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

WRIT PETITION NO. 649 OF 2013

M/s. Indusind Media & Communications Ltd.
In Centre, 49/50, MIDC,
12th road, Andheri (E), Mumbai-400093. …Petitioner

Versus

The Assistant Commissioner of Income Tax 11(1)
Aayakar Bhavan, M.K.Road,
Mumbai-400020. …Respondent

Mr Mihir Naniwadekar a/w Ruturaj Gurjar, for Petitioner.
Mr Suresh Kumar, for Respondent.

CORAM: **M.S. Sonak &**
Jitendra Jain, JJ.
DATE : **20 February 2025**

JUDGMENT (Per Jitendra Jain, J.):-

1. This petition, under Article 226 of the Constitution of India, challenges a notice under Section 148 of the Income Tax Act, 1961 ('the Act') dated 30 March 2012 for assessment year 2007-08. Rule and interim relief were granted on 23 June 2014.

Brief Facts : -

2. The petitioner filed its return of income on 29 October 2007, which return was revised on 31 March 2009. In the revised computation of income, the petitioner claimed as

deduction an amount of Rs.69,88,37,464/- being Inventories, Sundry Debtors, Loans & Advances and Cost of Set Top Boxes written off against the Share Premium pursuant to amalgamation scheme approved by the High Court. The case of the petitioner was selected for scrutiny assessment.

3. On 7 December 2009, the petitioner filed written submissions wherein it had mentioned various write off against the share premium account in accordance with the amalgamation order passed by this Court on 9 February 2007. The petitioner also gave its submissions on business loss & bad debts in respect of the Inventories, Sundry Debtors, Loans & Advances amounting to Rs.9,05,12,555/-, Rs.41,00,00,000/- and Rs. 12,99,12,471/- respectively. The petitioner in paragraph 20 of the said letter also gave its submission with respect to a claim of Rs.6,84,12,438/- on account of write off of Set Top Boxes.

4. On 30 December 2009, an assessment order under Section 143 (3) of the Act was passed. In the said assessment order, an amount of Rs.1,00,41,557/- was disallowed on account of bad debts. The income assessed was Nil after setting off unabsorbed business losses and depreciation.

5. On 30 March 2012, the impugned notice under Section 148 of the Act was issued to the petitioner. The petitioner was served with the reasons for reopening assessment vide letter dated 22 May 2012 and the reasons read as under : -

"On perusal of assessment records relating to A.Y.2007-08, following discrepancy has been noted:

"The assessee company in the business of cable operation and film distribution. The assessee filed original return of income in October 2007 and subsequently revised return of income was filed in March 2009 declaring total income at rupees Nil to correct mistakes in the capital gains working, disallowance under section 14A, rectification for claim of set-off of unabsorbed losses and application under section 72A.The assessment for Assessment Year to 2007-08 was subsequently completed after scrutiny in December 2009 assessing total income at rupees Nil.

It is seen from records that a scheme of amalgamation between Network Entertainment Ltd and In2 Cable (India) Limited and Industry Media and Communications Ltd. was submitted before Honourable Bombay High Court which was approved by High Court vide order dated 09. 02. 2007 effective from 01. 04. 2006. As per scheme the transferee company shall utilise by way of adjustment a sum of Rs. 85 crores in the of the aggregate of the balance standing in the Securities Premium Account of the Transferee Company as on 31st March 2006 for utilising by way of adjustment of :

a . Goodwill at Rs. 14 course
b . Inventory-of Rs. 14 crore
c . Receivable of Rs. 41 crore
d . Advances at Rs. 15 crores
e . Investments at Rs. 1 crore

