ITEM NO.6 VIRTUAL COURT NO.1 SECTION IX

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

SPECIAL LEAVE PETITION (CIVIL) Diary No.7367/2020

(Arising out of impugned final judgment and order dated 21-08-2019 in WP No.1917/2019 passed by the High Court Of Judicature At Bombay)

THE ASSISTANT COMMISSIONER
OF INCOME TAX 12(3)(2) & ORS. Petitioner(s)

VERSUS

MARICO LTD. Respondent(s)

(FOR ADMISSION and I.R.; and, IA No.39392/2020 – FOR CONDONATION OF DELAY IN FILING)

Date : 01-06-2020 This petition was called on for hearing today.

CORAM :
HON'BLE MR. JUSTICE UDAY UMESH LALIT
HON'BLE MR. JUSTICE MOHAN M. SHANTANAGOUDAR
HON'BLE MR. JUSTICE VINEET SARAN

For Petitioner(s) Mr. Sanjay Jain, ASG
Mr. S.K. Singhania, Adv.
Ms. Gargi Khanna, Adv.
Mrs. Anil Katiyar, AOR

For Respondent(s) Mr. Arvind Datar, Sr. Adv.
Mr. Mahesh Agarwal, Adv.
Mr. M.S. Ananth, Adv.
Mr. Anshuman Srivastava, Adv.
Mr. E.C. Agrawala, AOR

UPON hearing the counsel the Court made the following
O R D E R

Delay condoned.

In the present matter, the assessment order was passed on 30.01.2018 as regards the Assessment Year 2014-15.

According to the record, certain queries were raised by the Assessing Officer on 25.09.2017 during the assessment proceedings which were responded to by the Assessee vide letters dated 10.10.2017 and 21.12.2017.

After considering said responses, the assessment order was passed on 30.01.2018.

Subsequently, by notice dated 27.03.2019 issued under Section 148 of the Income-Tax Act, the matter was sought to be re-opened. While accepting the challenge to the issuance of notice, the High Court in para 12 of its judgment observed as under:

> **"12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has raised the query dated 25 September 2017 during the assessment proceedings and the Petitioner had responded to the same by its letters dated 10 December 2017 and 21 December 2017 justifying its stand. The non-rejection of the explanation in the Assessment Order would amount to the Assessing Officer accepting the view of the assessee, thus taking a view/forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated 27 March 2019 is quashed and set-aside."**

In the circumstances, we see no reason to interfere in the matter. This special leave petition is, accordingly, dismissed.

Pending application(s), if any, also stand disposed of.

(MUKESH NASA)
COURT MASTER

(PRADEEP KUMAR)
BRANCH OFFICER

JPP

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

WRIT PETITION NO. 1917 OF 2019

Marico Ltd. … Petitioner

V/s.

The Assistant Commissioner of
Income Tax-12(3)(2) and Ors. ... Respondents

Mr. Percy Pardiwala, Senior Advocate a/w. Nitesh Joshi i/b. Mandar Manohar Vaidya for the Petitioner.

Mr. Sham Walve a/w. Pritish Chatterjee for the Respondents.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 21 AUGUST 2019.

P.C. :-

At the request of the learned Counsel for the parties, this Petition is taken up for final disposal at the stage of admission.

2. This Petition under Article 226 of the Constitution of India challenges a notice dated 27 March 2019 issued by the Respondent No.1 – Assistant Commissioner of Income Tax. The

impugned notice dated 27 March 2019 has been issued under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen the assessment for Assessment Year 2014-15.

3. Briefly, the facts leading to this Petition arise as under :-

(i) For the Assessment Year 2014-15 the Petitioner filed its revised return of income, declaring a total income of Rs.418.04 crores under normal provisions of the Act and Rs.670.82 crores as Book Profits under Section 115JB of the Act. In its return the Petitioner has also claimed a deduction of Rs.47.04 crores on account of amortization of brand value, while computing Book Profits at Rs.670.82 crores under Section 115JB of the Act.

(ii) The Assessing Officer took up the Petitioner's return relating to Assessment Year 2014-15 for scrutiny assessment. On examination of the return of income, the Assessing Officer issued a notice dated 25 September 2017 under Section 142(1) of the Act to the Petitioner. The above notice at Serial No.5 thereof *inter alia* called for explanation as under :-

> *5. You have reduced from Book Profits under Section 115JB an amount of Rs.47,04,58,042/- (as per revised return), being "Book depreciation on intangibles (Fiancee & Haircode)". In preceding AY 2013-14 also,*

exactly the same amount of Rs. 47,04,58,042/- was so reduced from book profits, which amount was added back to book profits for detailed reasons given in said assessment order. Pleas show cause as to why the said amount should not be added to your Book Profits under Section 115JB on similar line as made in AY 2013-14.

