

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 16.11.2017

+ **W.P.(C) 422/2006**

KARAMCHAND APPLIANCES P.LTD. Petitioner

versus

DEPUTY COMMISSIONER OF INCOME Respondent

+ **W.P.(C) 2794/2008, C.M. APPL.5381/2008**

S.C. JOHNSON PRODUCTS PVT LTD & ANR Petitioners

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 5(1)
..... Respondent

+ **W.P.(C) 2795/2008, C.M. APPL.5383/2008**

S.C. JOHNSON PRODUCTS P. LTD. & ANR Petitioners

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 5 (1),
NEW DELHI Respondent

+ **W.P.(C) 8177/2008**

S.C.JOHNSON PRODUCTS P.LTD. FORMERLY KARAMCHAND
APPLIANCES P.LTD. & ANR. Petitioners

versus

DEPUTY COMMISSIONER OF INCOME TAX Respondent
Through : C.S. Aggarwal, Sr. Advocate with Sh.
Prakash Kumar, Advocate, for petitioners.
Sh. Ashok. K. Manchanda, Sh. Raghvendra Singh
and Sh. Anand. K. Chaudhuri, Advocates, for
Revenue.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

MR. JUSTICE S. RAVINDRA BHAT

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1. In these proceedings under Article 226 of the Constitution of India, the assessee has questioned orders issued by the Assessing Officer (AO)

proposing to re-open completed assessments for previous years. For AY 2000-01 (which is the subject matter of W.P.(C) 422/2006) the “reasons to believe” given by the AO, under Section 148 of the Income Tax Act (“the Act”) are *inter alia*, as follows:

“It has been judicially held by the Supreme Court in the cases of CIT Vs Sterling Foods 237 ITR 579 (SC), Cambay Electric Supply Industrial Co. Ltd. Vs CIT 113 ITR 84 (SC), CIT Vs Pandian Chemicals Ltd. 233 ITR 497 (SC) and by Madras High Court in the cases of CIT Vs Sundaram Industries Ltd. 253 ITR 396 (Mad.) and in the case of CIT vs Menon Impex (P) Ltd. (2003) 259 ITR 403 (Mad.) and by Kerala High Court in the case of CIT Vs Cochin Refineries Ltd. (1982) 135 ITR 278 (Ker) that the use of the term "derived from" in the relevant provision of the Act indicates the restricted meaning to cover only the profits and gains directly accruing from the conduct of business undertaking.

5. The interest income of Rs. 1,73,09,543/- is in the nature of "income from other sources" and it has not been derived from the industrial undertaking. The assessee has not disclosed the true particulars regarding this interest income and has claimed it as business income derived from industrial undertaking and consequently has claimed excess deduction u/s 80IB on it.

6. As per the provision of section 80IB where any deduction under chapter VI-A is to be allowed in respect of any income of the nature specified in that section which is included in the gross total income of the assessee, then, notwithstanding anything contained in that section, for the purpose of computing deduction under that section, the amount of income of that nature as computed in accordance with the provision of this Act (before making any deduction under this chapter) shall alone be deemed to be the amount of income of that nature which is derived or received by the assessee and which is included in his gross total income.

7. The assessee incorrectly claimed chapter VI-A deductions on income which included income from other sources i.e. interest income amounting to Rs. 1,73,09,453/- instead of restricting the deduction to the extent of income from the profits and gains of business as has been prescribed in the provisions of section 80AB. This action of the assessee has resulted in under assessment of other income by Rs. 1,73,09,453/-.”

