

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

WRIT PETITION NO. 224 OF 2007

Crompton Greaves Ltd. .. Petitioner
versus
Assistant Commissioner of
Income-tax, Circle 6(2) & Ors. .. Respondents

Mr. S.E. Dastur, Sr. Advocate with Mr. Nishant Thakkar and Mr. Rajesh Poojary i/b. Mulla and Mulla C.B. & C., for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

**CORAM: M. S. SANKLECHA, &
M. S. SONAK, JJ.**

DATE : 22 DECEMBER, 2014.

ORAL JUDGMENT : (*Per : M. S. Sonak, J.*)

1] By this petition under Article 226 of the Constitution of India, the petitioner questions the assumption of jurisdiction by the Commissioner of Income Tax [Circle 6(2)], Mumbai under Sections 147 and 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) by issuing notice dated 29 March 2006 as well as the consequent Reassessment Order dated 26 December 2006.

2] The brief factual matrix, in which the petition came to be filed, is set out hereafter :

(A) The relevant Assessment Year is 1999-2000;

(B) Vide a Scheme sanctioned by the Board of Industrial and Financial Reconstruction (BIFR) on 16 April 1999, Punjab Power Generation Machines Ltd. (“PPGM”) amalgamated with the petitioner with effect from 1 April 1997. The final accounts of the petitioner for the year ended 31 March 1998 were approved by its Board on 14 May 1999. Similarly, the final accounts of PPGM were also approved by the Board on 11 March 1999. PPGM also made necessary declaration under Section 72A(1) of the Act for availing the benefit of setting off and carrying forward of losses on 31 August 1999;

(C) The petitioner filed its return of income in terms of Section 139(1) of the Act on 31 December 1999 and thereafter, on 31 March 2000, a revised return of income under Section 139(5) of the Act. In its return of income, the petitioner made the necessary disclosures for determination of MAT liability in terms of Section 115JA of the Act;

(D) Assessing Officer made an assessment order dated 21 March 2002 under Section 143(3) of the Act. In doing so, the Assessing Officer clearly took into consideration the disclosures made by the petitioner in its return of income referred to herein above. On the said basis, the Assessing Officer allowed the claim of the petitioner and set off the loss of PPGM for the financial year 1998-99 against the book profits of the petitioner for that financial year for the

purposes of determining the petitioner's MAT liability under Section 115JA of the Act;

(E) The impugned notice under Section 148 of the Act was issued on 29 March 2006 (Exhibit-G to the petition), which is admittedly after the expiry of four years from the end of the relevant assessment year i.e. 1999-00 seeking to reopen the assessment. Reasons in support of the impugned notice were supplied to the petitioner only on 16 November 2006 even though the same were demanded by the petitioner on 20 April 2006. The petitioner lodged its objections on 22 November 2006 and the same were disposed of by the Assessing Officer, on 21 December 2006;

(F) Soon thereafter, i.e., on 26 December 2006, the Assessment Officer proceeded to complete the reassessment proceedings and make reassessment order (Exhibit - M to the petition).

3] This petition was filed on or about 25 January 2007. Rule was issued on 26 March 2007 and by way of interim relief, the respondents were restrained from taking any steps to recover any demand raised in pursuance of the impugned notice dated 29 March 2006 and the impugned reassessment order dated 26 December 2006.

4] Mr. S.E. Dastur, the learned Senior Counsel for the petitioner has basically questioned the assumption of jurisdiction to reassess the

petitioner's income for the Assessment Year 1999-2000, *inter alia*, on the following grounds :-

(A) The notice dated 29 March 2006 under Section 148 of the Act proposing to reassess the petitioner's income for the Assessment Year 1999-00 has admittedly been issued beyond the period of four years from the end of Assessment Year 1999-00. Accordingly, the present case would be governed by the proviso to Section 147 of the Act, which in terms provides that no action shall be taken under Section 147 of the Act unless any income chargeable of tax has escaped assessment by reason of the failure on part of the Assessee to disclose fully and truly all material facts necessary for his assessment, for that Assessment Year. In the present case, it was submitted that there is neither any allegation in the impugned notice dated 29 March 2006 nor do the circumstances warrant any inference that there was any failure on the part of the petitioner – Assessee to disclose fully and truly all material facts necessary for assessment. In fact, the circumstances would indicate that there was not only full and true disclosure of all material facts, with regard to its claim for MAT computation after consideration of loss of PPGML. Further such disclosed material facts were specifically taken into consideration by the Assessing Officer in making the Assessment Order dated 21 March 2002 under Section 143(3) of the Act. Similarly with regard to the second issue in the reasons viz. by debiting capital expenditure to the profit and loss account

