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

WRIT PETITION No. 3314 OF 2004

M/s. Eskay K'n' IT (India) Ltd. .. Petitioner.
V/s.
Dy. Commissioner of Income Tax
Central-Circle 33 & Others .. Respondents.

Mr. P. J. Pardiwala, Sr. Advocate with Mr. S. G. Dalal i/b. S. G. Lakhani, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

CORAM: M.S.SANKLECHA, &
G.S. KULKARNI, JJ.
DATE : 11th AUGUST, 2014.

ORAL JUDGMENT:-(Per M.S.Sanklecha,J.)

This Petition under Article 226 of the Constitution of India, challenges the notice dated 26th March 2003 issued under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice dated 26th March 2003 seeks to re-open the assessment for the Assessment Year 1993-94.

2 On 30th December 1993, the Petitioner have filed its Return of Income under Section 139(1) of the Act for the Assessment Year 1993-94, declaring total income of Rs.4.64 lakhs. This was subsequently revised to Rs.8 lakhs in a Revised Return of Income filed under Section 139(5) of the Act on 13th May, 1994. In October 1995, the Assessing Officer completed assessment proceedings for the Assessment Year 1993-94.

During assessment proceeding, specific query was made by the Assessing Officer with regard to the depreciation claimed by the Petitioner. The Petitioner filed details in respect of depreciation claimed. The Assessing Officer in the Assessment Order passed in October 1995 allowed the depreciation only to the extent of 25% in respect of three items where 100% depreciation was claimed. Besides, other issues were also considered by the Assessing Officer and the Petitioner's income was determined at Rs.10.30 lakhs.

3 On 1st August 1996, a search was conducted on the Petitioner's premises under Section 132 of the Act. Consequent to a search, a notice dated 7th February 1997 was issued under Section 158BC of the Act, directing the Petitioner to file return of income for the block period 1st April 1986 to 1st August 1996, declaring its undisclosed income. The Petitioner duly complied with the directions and on 30th September 1997, the Assessing Officer passed an order for the block period from 1st April, 1986 to 1st August, 1996 i.e. Assessment Year 1987-88 to 1997-98. In the order dated 30th September 1997, in respect of Block Assessments additions were made by the Assessing Officer on account of excess rate of depreciation claimed by the Petitioner.

4 Being aggrieved by the order dated 30th September, 1997, the Petitioner preferred an appeal to the Income Tax Appellate Tribunal (Tribunal). On 25th October 2002, the Tribunal allowed the Petitioner's appeal for the block period 1st April,1986 to 1st August, 1996 (Assessment Year 1987-88 to 1997-98) and deleted the entire addition made on dis-allowance of depreciation by the Assessing Officer.

5 Consequent to the above order dated 25th October, 2002, the Assessing Officer issued impugned notice dated 26th March, 2003 seeking to re-open the assessment for the Assessment Year 1993-94.

6 In support of the impugned notice dated 26th March, 2003, the Assessing Officer furnished to the Petitioner, the following recorded reasons :-

> " *M/s. SHREE KRISHNA PETRO YARNS LTD.*
> *ASSESSMENT YEAR 1993-94*
>
> *Date: 26.03.03.*
>
> *A search & seizure action u/s 132 of the I. T. Act, 1961 was conducted on M/s. Shree Krishna Polyster Limited 01.08.1996. The assessee had filed nil return for the block period in response to notice u/s. 158BC. The block assessment in this case was completed on 30.09.1997 estimating the total undisclosed income of Rs.38,65,986/- for the block period in A. Y. 1993-94.*
>
> *Being aggrieved, the assessee went in first appeal before the Hon. ITAT against the above assessment order. The Hon. ITAT has given relief to the assessee relying on various judicial pronouncements viz.*
>
> *1 CIT v/s. Vinod D. Ghodawat (163 CTR 432) (Bom).*
> *2 CIT v/s. Dr. M.K.E. Memon (112 Taxmen 96) (Bom).*
> *3 DCIT v/s. Shaw Wallace & Co. (248 ITR 81) (Cal.).*
> *4 CIT v/s. Rajendra Prasad Gupta (248 ITR 350)(Raj.).*
> *5 Bhagwat Prasad Kedia v/s. CIT (248 ITR 562) (Cal.).*
> *6 CIT v/s. Ravi Kant Jain (250 ITR 141) (Del.).*
> *7 Vrsihali Hotels Pvt Ltd.v/s. ACIT (66 TTJ 693) (ITAT, Pune).*
> *8 Ravi Prakash Agarwal v/s. ACIT (67 TTJ 234) (ITAT, Delhi).*
>
> *The Hon. ITAT has also given a clear cut finding that:*
>
> " *the rate at which depreciation is permissible on a particular asset is a matter to be considered in the regular assessment. Even if the assessee has claimed higher depreciation than what is permissible, the same can not be said to be undisclosed income for the purpose of the block assessment".*

Keeping in view the provisions of section 153(3)(ii) Explanation 2, it is proposed to re-open the assessment of the assessee for A. Y. 1993-94 u/s. 148 of the I. T. Act, 1961 as income of Rs.38,65,986/- for A. Y. 1993-94 has escaped assessment.

