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

WRIT PETITION NO.801 OF 2005

M/s. Allanasons Limited]
a Company registered under the]
Companies Act, 1956 having its]
Registered Office at Allana House,]
Allana Road, Colaba, Mumbai 400 001.] .. Petitioner.

V/s.

1 The Deputy Commissioner of Income]
Tax Circle 1(1), having his office at]
Room No.533, Aayakar Bhavan,]
M. K. Road, Mumbai 400 020.]
2 The Additional Commissioner of]
Income Tax Range I, having his]
office at 5th Floor, Aayakar Bhavan,]
M. K. Road, Mumbai 400 020.]
3 The Commissioner of Income Tax,]
City I, having his office at 3rd Floor,]
Aayakar Bhavan, M. K. Road,]
Mumbai 400 020.]
4 Union of India, having his office at]
Aayakar Bhavan, M. K. Road,]
Mumbai 400 020.] .. Respondents.

Mr. Jitendra Jain with Mr. Murlidharan V. C. i/b. M/s. Joy Legal Consultants, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

CORAM: M.S.SANKLECHA, &
G.S. KULKARNI, JJ.
DATE : 17th JUNE, 2014.

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

The Petition under Article 226 of the Constitution of India, assails the notice dated 10th January 2005 issued under Section 148 of the Income Tax Act, 1961 (the Act). By the impugned notice dated 10th January 2005, the Assessing Officer has sought to re-open the assessment for the Assessment Year 1998-99.

2 The relevant facts necessary for disposing of the Petition are as under:-

(a) For the Assessment Year 1998-99, the Petitioner filed its return of income declaring its income at Rs.2.47 Crores. The income of Rs.2.47 Crores was arrived at by claiming a deduction of Rs.17.67 Crores under Section 80HHC of the Act;

(b) On 7th March 2001, the Assessing Officer passed an Assessment Order under Section 143(3) of the Act, determining the Petitioner's income at Rs.9.57 Crores. This was so determined after having reduced the deduction under Section 80HHC of the Act to Rs.10.67 Crores;

(c) On 10th January 2005, the impugned notice under Section 148 of the Act was issued, seeking to re-open the assessment for the Assessment Year 1998-99. Thereafter on 28th January 2005, the reasons recorded for re-opening were furnished to the Petitioner. The reasons recorded at the time of issuing the impugned notice reads as under:-

"Assessee has been allowed deduction u/s. 80HHC as under:-

Trading profit	*Rs.5,29,09,932/-*
Profit from manufacturing	*Rs.7,00,54,773/-*
Deduction on incentives	*Rs.12,38,59,372/-*
Deduction allowed	*Rs.10,67,14,531/-*

When the deduction was allowed the judgment of Mangalya Trading and Investment Ltd (ITA 6354/Mum./98 dt. 23/4/2004) was not available at the time of completion of assessment u/s. 143(3). The decision of ITAT Mumbai has been endorsed by the Hon'ble High Court in the case of Rohan Dyes & Intermediates Ltd. v/s. CIT dated 9/8/2004. In view of these judgments the deduction u/s. 80-HHC would not available on the balance incentives, even where the 90% of the incentives exceeds the (Net) loss from the exports. As per judgment of IPCA Laboratories Ltd. of Supreme Court (266 ITR 521) and the losses in export of trading goods should be adjusted against the profits of manufacture goods for vis-a-versa while computing the deduction u/s. 80-HHC. Therefore, in view of the decision of IPCA Laboratories Ltd. and Rohan Dye and Intermediates Ltd, the deduction u/s. 80-HHC will not available on balance incentives if there is no net profit from trading and manufacturing export.

After adjusting the loss of Rs.7,00,54,773/- from manufacturing export against trading profit of Rs.5,29,09,932/-, there is net loss of Rs.1,71,44,841/-. Since the assessee do not have profit from exports, the deduction on incentives is not available in view of decision of Rohan Dye & Intermediates Ltd. cited above. Therefore, I have reason to believe that income has escaped assessment. Approval has been granted by CIT-I, Mumbai vide letter dt. 6/1/2005 for re-opening assessment u/s. 147. Therefore, assessment proceeding are re-opened u/s. 147. Issue notice u/s. 148 of the I.T. Act."