(iii) The Petitioner responded to the above notice dated 25 September 2017 by its letters dated 10 October 2017 and 21 December 2017. In its response, the Petitioner justified claiming depreciation of Rs. 47.04 crores on intangible i.e. brand value while determining Book Profits under Section 115JB of the Act. It was pointed out that depreciation not debited to profit and loss account, will still have to be taken its account to determine book profits, if the same is disclosed in the notes to the Balance Sheet and Profit and Loss Account. Reliance in support of the above was made on the decision of Delhi High Court in *CET v/s. Sain Processing & Weaving Mills (P) Ltd. (221 CTR 493)*. It was further pointed out that the adjustment of brand against securities premium and capital redemption reserve is not in accordance with AS (Accounting Standard) 26 and cannot be permitted.

(iv) The Respondent No.1 passed an assessment order dated 30 January 2018 under Section 143(3) r/w Section 144C of the Act. The above assessment order accepted the Petitioner's claim for

allowing depreciation for amortization of brand value to determine Book Profits under Section 115JB of the Act at Rs.684.04 crores.

(v) Thereafter, on 27 March 2019 the impugned notice was issued seeking to re-open the Assessment Year 2014-15. The impugned re-opening notice has been issued within a period of four years from the end of Assessment Year 2014-15. The reasons in support of the impugned notice as issued to the Petitioner reads as under :-

> *"1) In this case, the assessee has filed its return of income on 24.11.2014 declaring total income of Rs.422,17,76,910/- for A.Y. 2014-15. The case was selected for scrutiny under CASS and scrutiny assessment was completed u/s.143(3) r.w.s. 144C(3) on 30.01.2018 determining total assessed income at Rs.4,98,28,21,820/- and Book Profit u/s 115JB at Rs.684,08,76,976/-.*
>
> *2) On going through the records of the assessee company for A.Y. 2012-13, and the assessment order passed by the then AO for that year, it is seen that the assessee has written off an amount of Rs.47,04,58,042/- as amortization for the A.Y. 2014-15. Under the provisions of section 115JB of the Income tax Act, 1961, the book profit is to be computed after making additions and deletions to the net profit specified therein. No deduction is allowable beyond the specified deletions or negative adjustments provided in the said section. The assessee company had claimed deduction of Rs.47,04,58,042/- from the book profit on the ground that after revaluation of the assets of certain*

brands having the net book value of Rs.473 Cr. were written off and charged to Capital redemption reserve and securities premium during A.Y. 2007-08. The amount written off pertains to brand Manjal and Nihar acquired in A.Y. 2006-07 and Fiancee and Haircode acquired in A.Y. 2007-08. There is no provision in section 115JB for granting deduction for the amortization not charged in the profit and loss account on a notional basis. The department has consistently denied the deduction to the book profit claimed by the assessee from A.Y. 2010-11 onwards. However, during the assessment proceedings for the A.Y. 2014-15, the notional amortization amount of Rs.47,04,58,042/- was remains to be added back by the assessing officer. This has resulted into under assessment of Rs.47,04,58,048/- and income chargeable to tax of equal amount has escaped assessment within the meaning of clause (c) explanation 2 of section 147 of the income Tax Act, 1961.

3) In view of the above, I have reason to believe that income amounting to Rs. 47,04,58,042/- chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts within the meaning of section 147 of the Income-tax Act, 1961 for the A.Y. 2014-15. Hence, it is a fit case for issue of notice u/s.148 of the I.T.Act, 1961'.

(vi) The Petitioner by its letter dated 14 May 2010 objected to the re-opening notice on the ground that it is without jurisdiction inasmuch as it is based on change of opinion. This very issue/reason for reopening the assessment was subject matter of consideration during the regular assessment proceedings, leading to the assessment

order dated 30 January 2018.

(vii) The Assessing Officer by an order dated 9 June 2019 rejected the objections by holding that basis of the reopening notice is not on account of change of opinion. This for the reason that the Assessing Officer had not formed any opinion with regard to the same in the order dated 30 January 2018 passed under Section 143(3) of the Act, as there is no discussion on it, in the impugned order dated 30 January 2018.