In this regard, a letter dated 11.03.03 has been put up requesting CIT(C)-III's sanction u/s. 151.

CIT(C)-III has accorded his approval for issuance of notice u/s. 148 vide letter dated 24.03.03. Accordingly, notice u/s. 148 is issued."

7 The Petitioner by its letter dated 23rd November, 2004, objected to the reasons recorded for issuing the impugned notice dated 26th March, 2003. The primary objections to re-opening of the assessment for the Assessment Year 1993-94, were as under:-

(a) the impugned notice is time barred;

(b) there was no failure to disclose true and complete facts necessary for assessment. Therefore, the re-opening of assessment beyond a period of four years from the end of the Assessment order is without jurisdiction; and

(c) there was no reason to believe that the income chargeable to tax has escaped the assessment inasmuch as the issue of depreciation was subject matter of consideration while passing the Assessment order under Section 143(3) of the Act.

8 On 6th December 2004, the Assessing Officer by order rejected the Petitioner's objections. The order dated 6th December 2004 held that the impugned notice dated 26th March 2006 has been correctly issued in view of the finding recorded in the order of the Tribunal dated 25th October 2002.

9 Mr. Pardiwala, learned Senior Counsel appearing for the Petitioner in support of the Petition submits as under:-

(i) The impugned notice dated 26th March 2003 is time barred as it seeks to re-open the assessment for the Assessment Year 1993-94 under Sections 147 and 148 of the Act i.e. almost nine years from the end of the relevant assessment year. The impugned notice is in the face of and in defiance of the period of limitation provided in Section 149 of the Act;

(ii) The revenue seeks to extend the period of limitation provided under Section 149 of the Act on a perverse reading of the order dated 25th October 2002 of the Tribunal in Block proceedings that it renders a finding which is being given effect to by the impugned notice dated 26th March 2003. It is submitted that there is no such finding in order dated 25th October 2002 of the Tribunal which extend the period of limitation by virtue of Section 150 of the Act; and

(iii) In any view of the matter, the impugned notice dated 26th March 2003 being beyond a period of four years from the end of the relevant Assessment Year i.e. 1993-94 had to satisfy the conditions in the first proviso to Section 147 of the Act viz. a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment. This not having been alleged in the impugned notice (the reasons in support of the notice), it would fail to satisfy the jurisdictional requirement making the impugned notice bad in law.

10 As against the above, Mr. Suresh Kumar, learned Counsel

appearing for the Respondent-Revenue in support of the impugned notice dated 26th March 2003 submits as under:-

(a) The impugned notice dated 26th March 2003 is within time as it has been issued to give effect to or in consequence of a finding recorded in the order dated 25th October 2002 of the Tribunal that the claim of the depreciation cannot be considered in Block assessment proceeding but only in a regular assessment. Thus, the period to issue notice for re-opening gets extended by a virtue of Section 150 of the Act; and

(b) There was a failure on the part of the Petitioner to make true and full disclosure at the time of regular assessment proceeding leading to the Assessment order in October 1995 for the Assessment Year 1993-94. Thus, the condition precedent to issue the impugned notice was satisfied. In view of the above, it is submitted that the Petition be dismissed.

11 It would be convenient to reproduce the relevant Sections of the Act which arises for our consideration in the context of the facts and the submission made before us. The relevant Sections are as under:-

Income escaping assessment.

> ***"Section 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, assessee 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.*

Provided that where an assessment under sub-section (3) of section 143 or this 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 year****, 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 assessment, for that assessment year."***

(emphasis supplied)

Issue of notice where income has escaped assessment.

Section 148 :- *Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period,[* * *] as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139*

Provided that …. …. ….

Time limit for notice.

Section 149 (1) No notice under Section148 shall be issued for the relevant assessment year-.

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.]

(c) ……

Provisions for cases where assessments is in pursuance of an order on appeal, etc.

Section 150:-(1) *Notwithstanding anything contained in section 149, the notice under section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a court in any proceeding under any other law].*

(2) ....

12 The law with regard to re-opening of assessment is fairly settled. A re-opening of assessment can only be done if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment on the basis of some tangible material. However, such re-opening of assessment is not in the nature of review and, therefore, such re-opening is not permissible on mere change of opinion. Moreover, in cases where re-opening of assessment is sought to be done beyond the period of four years from the end of the relevant assessment year, an additional requirement is to be satisfied viz: failure on the part of the assessee to truly and fully disclose all material facts for assessment.

