

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

WRIT PETITION NO. 2664 OF 2007

Godrej Industries Ltd., Mumbai

..Petitioner

Vs.

B.S. Singh, The Deputy Commissioner of
Income Tax, Range 10(2), Mumbai and Ors.

..Respondents

....

Mr. Farrokh Irani a/w Jitendra Jain and Atul Jasani, for the Petitioner.

Mr. A.R. Malhotra a/w N.A. Kazi, for the Respondents.

....

**CORAM : M.S. SANKLECHA &
N.M. JAMDAR, JJ.**

DATED : 21 JULY 2015

P.C.:

This petition under Article 226 of the Constitution of India challenges the notice dated 29 March 2007 issued under Section 148 of the Income Tax Act, 1961 (the 'Act'). The impugned notice seeks to reopen the petitioner's assessment for the Assessment Year 2000-01.

2 This petition was admitted on 23 January 2008 and interim relief was granted restraining the respondents from proceeding further with the impugned notice dated 29 March 2007.

3 On 30 November 2000, petitioner filed its return of income for the Assessment Year 2000-01. In its return of income, petitioner declared its total income as 'Nil' under the normal provisions of the Act and a book profit of Rs.52.70 crores. This resulted in Minimum Alternative Tax (MAT) income of

Rs.15.81 crores being 30% of such book profit under Section 115JA of the Act. The return of income filed by the petitioner was scrutinized under Section 143(3) of the Act and by order dated 28 January 2003, income under Section 115JA of the Act was enhanced from 15.81 crores to Rs.16.82 crores by the Assessing Officer.

4 Thereafter, the impugned notice dated 29 March 2007 was issued by the Assessing Officer seeking to reopen the assessment for the Assessment Year 2000-01. The reasons in support of the impugned notice as forwarded to the petitioner, reads as under:

“ On verification of the case records, it is seen that the then A.O. determined the interest element on the exempted dividend of Rs.7,74,04,508/- u/s.10(33) of the Act at Rs.38,70,000/-. In appeal, CIT(A) revised the element of interest for earning the exempted dividend at Rs.34,81,740/-. These expenses should have been added back to the net profit while arriving at book profit, according to the provisions of section 115JA of the Act.

The assessee company has debited an amount of Rs.3,82,85,000/- towards provision for Doubtful Debts and Rs.5,47,32,000/- on account of Provision for Depletion in Long term investments to the Profit and Loss Account. These being uncertain liabilities are required to be added back to the Net Profit for arriving at Book Profit.

Further, it is seen from the return of income that an amount of Rs.2,51,32,918/- representing Revaluation Reserve was deducted from the net profit for computing the book profit by the assessee company. Assessee company had claimed depreciation on revalued assets and after deducting the depreciation on the revalued portion debited the net amount of depreciation to the Profit and Loss Account. In fact the depreciation debited is the correct depreciation that can be debited. Deduction of depreciation on revalued portion of the assets is only for the purpose of presentation and accretion to reserves did not increase book profit. Therefore, there is no

justification in reducing the net profit by the amount of revaluation reserve.

In view of the above, I have reason to believe that income chargeable to tax of A.Y. 2000-01 has escaped assessment for failure on the part of the assessee company to disclose fully and truly all the material facts requiring for assessment for A.Y. 2000-01.”

5 The petitioner by reply dated 2 November 2007, filed its objections to the reasons in support of the impugned notice. In particular, the petitioner submitted that the impugned notice was beyond the period of four years from the end of the relevant assessment year and the reason in support do not indicate any failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. Besides, in respect of all the three grounds recorded as reasons in support of the impugned notice, it was submitted that there was no reason to believe that income chargeable to tax has escaped assessment and reopening of assessment was only on account of change of opinion. This was particularly so as all the three issues were a subject matter of consideration during the assessment proceedings leading to the order dated 28 January 2003.

6 On 13 November 2007, the Assessing Officer passed an order rejecting the petitioner's objections to reopening of notice dated 29 March 2007. The order disposing of the objections held that there was a failure to disclose material facts during the relevant assessment proceedings. This fact led to a reasonable belief that income chargeable to tax has escaped assessment. Further reliance was placed upon the decision of this Court in **Dr. Amin's Pathology Laboratory Vs. P.N. Prasad**¹ to conclude that there was no change of opinion.

