

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

WRIT PETITION NO.648 OF 2007

Viditi Investments Pvt. Ltd. .. Petitioner.
V/s.
The Deputy Commissioner of Income-Tax
Central Circle-31 & Another .. Respondents.

Mr. A. K. Jasani, for the Petitioner.
Mr. Arvind Pinto, for the Respondents.

**CORAM: M.S.SANKLECHA, &
G.S.KULKARNI, JJ.**

DATE : 15th JANUARY, 2015.

P.C:-

This Petition assails the notice dated 27th December, 2006 issued under Section 148 of the Income Tax Act, 1961 (the Act). By the impugned notice, the Assessing Officer, seeks to re-open the assessment for the Assessment Year 2003-04.

2 This Petition was admitted on 26th June, 2007 and the impugned notice dated 27th December, 2006 was stayed.

3 The Petitioner filed its Return of Income on 28th October, 2003, declaring an income of Rs.31.95 lakhs. The Assessing Officer passed an order under Section 143(3) read with Section 154 of the Act on 26th February, 2006, computing the Petitioner's book profit under Section 115JB of the Act at Rs.1.51 Crores. This was after having allowed deduction on dividend received under Section 80M of the Act as it

satisfied the conditions therein that it shall not claim deduction on dividend received more than the amount distributed by the Petitioner to its share holders before the due date of filing of return of income for the Assessment Year 2003-04 i.e. 31st October, 2003. Further, at the time of computing the book profits for the purpose of Section 115JB of the Act, the diminution in value of investment was not taken into account by the Assessing Officer, as it was not specifically provided therein at the relevant time.

4 Thereafter on 27th December, 2006, the impugned notice was issued, seeking to re-open the assessment for Assessment Year 2003-04. The reasons in support of the impugned notice as furnished to the Petitioner reads as under:-

“1. In this case return of income was filed on 28.10.2003 declaring income of Rs.3195170. Assessment was made vide order u/s. 143(3) dt. 12.01.2006 and total income was assessed at the returned figure. However the said order was rectified vide order u/s. 154 dt. 22.02.2006 as tax was to be calculated u/s. 115JB which was taken at Rs.15102450.

2. The assessee company was allowed deduction of Rs.21978000 u/s. 80M. Assessee had received dividend of Rs.25173165 from Sun Pharmaceutical Industries during the previous year relevant to A. Y. 2003-04. The assessee company had declared and paid Rs.21978000 as dividend after 1.4.2003. Dividend tax thereon @ 12.50% amounting to Rs.2815931 was paid on 11.10.2003. Such dividend which was distributed on or after 1.4.2003 and whereon dividend tax has been paid under sub sec. (1) of sec. 110, then by virtue of sub sec. (5) of sec. 115 O, the company could not claim deduction u/s. 80 M in respect of dividend so distributed. As deduction u/s. 80M has wrongly been allowed it has resulted in underassessment of income Rs.21978000.

3. Further while computing book profit, diminution in value of investment amounting to Rs.10075000 was not added to the net profit for computing book profit under special provision of I. T. Act though this was added to the total income under normal

provisions of I. T. Act. Omission to do so has resulted in under assessment of book profit of Rs.10075000.

4. *Thus it is seen that income chargeable to tax has been under assessed and also that excessive relief has been given for which provisions of explanation 2(c)(i) & (iii) of sec. 147 are applicable.*

In view of the above facts, I have reason to believe that income chargeable to tax has escaped assessment. The Limitation for approval and issue of notice expires on 31.3.2008."

From the above, it is evident that the grounds for re-opening the assessment was two fold as under:-

- (i) Petitioner not entitled to deduction under Section 80M of the Act; and
- (ii) The diminution in value of investment was not considered/ added while computing book profits under Section 115JB of the Act.

5 The Petitioner filed their objections by letter dated 15th January, 2007 to the re-opening notice and the Assessing Officer by an order dated 29th January, 2007 rejected the Petitioner's objections.

6 So far as the first ground viz- not entitled to deduction under Section 80M of the Act of the dividend received is concerned, the Counsel are agreed that the issue stands covered by the decision of this Court in favour of the Petitioner by virtue of the order dated 16th December, 2014 passed in Writ Petition No.644 of 2007 (Virtuous Finance Limited v/s. Deputy Commissioner of Income Tax). Therefore, the first ground mentioned in the reasons in support of the re-opening notice are not sustainable.

7 So far as second ground viz- non-consideration of diminution in value of investments is concerned, it is the Revenue's case that Section 115JB of the Act was amended by the Finance Act, 2008 with retrospective effect from 1st April, 2001 which specifically included amounts set aside as provided for diminution of valuation of assets. It is, therefore, the Revenue's contention that even though at the time when the re-opening notice was issued, Section 115JB of the Act did not specifically provide for adding the diminution in valuation of assets to arrive at Book Profits for the purpose of Section 115JB of the Act, yet by virtue of the amendment to Section 115JB of the Act in 2009 with retrospective effect from 2001 would make the impugned notice valid in law.

8 Mr. Jasani, learned Counsel appearing for the Petitioner invited our attention to an identical contention raised by the Revenue in ***Rallis India Limited v/s. Assistant Commissioner of Income Tax 323 ITR 54*** which was negatived. In the above case, this Court, inter alia observed in paragraph 22 as under:-

“22. In the present case, the principle of law which has been laid down by the Supreme Court in Max India (2007) 295 ITR 282 would be attracted. On the date on which the Assessing Officer purported to exercise his power to reopen the assessment under Section 147, the legislative amendment by the insertion of clause (i) to Explanation (1) to section 115JB had not been brought into force on the statute book. Obviously, therefore, the subsequent amendment could not have been and is not a ground which has been taken by the Assessing Officer, while reopening the assessment. The validity of the notice issued by the Assessing Officer in seeking to reopen the assessment must be determined with reference to the reasons which are found in support of the reopening of the assessment. These reasons cannot be allowed to be supplemented on a basis which was not present to the

mind of the officer and could not have been so present on the date on which the power to reopen the assessment was exercised. We, therefore, hold that the principle laid down by the Supreme Court in Max India (2007) 295 ITR 282 would be attracted to the present case. Consequently, it is evident that the order of the Assessing Officer with reference to the computation of book profits under section 115JB was at the least a probable view and as a matter of fact the correct view to take in view of the decision of the Supreme Court in HCL (2008) 305 ITR 409. It is well settled that the law laid down by the Supreme Court is declaratory of the position as it always stood. In any event, as we have noted, the view of the Assessing Officer was supported by the interpretation placed even contemporaneously in the judgment of this Court in Echjay Forgings (2001) 251 ITR 15 (Bom) and in the judgments of the Delhi High Court in Eicher (2006) 287 ITR 170 and HCL (2007) 292 ITR 299. In the circumstances, there was no warrant for reopening the assessment in exercise of the power conferred under Section 147.”

9 Mr. Pinto, learned Counsel appearing for the Revenue does not dispute that the decision of this court in Rallis India (supra) would govern the second ground raised in the reasons in support of the impugned notice.

10 Accordingly, the impugned notice dated 27th December, 2006 is quashed and set aside. **Petition is allowed.** No order as to costs.

(G.S.KULKARNI,J.)

(M.S.SANKLECHA,J.)