13 So far as limitation for issue of re-opening of assessment is concerned, Section 149 of the Act provides that the normal period for re-opening of assessment is four years from the end of the relevant Assessment Years. This period is extended to six years where the income which is likely to escape the assessment is Rs.1 lakh or more and to sixteen years, if it relates to income located outside India. Section 150 of the Act does away with the above bar of limitation, where the re-opening

notice under Section 148 of the Act has been issued in consequence of or to give effect to a finding or directions contained in an order passed by an Appellate Authority. The aforesaid provisions only extend the period of limitation but otherwise there is no change in the conditions precedent to be satisfied under the Act to issue a re-opening notice under Sections 147 and 148 of the Act. Thus, there is no change otherwise in the substantive conditions to issue a re-opening notice under Section 148 of the Act.

14 In this case, the impugned notice is issued after a period of almost nine years from the end of the relevant Assessment Years i.e. 1993-94. The reasons in support of the impugned notice as reproduced herein above, is the finding in the order of the Tribunal dated 25th October 2002. We find that the order of the Tribunal dated 25th October 2002 was dealing with appeal for block assessment i.e. 1st April 1986 to 1st August 1996. The Tribunal by its order dated 25th October 2002 while allowing the appeal of the Petitioner followed the decision of this Court in ***CIT v/s. Dr. M. K. E. Memon –*** to hold that the scope of the block assessment is only to assess the undisclosed income for the block period and not the total income or loss of the previous year, which exercise is to be carried out in a regular assessment under Section 143(3) of the Act. It was pointed out that the scope of regular assessment is to ensure that there is no undue payment of tax while block assessment is only to assess the undisclosed income. It was held that the question of rate of depreciation cannot be subject of examination in block assessment as otherwise, there would be no finality to the regular assessment already completed prior to the search. The following observations in order dated 25th October, 2002 of the Tribunal, being relied upon by the Revenue as findings are as

under:-

> " ....
> *The rate at which depreciation is permissible on a particular asset is a matter to be considered in the regular assessment. Even if the assessee has claimed higher depreciation than what is permissible, the same cannot be said to be undisclosed income for the purpose of block assessment. We may clarify here that we are not expressing any opinion about the rate of depreciation which is allowable on the assets under consideration."*

15 At this stage, Mr. Suresh Kumar, learned Counsel appearing for the Revenue states that the revenue is relying upon the aforesaid finding alone to re-open the assessment for the Assessment Year 1993-94 by the impugned notice. Mr. Suresh Kumar, learned Counsel appearing for the Revenue concedes that there are no directions in the order of the Tribunal dated 25th October 2002 being relied upon for the issue of impugned notice. However, it is submitted that the aforesaid finding in the order of Tribunal dated 25th October, 2002 entitles the Assessing Officer to issue the impugned notice.

16 Therefore, the issue for our examination is whether there is any finding in the order of the Tribunal dated 25th October, 2002 which is being given effect to and/or as consequence thereof, the impugned notice has been issued. It is only when the answer to the above question is in the affirmative i.e. there is a finding that the issue of impugned notice would be saved from the bar of limitation by virtue of Section 150(1) of the Act.

17 The issue of what is a 'finding' in an adjudicatory/ appellate order is no longer res integra. The Supreme Court while dealing with a provision similar to Section 150 of the Act found in Section 34(3) of the

Income Tax Act, 1922 in ***ITO v/s. Murlidar B. Deo 52 ITR 335*** has explained the meaning of 'finding' thus:-

> *"* …. …. …..
>
> *A 'finding', therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question."*

The aforesaid meaning to the word 'finding' was rendered in the following contextual facts:-

Income Tax Office had issued a re-opening notice, seeking to re-open assessment for the Assessment Year 1949-50. Consequently, the Assessment Order was also passed. In appeal, the Appellate Assistant Commissioner held that addition of interest made for the Assessment Year 1949-50 was incorrect and if at all it had to be included in the Assessment Year 1948-49. It was consequent to the aforesaid order of the Appellate Authority that notice for re-opening were for 1948-49 on 5th December 1957. The assessee therefore filed a Petition under Article 226 of the Constitution of India on the ground that the notice dated 5th December 1957 seeking to re-open the assessment for Assessment Year 1948-49 is time barred under Section 34 of the Income Tax Act, 1922. The revenue contended that the Appellate Authority in his order for the Assessment Year 1949-50 had given a finding that the interest is chargeable to tax for Assessment Year 1948-49. This was not accepted by the Supreme Court

on the basis of the meaning of finding given by it i.e. it was not necessary for the disposal of the appeal for Assessment Year 1949-50 to give a finding that the income is chargeable to tax in Assessment Year1948-49. The Supreme Court also made the following further observations with regard to the words 'in consequence of or to give effect to' which was in Section 34 of the Income Tax Act, 1922 and even incorporated in Section 150 of the Act as under:-