7 On the passing of the order dated 13 November 2007 disposing of the

1. 252 ITR 673

petitioner's objections that the impugned notice has been challenged before this Court. Mr. Irani, the learned Counsel in support of the petition submits as under:

- (a) Impugned notice admittedly issued beyond the period of four years from the end of the relevant assessment year without alleging failure on the part of the petitioners to disclose truly and fully all material facts necessary for assessment. In fact, the reasons itself indicate that the impugned notice is issued on verification of records;
- (b) At the time when the impugned notice was issued there was no reason to believe that income chargeable to tax has escaped assessment. The amounts brought to tax during the regular assessment proceedings were in accordance with law;
- (c) All the three issues which form the basis of the reopening notice, were a subject matter of consideration during the regular assessment proceedings leading to order dated 28 January 2008. Thus the impugned notice flows from a mere change of opinion;
- (d) The issue of disallowing interest expenditure to earn exempt income while computing the book profit under Section 115JA of the Act was considered during the original assessment proceedings leading to the order dated 28 January 2003. This issue was a subject matter of examination by the CIT(A) and the Tribunal in appeal proceedings for the subject assessment year. Thus the impugned notice on above account was on account of mere change of opinion. Besides there was a full disclosure during the assessment proceedings;
- (e) Provision for bad and doubtful debts and provision for depletion of long term investment have been fully disclosed in the petitioner's Balance Sheet and Profit and Loss Account filed along with its Return

of Income Tax. Besides the same has also been disclosed while computing the profit under the normal provisions of the Act. Moreover, at the relevant time i.e. during the assessment proceedings as well as at the time of issue of the impugned notice, the provision for bad and doubtful debts and depletion of long term investment were not items that could not added back to arrive at MAT profits under Section 115JA of the Act as they are not liabilities. Thus there could be no reason to believe that income chargeable to tax has escaped assessment. Besides the issue was dealt with by the Assessing Officer while passing the order, consequently the impugned notice is merely on change of opinion; and

- (f) So far as deduction of revaluation reserves from book profit is concerned, it is pointed out that there was a full disclosure in the computation of income both under the normal provisions of the Act as well as under Section 115JA of the Act. Moreover, the same was subject matter of consideration in the assessment order dated 28 January 2003 and therefore the above ground is also on account of mere change of opinion.

8 As against the above, Mr. Malhotra, the learned Counsel appearing for revenue in support of the impugned notice very fairly states that so far as issues 1 and 3 of the reasons in support of the impugned notice he is not contesting the submissions made on behalf of the petitioner. However according to him the impugned reopening notice is sustainable in law on the second issue viz. provisions for bad and doubtful debts and provision of depletion in long term investment and in support submits as under:

- (a) The depth of examination by the Court in a challenge to a reopening notice is only to examine whether there is a prima facie satisfaction of the Assessing Officer that income chargeable to tax has escaped assessment. At this stage, the Assessing Officer is not required to establish the revenue's case beyond doubt;
- (b) This issue was not a subject matter of discussion in the order of assessment dated 28 January 2003 nor any question raised on it during the assessment proceedings which would indicate application of mind. Consequently, there could be no change of opinion on the issue as no opinion was formed;
- (c) The provision for doubtful debts and for depletion in long term investment has not been truly and fully disclosed during the assessment proceedings. This had been added to the net profit in the computation of income under the normal provisions of the Act. However, while computing the total income under MAT provisions i.e. Section 115JA of the Act, no disclosure about the provision for doubtful debts and for depletion in long term investment has been made. Both of which according to the revenue had to be added to the book profits for purposes of computing book profit. Thus there was a failure on the part of the petitioner to fully and truly disclose all facts material to assessment;
- (d) Specific attention was drawn to clause (g) of the Explanation to Section 115JA of the Act which was inserted by the Finance(No.2) Act 2009 with retrospective effect from 1 April 1998. This by itself would establish /justify the action of the Assessing Officer in issuing the impugned notice as prior to the amendment the position was not clear; and

- (e) Reliance was placed upon the decision of this Court in *Dr. Amin's Pathalogy Laboratory(supra)* to contend that failure to notice an item during the regular assessment proceedings will entitle the Assessing Officer to issue a reopening notice even beyond a period of four years. It was further held in the above case that mere filing of Balance Sheet, Profit and Loss Accounts will not amount disclosure under the proviso to Section 147 of the Act.