The application and consequential reduction of Securities Premium Account is an integral part of the Scheme itself. The utilisation and consequential reduction of the Security Premium Account does not involve either diminution of liability in respect of unpaid share capital or payment to any shareholders. Accordingly as per approved Scheme of amalgamation assessee company has adjusted Securities Premium Account to the extent of Rs. 82.08 crores (ie Goodwill-Rs 13.55 corrodes, Investment Rs. 54 lakhs, Inventory is Rs. 14 course, Sundry Debtors Rs. 41 crores and Loan and Advances of Rs. 13 course) However it is noticed that assessee company had claimed and department had allowed deduction of Rs.53,99,12,471/-under section 36 (1) (Vii) on account of 'Bad Debts (Sundry Debtors-Rs.41 crores and Loan and Advances Rs. 12,99,12,471/-) already adjusted against Securities Premium Account and Rs.15,89,24,993/-under section 37 (1) under the

head "Inventories (Inventories of Rs 9,05,12,555 and Cost of Set-Top boxes sold of Rs.6,84,12,438/-) written off which were also registered against Securities Premium Account as per Scheme of amalgamation. Audit scrutiny revealed that while computing income as per normal provisions of the Act, these amounts were again claimed as deductible under section 36 (1) (Vii) and 37 (1) of the Act as party's accounts are written off. Thus in the present case the assessee company had not charged Bad Debts and inventories off to Profit and Loss Account. Moreover the allowance of these amounts which were in fact already adjusted against Share Premium Account against the income computed under normal provisions of the Act was also violation of scheme of arrangement approved by Honourable High Court. Accordingly the same were required to be disallowed. The omission to disallow the same had resulted in under assessment of Rs.69,88,37,464/- involving revenue impact of Rs 23,52, 28,690/-.

On account of facts and circumstances as above, I have reasons to believe that taxable income of Rs.69,88,37,464/- has escaped assessment for A.Y.2007-08 and I am satisfied that it is fit case for re-opening u/s 147 of the I.T. Act. If administratively approved, notice u/s 148 may be issued to the assessee."

6. On 3 November 2012, the petitioner filed its objections to the aforesaid reasons recorded for reopening the case. Briefly, the petitioner called upon the respondent to furnish audit scrutiny report on the basis of which the reopening proceedings were initiated. The petitioner also stated that the issue raised in the reasons recorded were examined during the course of the scrutiny proceedings and, therefore, the impugned proceedings are based on change of opinion which is not permissible. The petitioner also denied that there is any escapement of income on account of double deduction of the same amount. The petitioner specifically raised the objection that the date of recording the reasons has not been furnished and, therefore, it was submitted that the reasons have not

been recorded prior to issue of notice. The petitioner prayed for dropping the proceedings.

7. On 17 January 2013, the respondent disposed of the objections by reproducing the reasons recorded and the objections filed by the petitioner. The only reasoning in the said order rejecting the objections is paragraph 6.7 which reads as under :-

> *"6.7 The assessing officer, who has completed the assessment originally had discussed the disallowance claim for bad debts only to the extent of advances written off relatable only to "Related Parties" of the assessee and has not dealt with the overall claim for "Write off" of bad debts relatable to other items of amounts written off ie., inventories, sundry debtors, loan and advances, cost of set top boxes other that those considered in the assessment order. On perusal of the assessment order passed u/s.143(3), it is noticed that the above items were not at all discussed and as a result of which the income has escaped and is under assessed."*

8. Being aggrieved by the above order rejecting the objections, the petitioner challenged the reassessment proceedings by approaching this Court and this Court granted Rule and interim relief on 23 June 2014.

9. Mr. Naniwadekar, learned counsel for the petitioner submitted that inspite of specific objections being raised with respect to the date of recording the reasons, the same has not been provided, nor in the reply it is stated as to when the reasons were recorded. He submits that in the absence of any date and on a specific plea being taken by the petitioner, it should be inferred that the reasons have not been recorded before issuing the notice under Section 148 and, therefore,

the proceedings are *ab initio void*. He further submitted that there is no rebuttal to the objection raised by the petitioner in the order rejecting the objections except stating that in the assessment order, the discussion is only with respect to bad debts of related parties and in the absence of any discussion on other issues, income has escaped assessment. Learned counsel further submits that although the reassessment is within 4 years but the issue was examined in the course of the assessment proceedings and therefore the impugned proceedings are bad-in-law. In support of his various submissions, he has relied upon the decisions in the case of ***Indian & Eastern Newspaper Society Vs. Commissioner of Income-tax***[1]***, Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-tax-2(1)***[2]***, Ankita A. Choksey Vs. Income Tax Officer-19(1)(1) & Ors.***[3] *and* ***Mrs. Parveen P. Bharucha Vs. Deputy Commissioner of Income-tax, Circle 2, Pune***[4] and prayed for quashing the impugned proceedings.

