

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

WRIT PETITION NO. 3035 OF 2022

Survival Technologies Pvt. Ltd.
23, 6th Floor, Ahoora Mahal,
93, "G" Road,
Marine Drive, Mumbai 400 002. Petitioner

Versus

1. The Deputy Commissioner of
Income Tax Circle – 4(3)(1),
Room No.649, 6th Floor,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020.

2. The Assessing Officer,
National Faceless Assessment Centre,
Delhi.

3. The Principal Commissioner of
Income Tax-4,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020.

3. Union of India,
Aaykar Bhavan, M.K. Road,
Mumbai – 400 020. Respondents

Ms.Krupa Toprani i/b PRH Juris Consults, Advocate for petitioner.
Mr.Suresh Kumar, Advocate for respondents.

**CORAM : DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.**

Pronounced on : 20th February 2023

: J U D G M E N T :**PER DHIRAJ SINGH THAKUR :**

1. The petitioner questions the legality of a Notice dated 30th March 2021 issued under section 148 of the Income Tax Act, 1961 ('the Act') seeking to reopen the petitioner's assessment for the assessment year 2015-16. The petitioner also challenges the order dated 21st July 2022 passed by the respondent No.1, whereby the objections to the reopening of the assessment have been disposed of.

2. Briefly stated the material facts are as under :

2.1 The petitioner filed a return of income for the assessment year 2015-16. The case was subsequently selected by Computer Assisted Scrutiny Selection (CASS) for scrutiny assessment. Notices were issued under section 143(2) of the Act on 17th March 2016 and subsequently under section 142(1), dated 23rd January 2017. Necessary information and details were filed pursuant to such notices including the petitioner's claim for deduction under section 35(2AB) of the Act. Finally, an order of assessment dated 13th June 2017 was passed under section 143(3) of the Act assessing the total income at Rs.8,48,00,190/-, by disallowing

Rs.32,70,724/- being excess deduction claimed under section 35(2AB) of the Act. The disallowance was subsequently reduced to Rs.16,35,262/- as per rectification order dated 23rd June 2017 passed under section 154 of the Act.

2.2 Notice dated 30th March 2021 was issued under section 148 seeking to reopen assessment for the assessment year 2015-16 on the ground that income chargeable to tax had escaped assessment. Pursuant to the said Notice and in compliance thereof, return of income was filed and reasons were sought, for such reopening, which were furnished and stated as under :

2. During the year under consideration, i.e. FY.2014-15 (Relevant A.Y. 2015-16), it is noticed that as per note No.23 to the accounts, the assessee company has transferred building on WDV of Rs.91,61,341/- as on 1.4.2014 from fixed assets to the R & D Centre and accordingly the capital expenditure of R & D Building of Rs.1,63,40,354/- which includes WDV of the building of Rs.91,61,344/- is debited to P & L Account. However, in the computation of income, the assessee company has reduced the entire amount of Rs.1,63,40,354/- as weighted deduction under section 35(2B) @ 100%, on capital expenditure. Whereas the amount debited of RS.91,61,341/- was firstly required to be added back to the net profit as per the P & L Account (in the computation), before allowing the deduction under section 35(2B) of Rs.1,63,40,354/-. This has resulted in excesses allowance of deduction under section 35(2B) of the tune of Rs.91,61,341/-.

3. Since 4 years from the end of the relevant year have expired in this case, the requirement to initiate proceedings under section 147 of the Act are reason to believe that

income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary of his assessment for the assessment year under consideration.

4. It is true that the assessee has filed a copy of audited P & L account and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P & L Accounts and balance sheet or other evidence as mentioned above, the requisite material facts, as noted above, in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by AO and would have been discovered with due diligence, accordingly attracting provisions of Explanation-I of section 147 of the Act.

5 It is pertinent to mention here that reason to believe that income has escaped assessment for the year under consideration have been recorded in the above referred paragraph. I have carefully considered the assessment record containing the submission made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed material facts necessary for his assessment of the year under consideration thereby necessitating reopening under section 147 of the Act.