(d) The assessee filed its objections and in particular urged that the impugned notice dated 10th January 2005 is without jurisdiction. This was on the ground that the impugned notice is issued after the expiry of four years from the end of the Assessment Year 1998-99

and the reasons recorded do not indicate any failure on the part of the Petitioner to fully and truly disclose all material facts necessary for assessment. Besides, other objections were also raised; and

(e) By an order dated 28th February 2005, the Assessing Officer rejected the Petitioner's objections to re-opening of the assessment for Assessment Year 1998-99. It was only in the order rejecting the objections that the Assessing Officer alleged for the first time that the Petitioner had failed to truly and fully disclose all material facts necessary for assessment.

3 It is this notice dated 10th January 2005 and the consequent order dated 28th February 2005 rejecting Petitioner's objections to re-opening of the assessment for the Assessment Year 1998-99 which is challenged in this Petition. This Petition was admitted on 19th April 2005 and the revenue was restrained by an interim order from acting on the impugned notice dated 10th January 2005.

4 Mr. Jain, learned Counsel appearing in support of the Petition submits that :-

(i) the reasons as recorded for issuing the impugned notice dated 10th January 2005 does not mention any failure on the part of the Petitioner to fully and truly disclose all material facts necessary for assessment. Thus, in view of the decision of this Court in ***Hindustan Lever Ltd. v/s. R. B. Wadkar 268 ITR 332***, the impugned notice is without jurisdiction;

(ii) in any case, the reasons as recorded for issue of impugned notice

dated 10th January 2005 do not indicate any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for assessment. The aforesaid requirement is sine-qua-non for issue of a notice beyond a period of four years from the end of the relevant Assessment Year i.e. Assessment Year 1998-99 for re-assessment; and

(iii) the only basis for issuing the impugned notice dated 10th January 2005 as recorded in the reasons is subsequent decisions of Tribunal and Courts. It is a settled position in law that decisions rendered by Court subsequent to assessment orders do not by itself amounts to failure to fully and truly disclose all material facts necessary for assessment.

In view of the above, it is submitted that the Petition be allowed.

5 As against the above, Mr. Suresh Kumar, learned Counsel appearing for the respondent-revenue in support the impugned notice dated 10th January 2005 as well as the order rejecting the objections dated 28th February 2005 urges as under:-

(i) It is open to the Assessing Officer to re-open the assessment passed under Section 143(3) of the Act in view of decision rendered subsequent to the assessment order passed by the Assessing Officer. In support, reliance is placed upon the decision of the Apex Court in the matter of ***A.L.A. Firm v/s. Commissioner of Income Tax 189 ITR 2085;*** and

(ii) In any case, the reasons rejecting the objections on 28th February

2005 allege failure on the part of the Petitioner to make full and true disclose all material facts necessary for assessment.

Therefore, the impugned notice is valid in law and the Petition be dismissed.

6 It is well settled that in terms of the proviso to Section 147 of the Act any assessment sought to be opened beyond a period of four years from the end of the relevant Assessment Year, the twin jurisdictional conditions have to be cumulatively satisfied :-

(a) there must be a reason to believe that income chargeable to tax has escaped the assessment; and

(b) such escapement of income should have arisen on account of failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment.

Further as held by this Court in Hindustan Lever Ltd.(supra) the exercise of jurisdiction has to be examined on the basis of the reasons recorded at the time of issuing the impugned notice. It is not open to the Revenue to substitute or make addition to the reasons recorded at the time of issuing the impugned notice.

7 In the light of the above position in law for exercise of jurisdiction, we would consider the present facts in the light of the submissions made before us.

8 We shall first examine the submission of Mr. Jain, the learned Counsel for the Petitioner that in the absence of the reasons for re-opening

mentioning 'failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment', the re-opening notice under Section 148 of the Act is without jurisdiction. In support, reliance is placed on the decision of Hindustan Lever Ltd.(supra). The observations which support is the Petitioner are:-

> ***"20:-*** *The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. 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. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making an oral submission, otherwise, the*

reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the Court, on the strength of the affidavit or oral submissions advanced."

The aforesaid observations of our Court must be read in the light of the reasons recorded by the Assessing Officer for re-opening in the above case at paragraph 11 which reads as under:-

"11:- *On being noticed, respondents appeared and filed their counter affidavit disclosing the reasons recorded prior to the issuance of the notice under Section 148. The said reasons recorded read as under :*

"From the notes to the audited accounts, it is seen that while valuing closing stock, central excise and customs duty leviable on stock lying in godown was not considered as forming part of cost of the closing stock. Although no such duty was paid during the relevant previous year, liability to pay such duty arises immediately on manufacture of excisable goods. Also, Board's Instruction No. 1389 dated March 24, 1981, provides for inclusion of central excise and custom duty in valuation of inventory. In view of this position, I have reason to believe that income chargeable to tax has escaped assessment inasmuch as excise and customs duty leviable, Rs. 5.85 crores has not been added to the value of the closing stock, while completing the scrutiny assessment under Section 143(3) on 29th Jan., 1999."