10. Mr. Suresh Kumar, learned counsel for the respondent defended the initiation of the proceedings by submitting that the reassessment proceedings are initiated within a period of 4 years and, therefore, the Officer is justified in issuing the impugned notice. He further submitted relying upon the reasons recorded that the reference to audit is with respect to the fact that there is a double deduction by the petitioner of

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1 (1979) 2 Taxman 197 (SC)

2 (2014) 44 taxmann.com 304 (Bombay)

3 Writ Petition No.3344 of 2018 decided on 10 January 2019.

4 (2012) 28 taxmann.com 274 (Bom.)

the same amount and, therefore, there is escapement of income. He submitted that since the audit scrutiny is with respect to the facts and not on the law, the Officer was justified in initiating reassessment proceedings. He, therefore, prayed for dismissal of the petition.

11. We have heard the learned counsel for the petitioner and the respondent and have perused the documents annexed to the petition and affidavit in reply filed by the respondent.

12. It is by now settled position that even if the reassessment proceedings are initiated within a period of 4 years from the end of the relevant assessment year, reassessment proceedings cannot be initiated based on change of opinion since same would amount to review of the order which is not permissible under the Act.

13. In the instant case before us, the petitioner vide letter dated 7 December 2009 had filed its submissions on write off of various amounts, including the items which are the subject matter of the reassessment proceedings. In the said submission, there is a reference to the amalgamation order of this Court on the basis of which the amounts were written off in the books of account. In paragraph 2 of the said letter, the justification for write off of Inventories, Sundry Debtors and Loans & Advances amounting to Rs.9,05,12,555/-, Rs.41,00,00,000/- and Rs. 12,99,12,471/- respectively was submitted and the details of these 3 items were also filed along with the said letter by way of various annexures and

various case laws were relied upon in support of the claim. The petitioner also made its submissions on the provision of Section 36(1)(vii) and Section 36(2) of the Act. The petitioner in paragraph 20 also gave its submissions on right off of Rs.6,84,12,438/- on account of set top boxes. The petitioner specifically stated that all these amounts were set off against the Share Premium Account as per the High Court order and in the computation of income it was specifically claimed as deduction since these items were not debited to the profit and loss account but were reduced from the Share Premium Account. The assessing officer in the assessment order records that the petitioner appeared on various dates and filed the details called for. In the assessment order disallowance on account of bad debts was made of Rs.1,00,41,557/-. However, since the assessment proceedings and assessment order are not adversarial proceedings, the issues on which the queries were raised and replied vide letter dated 7 December 2009 and which were accepted does not figure in the assessment order.

14. It is not necessary that each and every item of query should appear itself in the assessment order. It is only those items or issues where there is a difference of opinion between the assessee and the assessing officer that discussion is required to appear in the assessment order. Therefore, merely because the assessment order does not discuss the issues on which the queries were raised and no addition/disallowance

was made, it cannot be said that there is no application of mind on the issue.

15. The fact that the query was raised, reply filed and accepted by not making any addition/disallowance in the assessment order clearly shows that the officer was satisfied with the replies. Therefore, any attempt thereafter to reopen the case on the very same material would amount to review of the order passed by the predecessor which is not permissible. The petitioner is justified in relying upon the decision of the Full Bench of Delhi High Court in the case of ***Commissioner of Income-tax Vs. Usha International Ltd.***[5] for this proposition.

16. In the reply of the respondent, it is stated that the letter dated 7 December 2009 does not contain any submissions on the issues which are sought to be reopen. We are afraid to accept this submission because on a perusal of letter dated 7 December 2009 the issues for which the reopening is sought were the subject matter of the submissions made by the petitioner and the same is self evident on a perusal of the same. Therefore, in our view, the reopening cannot be sustained on account of the fact that the issue was examined during the course of the assessment proceeding.