9 We have considered the rival submissions. The law with regard to reopening of assessment is fairly settled. An assessment can be reopened under Section 147 and 148 of the Act only on the jurisdictional requirement for reopening of an assessment being strictly satisfied. This is for the reason that a reopening of an assessment would disturb an settled position by reopening a completed proceeding. Normally, the jurisdictional requirements to be satisfied for issuing of an reopening notice are as under:-

- (a) The Assessing Officer must record his reasons /grounds for issuing a reopening notice before issuing the same;
- (b) The Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment and the same must be recorded/ revealed in his reasons/grounds;
- (c) The Assessing Officer should not have considered the issue on which the reopening is sought during regular assessment proceedings. In case the issue has been considered even if evidenced by asking questions then such an attempt to reconsider would not be permitted on ground of being a mere change of opinion;
- (d) The reopening of an assessment must be on tangible material and the grounds/reasons for reopening must be recorded before the issuing of

notice for reopening of an assessment;

- (e) These grounds / reasons recorded for reopening of an assessment must disclose a live link between the tangible material and the reason to believe that income chargeable to tax has escaped assessment;
- (f) In case of assessments sought to be reopened are beyond a period of four years from the end of the relevant assessment year then there should have been a failure on the part of the assessee to truly and fully disclose all material facts necessary for assessment; and
- (g) Sanction of a superior Officer to the reasons recorded, where required, in terms of Section 151 of the Act, should have been obtained before issuing of the impugned notice;

All the above jurisdictional requirements have to be satisfied cumulatively, wherever applicable. Therefore even if one the numerous jurisdictional requirements necessary for the issue of reopening notice is not satisfied, the re-opening of an assessment fails. The sustainability of the reopening notice would be tested only on the basis of the reason recorded at the time of issuing the notice.

10 Therefore, the reasons recorded at the time of issuing notice is the only evidence of the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment. These reasons cannot be added to, deleted from or supplemented. Besides when an notice for reassessment is challenged, the burden is on the revenue to establish that jurisdictional requirement stands satisfied. So far as reason to believe on the part of the assessing Officer is concerned, at the stage of issuing the notice only a prima facie and not a conclusive case of income escaping assessment should be established to turn down a challenge to the reopening notice.

11 Keeping the above broad parameters in view we shall now examine the petitioner's challenge to the impugned notice dated 29 March 2007 seeking to reopen the assessment for the Assessment Year 2000-01. Although three grounds were indicated in the reasons recorded in support of the impugned notice. The revenue has pegged its defence of the impugned notice only on the second ground/reason recorded in the reasons in support of the impugned notice i.e. *"The assessee company had debited the amount of Rs.3.82crores towards provision for doubtful debts and Rs.5.47 crores on account of provision for depletion in long term investment to the Profit and Loss Account. These being unascertained liabilities are required to be added back to the net profit for arriving at book profit."* This addition is sought in terms of of Explanation to Section 115JA of the Act as otherwise the Assessing Officer cannot make any change and /or tinker with the accounts maintained in accordance with the provisions of the Companies Act , certified by the auditors and passed by the company in a general meeting of shareholders as laid down in the Apex Court decision in **Appollo Tyres v. CIT**². Thus the impugned notice at the time of its issue places reliance upon clause (c) to the Explanation to Section 115JA of the Act which reads as under:

" (c) the amount or amounts set aside to provisions made for meeting liabilities, other than ascertained liabilities."

12 Although the petitioner has challenged the impugned notice on various grounds as set out herein above, in the present facts it may not be necessary to examine them as on the issue of reason to believe that income has escaped assessment, the issue appears to be covered in petitioner's favour by a decision of this Court in **Rallis India Ltd. vs. Asst. Commissioner of Income Tax**³. Therefore

2 255 ITR 273

3 323 ITR 54

we shall first examine the issue -Whether the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment? It is only in case the petitioner fails on the above challenge that the other grounds of challenge taken by the Petitioner would be examined in the context of the revenue's response to it.

13 The reason to believe of the Assessing Officer that income chargeable to tax has escaped assessment is on the ground that the provision for doubtful debts and provision for depletion of long term investment to the Profit and Loss Account are unascertained liabilities. Therefore, it is the Revenue's case that in terms of clause (c) of the Explanation to Section 115JA of the Act i.e. provision for bad debts and depletion of long term assets are required to be added back to the net profit for arriving at MAT profit. It is undisputed that the provision for doubtful debts and for depletion of long term investment are not liabilities. These provisions are made to take care/cover the likely fall in the value of assets. In fact this was so held by the Apex Court in *CIT Vs. HCL Comnet Systems and Services Ltd.*⁴ wherein the Court held that Item (c) of the Explanation to Section 115JA of the Act would have no application to provision made for bad and doubtful debts. This is so because the provision made for bad and doubtful debts is to cover possible diminution in the value of the assets. In the present case, the possible diminution in the value of assets being the provision for bad debts and for depletion of long term investment. This decision of the Supreme Court only declared what the law always was. In any case the position is very clear from the plain words of clause (c) of the Explanation to Section 115JA of the Act.