the net profit declared was defaulted, is on the basis of the profit and loss account already filed and considered in the regular proceedings. Therefore, it was urged, that in absence of the fulfillment of such vital jurisdictional parameter, the assumption of jurisdiction by the Commissioner of Income Tax, was clearly ultra vires, null and void;

(B) In the alternative, it was submitted that in any case, with regard to the computation of MAT liability under Section 115JA of the Act, the Assessing Officer has considered the claim while passing the assessment order dated 21 March 2002 under Section 143 (3) in regular assessment proceedings. Therefore, it is a clear case of change of opinion. Therefore, the impugned notice and consequent reassessment order are without jurisdiction;

(C) The other ground mentioned in the reasons in support of the impugned notice is the alleged debiting of excessive and inadmissible capital expenditure to the profit and loss accounts, thereby resulting in declaration of reduced net profits and book profits under Section 115JA of the Act and the consequent escapement of assessment upon the unstated or understated income. This also was a subject of examination and in view of the law laid down by this Court in the case of *Commissioner of Income Tax vs. Veekaylal Investment Co. P. Ltd.* 249 ITR 597, which

provides that income from capital gains is to be included in the book profits for the purposes of determining deemed income under Section 115J of the Act, as a logical corollary, it follows that capital loss, is also to be taken into consideration for determination of deemed income under Section 115J of the Act. The issue raised, is therefore, no longer *res integra*. The reason, which the Commissioner has relied upon, for reopening the assessment, constitutes no reason at all in the eyes of law. Thus, there was no reason to believe that income chargeable to tax has escaped assessment. Thus this ground is also on basis of a mere change of opinion, which is impermissible under the law;

(D) The impugned reassessment order was issued in great haste and in violation of principles of natural justice and fair play. The objections raised by the petitioner to the reopening of the assessment were disposed of on 21 December 2006. The period between 22 December 2006 to 25 December 2006 were not working days. On the immediate next date, i.e., on 26 December 2006, the impugned reassessment order has been made, in an attempt to present '*fait accompli*'. Such approach has been frowned upon by this Court in case of *Asian Paints vs. Dy. CIT – 296 ITR 90* and the Assessing Officer have been directed to wait for four weeks after disposal of the objection before commencing reassessment proceedings.

5] Mr. Suresh Kumar, the learned counsel for the Revenue submitted that in this case the reassessment order has already been made on 26 December 2006. As against the same, the petitioner can always avail the ordinary remedies of appeal etc. under the Act. This Court, therefore, ought not to exercise its extra ordinary jurisdiction in the matter. Further, learned counsel pointed out that the mere absence of statement in the impugned notice that there was no failure on the part of the petitioner to disclose full and truly all material facts, was by no means fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act, particularly since a holistic reading of the impugned notice, made out a *prima-facie* case of failure to disclose. For these reasons, learned counsel submitted that the petition as filed, is liable to be dismissed.

6] In order to evaluate the rival contentions, it is necessary to advert to the relevant statutory provisions contained in Section 147(1) of the Act and the first proviso thereto :

“147. If the [Assessing] Officer [has reason to believe] that any income 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 (hereinafter 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 143 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.”

7] From the aforesaid, it is clear that where the assessment under sub section (3) of Section 143 of the Act has been made for the relevant assessment year, no action can be taken under Section 147 of the Act 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 assessment for that assessment year.

8] In the present case, there is no dispute that the impugned notice dated 29 March 2012 seeking to reopen assessment has been issued after the expiry of four years from the end of the relevant assessment year i.e. 1999-00. Accordingly, there is no dispute whatsoever that the proviso to Section 147 of the Act is clearly attracted. The jurisdictional issue with which we are concerned is whether there was any failure on the part of the petitioner to disclose fully and truly all the material facts necessary for his assessment in the assessment year 1999-00.

