissioner of Income Tax and Ors., 350 ITR 651, nothing has been stated or observed.

16. A complete reading of the notice dated 18th November, 2013, would indicate that the Assessing Officer proposes to reassess the income because the assessee claimed set off of brought forward unabsorbed depreciation pertaining to 1997-98 to 1999-2000 amounting to Rs. 2,70,12,040/- against long term capital gain along with current year's losses of Rs. 6,81,54,185/-. This was the position emerging from the return filed on 29th September, 2009, which was thereafter selected for scrutiny and an assessment order was passed under section 143(3) on 7th December, 2011. The reasons disclose that the Assessing Officer was of the opinion that this unabsorbed depreciation of more than eight years old could not have been set off against long term capital gain. A judicial precedent has been referred in the reasons and it has been opined that the unabsorbed depreciation may be allowable under the new provision but has to be dealt with in accordance with the old provision and is subject to the limitation of being eligible for set off only against business income and for eight years. Thus, unabsorbed depreciation of the above assessment years 1997-98 to 2001-02 is not eligible for relief granted having regard to section 32(2) of the Income Tax Act, in assessment year 2002-03. The omission has resulted in incorrect set off of unabsorbed depreciation thereby leading to short levy of tax.

17. Then, there is a reference to deduction of bad debts written off and even with regard thereto, what we find is that the bad debts written off and to the tune of Rs. 36,72,286/- is also not an adjustment specified under section 115JB of the Income Tax Act. This has resulted in understatement of book profits to the extent indicated in the reasons leading to short levy of tax. If the assessee has not made full and true disclosure of income and its particulars in the return or during the assessment proceedings, then, we do not see how these figures have been derived by the Assessing officer. In one breath he says that he has perused the records and which reveals the above position. At the same time, he holds that the petitioner has not made full and true disclosure of income and its particulars in the return or during

assessment proceedings. This contradiction and inconsistency in the reasons would indicate that the necessary satisfaction in terms of statutory provision has not been recorded at all. This would be further clear if one refers to the other reason viz. that the income has escaped assessment and also in view of sub-clause (I) of clause (c) of Explanation-2 to section 147 of the Act if income chargeable to tax has been underassessed. Such recording of reasons can never be termed as satisfactory. There is either a satisfaction based on the income escaping assessment by virtue of it being chargeable to tax and, therefore, reassessment and in terms of substantive provision is required. The satisfaction can also be said to be that the case is covered by the deeming fiction and the income chargeable to tax has escaped assessment by virtue of Explanation 2 clause (a), (b), (ba) and (c) and (d). However, if one refers to the failure on the part of the assessee to make full and true disclosure of income, then, what the Assessing Officer has in mind is the first proviso to section 147. That enables reassessment after expiry of four years from the end of the relevant assessment year if the income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the present case, both are referred viz. The first proviso to section 147 and Explanation 2 thereof. However, this is not a case where action under section 147 is taken after the expiry of four years from the end of the relevant assessment year but it is within four years period. Thus, this proviso cannot be of any assistance. At the same time, the Assessing Officer says that he has reason to believe that income has escaped assessment and also in view of sub-clause (1) of clause (c) of Explanation-2. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the Assessing Officer to act in terms of this section. If more than one reason is assigned as in this case then the Court can sustain the notice only if it is of the opinion that an erroneous reference to a statutory provision been made but still there is an income chargeable to tax which escaped assessment and on account of which

issuance of notice justified. Which ground is sufficient to sustain the notice something which must be indicated in clear terms and should be a matter of speculation or guess work.

18. We are unable to agree with the reasoning of the Assessing Officer. In our view the entire approach of the Assessing Officer in the facts of the present case is misconceived. The assessment order in the present case has obviously taken into account the aspect of depreciation. Perusal of the assessment order reveals that all relevant documents and details as called for were filed. It is further recorded in paragraph 3 of the assessment order that the details of assessing company alongwith return of income and those which were called for assessment proceedings were scrutinised. There does not appear to the tangible material/ reason for the assessing officer to reopen the assessment proceedings in the facts of the present case. The reasons offered by the Assessing Officer while rejecting the objection that the issues involved in reassessment proceedings were never examined by the Assessing Officer are not tenable. No particulars whatsoever has been relied upon by the Assessing Officer whilerejecting the objections.

19. The facts reveal and we are satisfied that in the present case, the order of reopening of the assessment will not be justified. The decision to reopen assessment is not based on proper reasons but obviously is a result of change of opinion. This is impermissible. In the case of ECGC, there was specific finding that there existed tangible material and reason to reopen the assessment and that was evident from the record in that case. It is not the case of the Revenue that in this case any new material was forwarded to the Assessing Officer. In any event we are not called upon to decide on the merits of the case and the proposed reopening is not justifiable in the facts and circumstances of the present case. Accordingly, the petition must succeed. We, therefore, pass the following order :

The impugned notice dated 18.11.2013 being Exhibit “H” to the petition issued under section 148 of the Income Tax Act, 1961 in respect of assessment year 2009-10 and the order

dated 4th February, 2015 rejecting objections of the petitioner passed by Respondent No. 1 are hereby set aside. There will be no order as to costs.

(A.K. MENON,J.) ***(S.C. DHARMADHIKARI,J.)***