17. It is also important to note that in the objections to the reasons recorded, the petitioner had specifically raised a plea that there is no double deduction of the same amount. There is no rebuttal to this objection by assessing officer in his order

[5] (2012) 25 taxmann.com 200

dealing with the objections and therefore it would be safe to conclude that the officer has accepted that there is no double deduction. In any case on the directions of the Court, Profit and Loss account was proudced in which these items do not appear to have been debited and therefore, no case is made for double deduction. Therefore, even on this count the basis of reopening falls to ground.

18. The four items namely Inventories, Sundry Debtors, Loans & Advances and Cost of Set Top Boxes sold amounting to Rs.69,88,37,464/- which are subject matter of reassessment proceedings were reduced from the Share Premium Account and claimed as deduction in the computation of income. The treatment given by the petitioner against the Share Premium Account is a balance sheet item and not routed through the profit and loss account. Therefore, the petitioner made a claim in the computation of income while offering its income under the Income-tax Act. The assessing officer himself accepts in the reasons recorded that these items have not been charged to profit and loss account. We fail to understand that if these items are not charged to the profit and loss account then how can it be said that there is a double deduction. On a query being raised by this Court, the respondent has not justified the issue of the petitioner claiming double deduction of the same amount for which the reopening was sought. Therefore, even on this count the impugned proceedings are required to be quashed and set aside.

19. The petitioner is justified in relying upon the decision of this Court in the case of ***Aroni Commercials Limited (Supra)*** where the Co-ordinate Bench has held that even in case of reopening within 4 years from end of the assessment year if the issue was examined in the course of the assessment proceedings then no reopening of assessment can be done since the same would amount to change of opinion. In our view, the ratio of this decision supports the case of the petitioner.

20. The petitioner is also justified in relying upon the decision of the Co-ordinate Bench in the case of ***Ankita Choksey (Supra)*** wherein the Court had observed that when an assessee points out in its objection that the officer has proceeded on wrong facts and the assessing officer in its order disposing of the objection does not deal with this factual position then, it should be safely concluded that the revenue does not dispute the fact stated by the assessee. In our view, the petitioner in its objections has stated that there is no double deduction of the same amount and therefore, the basis of reopening that there is a double deduction is factually incorrect. This factual averment raised by the petitioner in its objection has not been rebutted in the order rejecting the objections. Therefore, even on this count the decision relied upon by the petitioner in the case of ***Ankita Choksey (Supra)*** supports the case of the petitioner.

21. We may also note the following decisions wherein it is held that reopening is without jurisdiction if the grounds on which reopening is sought was subject matter of deliberation in the course of the assessment proceedings.

i. *Assistant Commissioner of Income-tax Vs Marico Ltd.*[6]
ii. *Marico Ltd. Vs Assistant Commissioner of Income-tax-12(3)(2)*[7]
iii. *Principal Commissioner of Income-tax Vs Century Textiles & Industries Ltd.*[8]
iv. *Principal Commissioner of Income-tax Vs Century Textiles & Industries Ltd.*[9]
v. *Cliantha Research Ltd. Vs Deputy Commissioner of Income-tax, Ahmedabad Circle – I*[10]
vi. *Commissioner of Income Tax Gandhinagar Vs Gujrat Power Corporation Ltd.*[11]

22. In view of above, the impugned notice under Section 148 of the Act dated 30 march 2012 for the assessment year 2007-08 is quashed and set aside.

23. The Rule is made absolute in the above terms. Petition is disposed of.

(Jitendra Jain, J) **(M.S. Sonak, J)**

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6 117 taxmann.com 244 (SC)
7 111 taxmann.com 253 (Bombay)
8 (2018) 99 taxmann.com 206 (SC)
9 (2018) 99 taxmann.com 205 (Bom)
10 (2013) 35 taxmann.com 61 (Gujrat)
11 (2013) 350 ITR 266 (Gujrat)