4. Mr. Pardiwala, learned Senior Advocate appearing in support of the Petition submits as under :-

(a) Although the impugned notice for reopening has been issued within a period of four years from the end of Assessment Year i.e. 2014-15, yet the jurisdiction to reopen an assessment cannot be exercised on account of change of opinion. It is submitted that jurisdiction to re-open an assessment is not a jurisdiction to review an order as held by the Apex Court in *CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561;*

(b) In this case a specific query with regard to the issue which forms the basis of the reopening notice was raised during the regular assessment proceeding under Section 143(3) of the said Act. The Petitioner's explanation to the above specific queries was

accepted, as no disallowance on above amounts was done to arrive at book profits in the assessment order dated 30 January 2018. Thus, on facts the reopening notice is on account of change of opinion; and

(c) No discussion in the Assessment Order dated 30 January 2018, would not mean that the Assessing Officer had not formed any opinion. This more particularly so, as query on this aspect was raised by the Assessing Officer and responded to by the Petitioner to the satisfaction of the Assessing Officer during the assessment proceedings.

5. Per contra, Mr. Walve, learned Counsel for the Respondents in support of the impugned notice submits :

(a) That the impugned notice has been issued within a period of four years from the end of the relevant Assessment Year, therefore mere disclosure of all material facts truly and fully will not oust the jurisdiction of the Assessing Officer to issue a reopening notice; and

(b) There is no change of opinion, for the reason that the Assessing Officer while passing the Assessment order dated 30 January 2018 under Section 143(3) of the Act had not formed any opinion on the issue. The opinion, if any, should find mention in the order by way of adjudication. Thus reopening notice is not on

account of opinion to one formed in the assessment order dated 30 January 2018 under Section 143(3) of the Act. Thus the Petition be dismissed.

6. We have considered the rival submissions. It is a settled position in law that the power to reopen an assessment within a period of four years from the end of the relevant assessment year, even when the assessment has been made under Section 143(3) of the Act, is not curtailed by the proviso to Section 147 of the Act. Therefore, even where an assessee has disclosed all material facts truly and fully for assessment and assessment is completed under Section 143(3) of the Act, the reopening is permissible within a period of four years from the end of the relevant assessment year. The only condition precedent for exercising the jurisdiction to reopen an assessment, is the Assessing Officer should have reasonable belief that income chargeable to tax has escaped assessment. This reason to believe that income chargeable to tax has escaped assessment should not be on the basis of change of opinion, as otherwise the power of reassessment would become a power of review, which it is not.

7. The Apex Court in *Kelvinator of India Ltd.* (supra), has while setting out the parameters for the exercise of powers of reopening an assessment had *inter-alia* observed as under :-

> *" However, one needs to give a schematic*

> *interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

8. In the present facts, we note that the Assessing Officer during the course of regular assessment proceedings leading to the assessment order dated 30 January 2018, on basis of the profits and loss account and balance sheet and the practice for the earlier years i.e. Assessment Year 2013-14 had issued notice on 25 September 2017 to the Petitioner to show cause why the amount of Rs.47.04 crores being claimed as book depreciation on intangibles should not be disallowed to determine book profits under Section 115JB of the Act. The above query of the Assessing Officer was responded to by the Petitioner in great detail by its letters dated 10 October 2017 and 21 December 2017. It justified its claim for deductions by placing

reliance upon the decisions of the Courts. In support of its contention that they are entitled to deduction of the current years depreciation from the net profit to arrive at the book profits under Section 115JB of the Act. It was also explained that under sub-section 6 of Section 211 of the Companies Act, reference to a balance sheet or profit and loss account would also include any notes thereto or documents annexed thereto. Thus the notes to the account should be taken into account to determine the net profits for working out the book profits in terms of Section 115JB of the Act. The Assessing Officer thereafter proceeded to pass an assessment order dated 30 January 2018 under Section 143(3) of the Act and did not make the proposed dis-allowance.

9. It is made clear that for the purpose of this petition, we are not called upon to and therefore not examining the correctness or otherwise of the disallowance of depreciation to arrive at book profits. Our examination is limited only to jurisdiction of the Assessing Officer to reopen the assessment.

10. It is undisputed position before us, that query was raised on the very issue of reopening during regular Assessment proceedings. The parties have responded to it and the Assessment Order dated 30 January 2018 makes no reference to the above issue at all. However, once a query has been raised by the Assessing Officer during the assessment proceedings and the assessee has

responded to that query, it would necessarily follow, as held by our Court that the Assessing Officer has accepted the Petitioner's/Assessee's submissions, so as to not deal with that issue in the assessment order. In fact, our Court in *GKN Sinter Metals Ltd. V/s. Ms. Ramapriya Raghavan, Assistant Commissioner of Income Tax, Circle 2(1) (371) ITR 225* had occasion to dealt with the similar/identical submissions on behalf of the Revenue viz. that an assessment order passed under Section 143(3) of the Act does not reflect any consideration of the issue, it must follow that no opinion was formed by the Assessing Officer in the regular assessment proceedings. This submission was negatived by this Court by observing as follows :-