It would, therefore, be noticed that on reading of the reasons recorded as a whole it would not lead to a conclusion that there was any failure on the part of the assessee therein to disclose truly and fully all material facts necessary for assessment. It was in the above context that observations of non-averment of failure to disclose all facts truly and fully were made. We are of the view that the words "failure on the part of the assessee to disclose fully and truly all material facts necessary for

assessment" is not a magician's mantra which alone would give jurisdiction to re-open an assessment. Just as it would not be open to the revenue to urge that the mere use of words 'failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment', the abscenee of the above words will not by itself oust the jurisdiction to re-assess. We are of the view that if on reading of the reasons recorded as a whole implies/ points/ evidences a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, then the exercise of jurisdiction cannot be faulted. We, therefore, do not accept the submission that the absence of the words 'failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment' would make the issue of notice under Section 148 of the Act without jurisdiction.

9 However, in the facts of the present case, the reasons as recorded, when read as a whole do not indicate even remotely any failure on the part of the Petitioner to disclose fully and truly any material facts necessary for assessment. The only reason recorded in this case by the Assessing Officer for re-opening is the subsequent decisions of Tribunal and Courts. There is no whisper of any facts indicating that the Petitioner had not having disclosed any fact which led to a reasonable belief that income chargeable to tax has escaped assessment. Therefore, in the present facts, we are clearly of the view that the reasons as recorded for issuing the impugned notice dated 10th January 2005 do not satisfy the jurisdiction requirement in case of notice issued beyond a period of four years from the end of the relevant Assessment Year i.e. 1998-99.

10 The contention of Mr. Suresh Kumar, learned Counsel appearing for the Revenue that the order rejecting the objections dated 28th February 2005 did allege failure to disclose truly and fully all material facts and the same would be therefore satisfy the jurisdictional requirement. In view of the decision of this Court in Hindustan Lever Ltd. (supra) as found in paragraph 20 thereof quoted herein above, we are required to only examine the reasons recorded at the time of issuing the impugned notice dated 10th January 2005 under Section 148 of the Act to ascertain whether or not the Assessing Officer has jurisdiction to re-open the assessment. On examination of the reasons, we have come to the conclusion that the impugned notice does not satisfy the jurisdictional requirement of reasonable belief that income chargeable to tax has escaped assessment on account of the assessee failure to disclose truly and fully material facts necessary for assessment.

11 Moreover, the reasons recorded at the time of issuing the impugned notice itself relied upon various decisions of the Court rendered subsequent to the Assessment Year to conclude that there has been an escapement of income. This escapement of income by itself would not give jurisdiction to the Assessing Officer to open an assessment beyond a period of four years of assessment unless it is coupled with a failure to disclose truly and fully disclose all material facts necessary for the assessment. This Court in the matter of ***DIL Ltd. v/s. Assistant Commissioner of Income Tax and Others 346 ITR 296*** while dealing with a Petition where notice was issued beyond a period of four years on the basis of the amendment in to Section 115(j)(b) of the Act with retrospective effect from 1st April 2001 has observed that *" In view of*

the retrospective amendment of law by Parliament, the Assessing Officer may have reason to believe that income has escaped assessment. But that in itself is not sufficient for reopening an assessment beyond the period of four years. Beyond the period of four years when an assessment is sought to be reopened, there must be a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment." In the above facts, this Court concluded that re-opening of an assessment beyond a period of four years from the end of the Assessment Year in the absence of any failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment would not give jurisdiction to issue notice under Section 148 of the Act.

12 Before parting, we may point out that the reliance placed by Mr. Suresh Kumar, learned Counsel appearing for the Revenue upon the decision of the Apex Court in the matter of A.L.A. Firm (supra) is not applicable to the present facts. For the reason that the above case did not deal with decisions rendered by Court after the conclusion of the Assessment Year or after passing of the Assessment Order as in this case but it dealt with situation where the original Assessment Order was passed overlooking a binding decision of Court in existence at the time when the order was passed. Besides, the decision dealt with the normal period of limitation and not the extended period of limitation as in the present case. Moreover, it dealt with the preamended Section 147 of the Act. Therefore, the aforesaid decision is not applicable to the facts in the present case.

13 In view of the above, we allow the Petition in terms of prayer clause (a). No order as to costs.

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