> *" ..... Therefore, the expression 'finding' as well as the expression 'direction' can be given full meaning, namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words 'in consequence of or to give effect to' do not create any difficulty, for they have to be collated with, and cannot enlarge, the scope of the finding or direction under the proviso. If the scope is limited as aforesaid, the said words also must be related to the scope of the findings and directions."*

18 Our attention was also invited to the decision of this Court in ***Lotus Investments Ltd., v/s. G. Y. Wagh, Assistant Commissioner of Income Tax and Others – [2007] 288 ITR 459.*** In this case, the Revenue had issued notice on 30th March 2006, seeking to re-open assessment for the Assessment Year 1988-89 to 1999-2000 i.e. beyond a period of six years from the end of the relevant Assessment Year. So far as the Assessment Years 1988-89 to 1999-2000 is concerned, the revenue relied upon the order of the CIT(A) dated 24th December 2004 wherein it was observed as under:-

> *" The Assessing Officer is free to look into and consider these disallowances under section 148 of the Income-tax Act, in the relevant assessment years in terms of section 150(1) read with Explanation 2 of section 153 in respect of deletion of both amounts made in this order."*

The Assessing Officer relied upon the aforesaid observations to support the notices issued on the ground that there were finding/ directions given by the CIT(A). This Court followed the Apex Court's decision in Murlidhar Bhagwan Das (supra) to hold that there was no finding given in the CIT(A) order. So far as directions were concerned, this Court followed the decision in ***Rajinder Nath v/s. CIT 120 ITR 14*** to hold that the above observations were not directions to issue a notice but merely allowed the Assessing Officer to take a look into the issue and decide. This is different from directions. In view of the above, this Court held that the notice for re-opening are beyond the period provided under Section 149 of the Act and Section 150 of the Act would have no application as the CIT(A) had not given any finding and/or directions to re-open the assessment. In any case, in the present case the revenue has pegged its case only on a finding in the order of the Tribunal dated 25October 2002 for the issue of the impugned notice. We are not concerned with the meaning and scope of the word 'directions' in the present case.

19 In view of the above and particularly the law laid down by the Apex Court in Murlidhar Bhagwan Das (supra), it is very clear that the Tribunal in its order dated 25th October 2002 was concerned with an appeal from orders passed in block Assessment and held that the ambit/ scope for assessment for the block period under Chapter XIVB is only to assess the undisclosed income for the block period and not for the total income or loss suffered in the previous year which is subject matter of regular assessment. The only finding of the Tribunal in its order dated 25th October 2002 is that the extent of claim for depreciation made by the

assessee/ petitioner would not be a subject matter of enquiry in the block assessments. This is for the reason that the claim for higher depreciation cannot be said to be undisclosed income for the purpose of block assessment. The Tribunal had in its order dated 25th October 2002 while dealing with order passed in a block assessment had no occasion to examine whether or not the depreciation as claimed was permissible. It may also be pointed out that the Tribunal in its order dated 25th October 2002 has recorded a finding of fact that no material was found during the course of search to establish that the claim for depreciation made was incorrect. Therefore, we are of the view that there is no finding given by the Tribunal in the order dated 25th October 2002 which would enable the Assessing Officer to extend the period of limitation as provided under Section 150 of the Act for the purpose of issuing impugned notice in respect of Assessment Year 1993-94. On this ground alone, the impugned notice is not sustainable as it is clearly time barred.

20 In any view of the matter, the reasons in support of the impugned notice as reproduced herein above, do not indicate even remotely that there has been any failure on the part of the Petitioner to disclose truly and fully all material facts necessary for the assessment. This itself is fatal to the impugned notice as all the other conditions precedent to issue of re-opening notice under Sections 147/148 of the Act have to be satisfied. This even in cases where Section 150 of the Act is invoked as Section 150 of the Act merely extends the period of limitation but does not absolve the revenue from satisfaction of other conditions.

21 Moreover, during the assessment proceeding under Section 143(3) of the Act, the Assessing Officer called for details relating to the

assets available and the claim for depreciation. The Petitioner responded to the same and was subject matter of consideration by the Assessing Officer inasmuch as he disallowed the claim of 100% depreciation in respect of three items i.e. Semi Conductor, Comber Machine restricting it to 25%. It would thus be seen that the Assessing Officer had applied his mind to the depreciation claimed by the Petitioner during regular assessment proceeding. Thus, the impugned notice is also not sustainable as being issued on mere change of opinion.

22 In view of the aforesaid reasons, the impugned notice dated 26 March, 2003 is quashed and set aside and **Petition** is **allowed.**

(G.S.KULKARNI,J.) **(M.S.SANKLECHA,J.)**