9] The aforesaid issue shall have to be considered, in the context of the reasons supplied by the respondents for the issuance of impugned notice dated 29 March 2006. The reasons, which came to be supplied only on 16 November 2006, read thus :

“On perusal of the case record, it is seen that the assessee while computing the book profit deducted the loss suffered by an industrial unit amalgamated with the assessee company, in the previous year relevant to the assessment year 1997-98. According to assessee's own statement the accounts of the loss making company was being published separately even after its amalgamation. According to the MAT provisions the amount of profit of a sick industrial company for the assessment year commencing from the assessment year relevant to the previous year in which the company has become a sick industrial company and ending with the assessment year during which the entire net worth of such company has become equal to or exceeds the accumulated losses can only be claimed as deduction for computing the book loss. The net profit for this purpose is to be adopted from the certified profit and loss account and then deduct the business loss or depreciation which ever is less and as such the assessee has reduced the book profit by Rs.5,30,52,654/- instead of Rs.1,60,00,000/-. Further it is observed that there was no book loss to be adjusted from the net profit as per the certified accounts of the assessee company. Hence the deduction of loss of the sick industrial unit from the profit of the assessee company was not in order as the assessee company was not a sick company. By doing so, the assessee has under stated its income amounting to Rs.1,11,15,796/- under the book profit u/s 115JA of the IT Act.

Further it is seen that the assessees were debiting capital expenditure of various types such as loss on sale of assets, etc. which were inadmissible as per the normal provisions of the act and were added back for computing the income under the normal provisions of the Act. By debiting such excessive and inadmissible capital expenditure to the profit and loss accounts, the assessees succeeded in declaring less net profit and there by less book profits. By doing so, the assessee has under stated its income under the book profit u/s 115JA of the IT Act.

By doing so, the assessee understated the income under the book profit u/s 115JA of the IT Act to the above

extent. I am, therefore, satisfied that this is a fit case to be re-opened u/s. 147 of the IT Act, 1961. Since, assessment u/s. 143(3) has been completed and a period of four years from the end of the relevant assessment year has lapsed, hence, the case needs to be approved by the Commissioner of Income tax, City-6, Mumbai under the provisions of section 151(1) of the I.T. Act, 1961. Therefore, the case is submitted for approval so that notice u/s. 148 of the IT Act may be issued.”

10] It is significant to note that neither the impugned notice dated 29 March 2006 nor the reasons supplied in support thereof specifically state that there was any failure on the part of the petitioner to disclose fully and truly all the material facts necessary for its assessment for the relevant assessment year. No doubt, Mr. Suresh Kumar is right in his submission that the mere failure to incant the words or phrases employed in the statute with regard to failure to disclose fully and truly all material facts, is not necessarily fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. However, this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the Assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled down from the reasons in support of the notice seeking to reopen assessment, then the mere failure to repeat words or phrases of the statute is certainly not fatal to the assumption of jurisdiction. However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Sections 147 and 148 of the Act would be *ultra vires*, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act.

11] Further, as has been held by this Court in the case of *Hindustan Lever Ltd. vs. R. B. Wadkar, Assistant Commissioner of Income Tax & Ors. (No. 1) 268 ITR 332*, it is necessary whilst supplying the reasons for the issuance of notices under Sections 147 and 148 of the Act to communicate as to which fact or material was not disclosed by the Assessee fully and truly, that has resulted in the income escaping assessment. It is for the Assessing Officer to disclose and open his mind through the reasons recorded by him. The reasons so recorded must be clear and unambiguous and not suffer from any vagueness. Reasons recorded should be self explanatory and should not keep the Assessee guessing as to the facts or materials, which he may not have fully or truly disclosed for the purposes of assessment of his income. In fact the record of reasons and their disclosure is a vital safeguard against arbitrary reopening of concluded assessment. The reasons so recorded and disclosed, cannot even be supplemented by filing affidavits or making oral submissions.