2. In W.P.(C) 2794/2008 and W.P.(C) 2795/2008 the reassessment notice issued by the respondent assessee for AY 2003-04 and 2005-06 (both of which had been settled during regular proceedings as scrutiny assessments) was issued. The notice for AY 2003-04 observed that the return was filed, disclosing an income at ₹26,93,63,940/-; it had claimed deduction under Section 80-IB of the Act at ₹ 77,89,40,725/. The assessee manufactures mosquito repellants and has also traded, during the year in aerosols, oil spray, hand pumps, mats and coils. It had claimed deduction u/s 80-IB in respect of three units. The AO stated, in the impugned notice that:

“(a) in Para- (i) of notes of unit—wise Profit and Loss Account, the assessee had stated that trading sales have also been accounted for on the basis of actual sales to customers. The AO said that no separate particulars of trading sales were filed. Therefore, the profits derived from trading business was not eligible for deduction u/s 80-IB of the Act in respect of any unit though entire profits were taken as eligible for such deduction;

(b) The assessee’s P & L account stated that unit-wise sale was allocated in the ratio of production cost and clearance made by each unit and further, in the Notes that various expenses have been allocated on the basis of domestic sales. However, there were certain expenses claimed in consolidated Profit and Loss Account which catered to the needs of all units uniformly since there is one business of the Assessee Company and are not unit specific. Such expenses are advertisements and sales promotion ₹ 29,45,33,370/-. These expenses have to apportion according

to sales which has not been done resulting in excess claim of deduction in certain units and increased loss in certain units. The total sales of all units have been declared at ₹ 246,11,90,504/-

(c) Besides, there were other items which had been wrongly claimed as expenses and disallowance under Section 14A was not worked out.”

3. In W.P.(C) 2795/2008 (for AY 2005-06) the allegations and grounds of reassessment notice were identical. The AO felt that mixing up of trading sales and absence of unit specific profit and loss accounts led to excess deduction under Section 80IB to the extent of ₹ 1,73,77,558/-. In this petition, it is urged that the notice under Section 143 (2) was issued on 28.07.2006, but was not pursued. The assessment, therefore, was time-barred. Consequently reassessment is impermissible. Learned counsel relied on *Principal Commissioner v. Silver Line* (2016) 383 ITR 455 (Delhi)(HC) in this regard.

4. In the three writ petitions, the assessee argues that without any new or tangible materials, the AO could not have issued the impugned notices, upon a re-examination, as it were, of the existing record. It is contended that there is no suggestion in the two impugned notices that the returns did not make full disclosure; rather the materials on record showed that assessments were completed after due inquiry into the relevant issues, including the issues which the AO highlighted as relevant grounds for re-opening assessments.

5. It is argued that *Income Tax Officer v Lakhmani Mewal Dass* (1976) 103 ITR 437 (SC) holds that reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or

live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. The powers of the Income Tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "*reason to believe*" and not "*reason to suspect*". The reopening of the assessment after the lapse of many years is a serious matter. Learned counsel argued that in all the cases, the reassessment notice was clearly issued, merely to reassess and recalculate the existing materials, without the benefit of any extrinsic evidence or material that came to the knowledge of the AO. Therefore, the reassessment notices were unsustainable.

6. In W.P.(C) 8177/2008, the reassessment notice issued to the assessee by the revenue on 31.03.2008 (for AY 2001-2002) premises itself on the circumstance that in the original assessment, the assessee had claimed interest income as part of its exempt income, miscellaneous income and interest income, to the extent of ₹ 1,02,59,261/- which was not permissible, given the language of Section 80IA. Therefore, the revenue stated that the assessment had to be re-opened.

7. Mr. C.S. Aggarwal, learned senior counsel for the petitioners relied on the documents placed on record of the assessment proceedings and argued that the AO did not examine the original record; had he done so, it would have been apparent that not only was the material relied on in re-assessment proceeding not different from what was relied on originally, but even that the AO had directed material and relevant queries in the original proceeding. Learned senior counsel relied upon the decision of Supreme Court in

Commissioner of Income Tax v Kelvinator (India) Ltd (2010) 320 ITR 561, to say that in the absence of fresh “tangible” material the revenue is precluded from a second look at the assessment order as it would amount to an opinion. It is also argued that for the year 2005-06 the decision in *Principal Commissioner v. Silver Line* (2016) 383 ITR 455 (Delhi)(HC) is squarely applicable, because notice under Section 143(2) was not issued

8. The revenue contends and its counsel, Mr. Ashok. K. Manchanda argues that the reassessment notices in the three petitions does not suffer from any infirmity. The revenue realized that the excess deduction claimed by the assessee led to substantial revenue loss; before the matter could get barred, notices under Section 147/148 were issued. Reliance was placed on *Phool Chand Bajrang Lal & Anr v Income Tax Officer & Anr* [1993] 203 ITR 456 (SC), where the Supreme Court held as follows:

"27..Since the belief is that of the Income- tax Officer, the sufficiency of reasons for forming the belief, is not for the Court of judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief....."