> *14. According to the Revenue, it could only be when the assessment order contains discussion with regard to particular claim can it be said that the Assessing Officer had formed an opinion with regard to the claim made by the assessee. This Court in Idea Cellular Ltd. v/s. Deputy Commissioner of Income Tax 301 ITR 407 has expressly negatived on identical contention on behalf of the Revenue. The Court held that once all the material was placed before the Assessing Officer and he chose not to refer to to the deduction/ claim which was being allowed in the assessment order, it could not be contended that the Assessing Officer had not applied his mind while passing the assessment order. Moreover in this case, it is evident from the letter dated 6 th August, 2007 addressed by the Assessing Officer to the Petitioner containing the reasons recorded for issuing the*

impugned notice also record the fact that during the regular assessment proceedings, the Petitioner has been asked to furnish details in support of the claim for exemption under Section 80IA/IB of the Act. The letter further records that the details sought for were furnished and it is now observed that there has been a disproportionate distribution of expenses between various units belonging to the Petitioner for claiming deduction under Section 80IA/IB of the Act. This is a further indication of the fact that the Assessing Officer had during the regular assessment proceedings for Assessment Year 200203 sought information in respect of the allocation of expenses and the explanation offered by the Petitioner was found to be satisfactory. This is evident from query dated 27th December, 2004 and the Petitioner's response to the same on 25 th January, 2005 explaining the manner of distribution of common expenses for delaying the process of claiming deduction under Section 80IA/IB of the Act. All this would indicate that Assessing Officer had formed an opinion while passing the order dated 9 th March, 2005. This Court in Aroni Commercials Ltd. v/s. Assistant Commissioner of Income Tax 367 ITR 405 had occasion to consider somewhat similar submission made by the Revenue and negatived the same by holding that when a query has been raised with regard to a particular issue during the regular assessment proceedings, it must follow that the Assessing Officer had applied his mind and taken a view in the matter as is reflected in the Assessment Order. Besides, the manner in which an Assessing Officer would draft/frame his order is not within the control of an assessee. Moreover, if every contention raised by the assessee which even if accepted is to be reflected in the assessment order, then as observed by the Gujarat High Court in CIT v/s. Nirma Chemicals

> *Ltd. 305 ITR 607, the order would result into an epic tome. Besides, it would be impossible for the Assessing Officer to complete all the assessments which have to under gone scrutiny at its hand. In the above view, it is clear that once a query has been raised during the assessment proceedings and the Petitioner has responded to the query to the satisfaction of the Assessing Officer as is evident from the fact that the Assessment Order dated 9th March, 2005 accepts the Petitioner's claim for deduction under Section 80IA/IB of the Act. It must follow that there is due application of mind by the Assessing Officer to the issue raised.*

The above observations apply on all fours to this Petition, so far as the Revenue's submission of no change of opinion is concerned.

11. The further submission of Mr. Walve that in the absence of the Assessing Officer adjudicating upon the issue it cannot be said that the Assessing Officer had formed an opinion during the regular assessment proceedings leading to the order dated 30 January 2018. An adjudication would only be on such issue where the assessee's submissions are not acceptable to the Revenue, then the occasion to decide a lis would arise i.e. adjudication. However, where the Revenue accepts the view propounded by the assessee in response to the Revenue's query, the Assessing Officer has certainly to form an opinion whether or not the stand taken by the assessee is acceptable. Therefore, it must follow that where queries have been raised during the assessment proceedings and the assessee has responded to the

same, then the non-discussion of the same or non-rejection of the response of the assessee, would necessarily mean that the Assessing Officer has formed an opinion accepting the view of the Assessee. Thus an opinion is formed during the regular Assessment proceedings, bars the Assessing Officer to reopen the same only on account of a different view.

12. Thus we find that the reasons in support of the impugned notice is the very issue in respect of which the Assessing Officer has raised the query dated 25 September 2017 during the assessment proceedings and the Petitioner had responded to the same by its letters dated 10 December 2017 and 21 December 2017 justifying its stand. The non-rejection of the explanation in the Assessment Order would amount to the Assessing Officer accepting the view of the assessee, thus taking a view/forming an opinion. Therefore, in these circumstances, the reasons in support of the impugned notice proceed on a mere change of opinion and therefore would be completely without jurisdiction in the present facts. Accordingly, the impugned notice dated 27 March 2019 is quashed and set aside.

13. Petition allowed.

NITIN JAMDAR, J. M.S. SANKLECHA, J .