14 The revenue contends that at the time of issuing of the impugned notice on 29 March 2007 the position was not clear. The position became clear

4 305 ITR 409

only when the Parliament introduced/added clause (g) to the Explanation to Section 115JA of the Act with retrospective effect from 1 April 1998 and which reads as under:

“(g) the amount or amounts set aside as provision for diminution in the value of any asset.”

Thus submits the revenue that the impugned notice is sustainable on the above clause (g) of the Explanation to Section 115JA of the Act. However the reasons as recorded by the Assessing Officer for issuing the impugned notice is that provisions for bad and doubtful debts and for depletion/diminution of value of long term investment are unascertained liabilities. Thus the subsequent introduction of Clause (g) in the Explanation to Section 115JA of the Act cannot be relied upon by the revenue. It would have been a different matter if the reasons for the impugned notice had indicated the reasonable belief that income chargeable to tax has escaped assessment on the ground that provision for doubtful debts and diminution of value of assets has to be added to arrive at book profit in terms of Explanation under Section 115JA of the Act. It is only in such cases, that the retrospective amendment by introduction of clause (g) to the Explanation of Section 115 JA of the Act with retrospective effect come to the aid of the revenue. In the present facts, it is clear that the reasons for reopening of assessment by the impugned notice is that provision for doubtful debts and for depletion in the value of investment are ascertained liabilities. This can not be the reason which can lead to a belief that income chargeable to tax has escaped assessment. The validity of a reopening notice has to be tested on the basis of the reasons recorded at the time of issuing of the impugned notice. It is the Assessing Officer's belief at the time of issue of the notice that determines the validity of the notice. No subsequent event could put life into the Assessing Officer's reason to

believe that income chargeable to tax has escaped assessment when the reasons as originally recorded are still born.

15 In fact an identical issue had come up before this Court in *Rallis India Ltd.* (supra) wherein a reopening notice was inter alia issued on the ground that the book profits have to be increased in view of the Explanation to Section 115JB of the Act (similar to Section 115JA of the Act) after adding provision made doubtful debts and for diminution in the value of investment. This Court in the above case recorded the fact that Apex Court in *HCL Comnet Systems and Services Ltd.*(supra) has held that the provision for doubtful debts is a provision made for diminution in the value of assets and is not a liability. Thus it would not fall under clause (c) of the Explanation to Section 115 JA of the Act. Consequent to the aforesaid decision of the Apex Court, the Parliament has amended Explanation both under Section 115JA as well as 115JB of the Act in 2009 by adding clause (g) and (i) with retrospective effect from 1 April 1998 and 1 April 2001 respectively. This Court held that though the amendment was made with retrospective effect, the critical date is the date on which the Assessing Officer exercises jurisdiction under Section 148 of the Act and the subsequent amendment could not have been and is in fact not a ground on which the Assessing Officer sought to reopen the assessment. This Court has held that the validity of a reopening notice of Assessing Officer is to be determined with reference to the reasons which are recorded in support of thereof and nothing else. Mr. Malhotra, the learned Counsel for revenue sought to distinguish the aforesaid decision on the ground that in the facts of that case, the Assessing Officer had taken a view during the regular assessment proceedings and the reopening notice was on account of change of opinion. Be that as it may, the observations made by this Court in *Rallis India Ltd.* (supra) with regard to the

position in law in respect of reopening notices being judged by the reasons recorded on the date of its issue and that the retrospective amendment by introduction of Clause (i) in Explanation to Section 115JB of the Act similar to Clause (g) in which Explanation to Section 115JA of the Act in the present facts would have no application. Further even if Mr. Malhotra is right that there was a issue of change of opinion on the part of the Assessing Officer in the case of *Rallis India Ltd.,(supra)* the reopening notice has been set aside not only on account of change of opinion but also on account of the fact that the retrospective amendment allowing the addition of provision made for diminution of value of assets cannot impact of reopening notice, which was not on account of diminution in the value of the assets but on the ground that they are ascertained liabilities. Thus the above decision would apply to the facts of the present case. Accordingly on the above ground of absence of reason to believe that income chargeable to tax has escaped assessment, the impugned notice is not sustainable.

16 In view of the above, we have not considered other contentions raised by the petitioners and contested by the revenue to the reopening notice dated 29 March 2007 being without jurisdiction. The petition succeeds on the aforesaid finding that the Assessing Officer did not have reason to believe that income chargeable to tax has escaped assessment. Therefore we have not felt it necessary to examine the other challenges to the impugned reopening notice dated 29 March 2007.

17 Accordingly, rule made absolute. No order as to costs.

[N.M. JAMDAR, J]

[M.S. SANKLECHA, J.]