3. Objections were filed by the assessee to the proposed reopening, which were rejected vide order dated 21st February 2022, which too, is impugned in the present petition.

4. Counsel for the petitioner urged that the impugned notice and the order dated 21st February 2022 are unsustainable as the

petitioner had made full disclosure of all material facts which were gone into by the Assessing Officer leading to the passing of the order under section 143 of the Act. It was urged that there was no failure on the part of the assessee to disclose fully and truly material facts necessary for the purpose of assessment which was a jurisdictional pre-condition which onus has not been discharged by the Assessing Officer under section 147 of the Act illegal and bad in law.

5. Counsel for the revenue, on the other hand, generally supported and buttressed the view expressed by the Assessing Officer in the order impugned dated 21st July 2022.

6. The question that arises for consideration in the present case is whether the jurisdictional pre-conditions envisaged under section 147 of the Act, as was applicable to the present case, before its substitution by way of Finance Act, 2021 with effect from 1st April 2021 had been fulfilled, and if not, whether the reassessment proceedings could be said to be bad on account of change of opinion.

7. Section 147 of the Act empowers the Assessing Officer to assess or re-assess an income if he has reasons to believe that such income has escaped assessment, subject to the provisions of section 148 to 153. The first Proviso to the said section, however, envisages, *inter-alia* that where an assessment under section 143(3) has been made, no action shall be taken after the expiry of period of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such year by reason of the failure on the part of the assessee as to make a return under section 139, or in response to the notice under section 142(1) or section 148 as to disclose fully and truly all material facts necessary for its assessment for that assessment year.

8. Since this is a case of reopening beyond the period of four years, the Assessing Officer was to satisfy the jurisdictional conditions on both counts, i.e., 'reason to believe' and 'failure to disclose fully and truly the material facts'.

It is a settled principle of law that the jurisdiction exercised under section 147 by an AO has to be tested on the touchstone of the reasons recorded, which can neither be

improved subsequently nor added in the reply or in the subsequent pleadings.

9. Admittedly, this was a case where an order of assessment under section 143(3) had been passed for the relevant assessment year. As per the ratio of the judgment in *Hindustan Lever Ltd. V/s. R. B. Wadkar, Assistant Commissioner of Income-Tax and Ors.*¹, the AO was obliged to disclose as to which fact or material was not disclosed by the Assessee fully and truly for the purposes of assessment of that assessment year so as to establish a vital linkage between the reasons and the evidence. In the present case, the jurisdictional condition has not been satisfied by the AO, except having made a bald statement that the material facts were not disclosed fully and truly. Shelter is sought to be taken by the AO in the reasons recorded that although the assessee had produced books of account, annual reports and audited profit and loss account as also the balance-sheet etc., the relevant material or facts were so embedded therein that they could not have been discovered by the AO despite due diligence.

10. In our opinion, the AO has failed to establish that there was any failure on the part of the assessee to disclose fully and truly

1 2004 ITR 332 Vol.268.

any material fact in the present case. As all the relevant facts had not only been disclosed, as stated in the preceding paragraphs, but had also been considered by the AO, while considering the claim of deduction under section 35(2AB) in the order of assessment.

Apart from this, the impugned notice has been issued without there being any tangible material with the AO as he clearly relied upon the material which was already on record. No information was received by the AO between the date of the order of assessment under section 143(3) and the issuance of the notice under section 148 of the Act. This is clearly impermissible in terms of the ratio of the judgment in the case of *Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*² as being a case of mere 'change of opinion' which does not provide jurisdiction to the AO to initiate proceedings under section 147 of the Act. The Court held :

“.....all that the Income-tax Officer has 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

2 [1998] 234 ITR 170 (Delhi)

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.

11. Be that as it may, the present petition is allowed. The impugned notice 30th March 2021 issued under section 148 of the Act as also the order impugned, dated 21st February 2022 rejecting the objections of the petitioner impugned in the present petition are held to be unsustainable and are accordingly set aside.

[VALMIKI SA MENEZES, J.]

[DHIRAJ SINGH THAKUR, J.]