12] In the context of the reasons recorded, it is to be noted that in the present case apart from there being no allegation therein that there was any failure on the part of the petitioner to fully and truly disclose all material facts necessary for assessment, even otherwise, the reasons as recorded give no clue whatsoever as to the alleged failure on the part of the petitioner in disclosing fully and truly, the material facts necessary for its assessment. The reasons as recorded, in any case, do not disclose any particular fact or material that was allegedly not disclosed by the petitioner during the regular assessment proceedings under Section 143(3) of the Act. Clearly, therefore, the jurisdictional parameter, for

invoking the provisions of Section 147 of the Act is absent, in the present case on both the grounds mentioned in the reasons in support of the impugned notice. In fact, in the revised return of income filed by the petitioner on 31 March 2000 alongwith the profit and loss account are perused, it is evident that full and true disclosures were indeed made by the petitioner, in the matter of determination of MAT liability under Section 115JA of the Act with regard to the loss of PPGM and also debiting of capital loss to its profit and loss account. Further, the Assessing Officer, in the assessment order dated 21 March 2002 under Section 143(3) of the Act in regular proceedings has specifically considered disclosures in respect of loss of PPGML made by the petitioner. Such consideration is reflected in the assessment order itself, the relevant portion of which, reads thus :

“ Note – 1 : The assessee Company has filed a revised return of income wherein it has been stated that, “as per Sec. 115JA MAT will be payable when total income as computed under the Act is less than 30% of its book profits. In our case the adjusted total (PPGML + CGL) Book profits calculated as per the provisions of the Act is a loss. But in the both returns of income we have ignored the loss of PPGML, inadvertently. We request your honour to consider this mistake while calculating the MAT liability”. This submission of the assessee Company has been considered.”

[Emphasis supplied]

13] From the aforesaid, it is apparent that not only was there no failure on the part of the petitioner to disclose fully and truly all the material facts in relation to the determination of MAT liability under Section 115JA of the Act, but further such disclosed material facts were duly considered by the Assessing Officer in making the Assessment Order

dated 21 March 2002 under Section 143(3) of the Act. The jurisdictional parameter imposed by the proviso to Section 147 in matter of reopening of assessment was, thus, clearly not fulfilled. The issuance of impugned notice and the consequent assessment order is therefore in excess of jurisdictional restraint imposed upon the Assessing Officer by the proviso to Section 147 of the Act. The impugned notice dated 29 March 2006 and the second reassessment order dated 26 December 2006 are therefore liable to be quashed on this ground alone.

14] There is no necessity to adjudicate upon the other grounds urged by Mr. Dastur, primarily because this petition can be disposed of on the ground that there was no failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment for the relevant assessment year. This is applicable to both the grounds mentioned in the reasons furnished in support of the impugned notice.

15] In so far as the objection based upon the availability of alternative remedy is concerned, it is necessary to note that this petition was lodged on or about 25 January 2007 and admitted on 26 March 2007. At the stage when the petition was filed, the reassessment order dated 26 December 2006 had already been passed. This is not a case where the petitioner has already preferred an appeal questioning the reassessment order. The issues raised, do not involve any disputed questions of fact. Besides, in this case though the impugned notice under Section 148 of the Act was issued on 29 March 2006, the reasons in support thereof were furnished to the petitioner only on 16 November 2006. This is despite the fact that the petitioner, by letter dated 20 April 2006 had requested for the supply of the same. The objections lodged,

were disposed off by letter dated 21 December 2006 and within a period of five days thereafter i.e. on 26 December 2006, the impugned reassessment order came to be made. Incidentally, the petitioner has pointed out that the period between 22 and 25 December 2006 were holidays and 26 December 2006 was the very next working day on which reassessment order was made. The impugned reassessment order was served upon the petitioner on 3 January 2007 and as noted earlier, this petition was lodged on 25 January 2007. This is a case where Assessing Officer has not adhered to the jurisdictional restraints imposed by proviso to Section 147(1) of the Act and further there is violation of principles of natural justice. If all such circumstances are cumulatively considered, we do not deem it appropriate to reject the present petition on the ground of availability of alternate remedy.

16] Accordingly, Rule is made absolute in terms of prayer clause (a), which reads thus :

(a) That this Court be pleased to issue a Writ of Certiorari or any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the Impugned Notice (Exhibit 'G' to the petition) and the Impugned Order (Exhibit "M" to the petition) and after going through the same and examining the question of legality thereof to quash, cancel and set aside the Impugned Notice (Exhibit 'G' to the petition) and the Impugned Order (Exhibit 'M' to the petition)";

17] In the facts and circumstances of the present case, there shall be no order as to costs.

(M. S. SONAK, J.)

(M. S. SANKLECHA, J.)