9. It is submitted that the AO acted within jurisdiction in seeking to re-open the assessment, given the fact that the assessments based on original returns, concealed crucial relevant particulars, which were not gone into by

the authorities below. Whenever income escapement comes to light, the AO can look into the records to see whether the disclosure made was full and contained material particulars. Learned counsel relied on the decision of this court in *Commissioner of Income Tax v Usha International* 348 ITR 485 (Del), particularly the following observations:

“If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of ‘change of opinion’ will not apply. The reason is that ‘opinion’ is formed on facts. ‘Opinion’ formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of ‘change of opinion’. Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression ‘material facts’ means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

17. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong.”

Analysis and Findings

10. Section 147, to the extent it is relevant, is reproduced below:

"147. - Income Escaping Assessment - 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, assess 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 (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of section 148 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 his assessment, for that assessment year:

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2. - xxxxx xxxxx xxxxx xxxxx"..

11. This Court notices that *Phool Chand Bajrang Lal (supra)* is an authority for the proposition that acquisition of *"fresh information, specific in nature and reliable in character, relating to the concluded assessment"*

which exposes “*falsity*” of the assessee’s statement during the original statement is a legitimate basis for re-opening (the assessment). The Supreme Court pointedly noted that “*the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the I.T.O. would have the jurisdiction to reopen the concluded assessment in such a case.*” That decision had taken note of *Lakhmani Mewal Dass (supra)* and *Calcutta Discount Ltd. v. ITO* [1961] 41 ITR 191. In *Calcutta Discount Co. (supra)* it was held that the assessee’s prime obligation is to disclose fully and truly all material and relevant facts. This obligation does not extent to a responsibility to disclose what inferences can be drawn from such facts by the authorities.

12. The subsequent ruling of a three judge bench decision of the Supreme Court in *Commissioner of Income Tax v Kelvinator India Ltd* (2010) 320 ITR 561 (SC) crystallizes the acceptable standard for upholding a reassessment notice (under Section 147/148) as something beyond the existing record, in the form of “*tangible material*” available to the AO which provides a “*live link*” to the formation of a legitimate belief that reassessment is called for.

13. What is the “*tangible material*” which compelled the AO, in all these four cases, to issue the impugned reassessment notices? None absolutely. This is not a case of the kind visualized, in *Phoolchand (supra)*, where something relating to a past year comes to light in the course of assessment in a later assessment year; nor is the revenue arguing that some new and significant information about concealment of income brought to light. The revenue is indulging in fishing, by way of scrutinizing *again, something that had been specifically gone into, i.e the character of income and the extent of*

deduction claimed. Now, *Usha International (supra)* referred to by the revenue itself points out that if some aspect, vital or important, is overlooked during assessment, *per se* the remedy are not reassessment, but rather, the corrective jurisdiction under Section 263. That such jurisdiction cannot be exercised for some reasons, would not entitle the revenue to resort to reassessment, which in this case, is nothing but impermissible review. Considering that the reassessment is premised on reasons which were explicitly gone into (evident from queries to the assessee during the original assessment) for previous years, in the three writ petitions, the notices are clearly unsustainable.

14. As far as one year, covered by W.P.(C) 8177/2008, goes additionally, the court notices that reassessment is not permissible, for the reasons articulated in *Silverline (supra)*. There is no dispute that the revenue had issued a notice under Section 143 (2) but failed to complete the assessment. In these circumstances, the notice is not sustainable on this ground as well.

15. For the above reasons, the impugned reassessment notices and all subsequent proceedings are hereby quashed. The writ petitions are allowed in the above terms, without order on costs.

S. RAVINDRA BHAT
(JUDGE)

SANJEEV SACHDEVA
(JUDGE)

NOVEMBER 16, 2017