Chief Justice's Court **AFR**

Case :- WRIT TAX No. - 576 of 2014

Petitioner :- M/S Aci Oils Pvt. Ltd.
Respondent :- Deputy Commissioner Of Income Tax And Anr.
Counsel for Petitioner :- Rishi Raj Kapoor
Counsel for Respondent :- C.S.C. It

Hon'ble Dr. Dhananjaya Yeshwant Chandrachud,Chief Justice
Hon'ble Pradeep Kumar Singh Baghel,J.

The petitioner has sought to challenge in these proceedings a notice issued under Section 148 of the Income Tax Act, 1961 seeking to reopen an assessment for A.Y. 2007-08. Since the notice was issued on 31 March 2014, the reopening in the present case is admittedly beyond the period of four years of the end of the relevant assessment year.

The original assessment in the present case was completed under Section 143(3) by an order dated 16 March 2009 of the Assessing Officer. The order of the Assessing Officer indicates that the assessee had duly disclosed that during the course of the assessment year in question, it had closed its manufacturing activities and had entered into a lease agreement in respect of the land and building and for plant and machinery. Against the receipts therefrom, the assessee had claimed various expenses including administrative expenses, repair and maintenance, financial charges and depreciation. The Assessing Officer made a partial disallowance while computing the income under Section 115 JB.

For convenience of reference, the order of the Assessing Officer, insofar as is material, is extracted hereinbelow.

> "The assessee is a Private Limited company and upto the immediate previous Financial Year relevant to the Assessment Year 2006-07 the assessee was doing the manufacturing of Refined Oil, Vanaspati and Hand made soap but during the year under consideration, it closed the manufacturing activity and has given its unit on lease to M/s Agro Tech Foods Ltd. The income on account of lease received from M/s Agro Tech Foods Ltd. has been shown as Income from Other Sources by the assessee. A perusal of the lease agreement as filed during the assessment proceedings, shows that the assessee has received an amount of Rs. 5 lacs per month as leased amount from M/s Agro Tech Foods Ltd. Out of the total amount, Rs. 1 lac has been received towards land & building and Rs.4 lacs have been received towards plant & machinery. Against these receipts, the assessee has claimed various expenses under the head Administrative Expenses, Repair & Maintenance, Financial Charges and depreciation. It was submitted that the expenses have been incurred towards the maintenance of its unit as according to the lease agreement, the assessee has to bear the cost of maintenance of the unit.
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> The assessee also furnished the details of these expenses.
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> A perusal of the details furnished in respect of Repairs & Maintenance shows that the assessee had claimed a number

> of such expenses which are not fully verifiable. Particularly the expenses towards the repairs and maintenance of electricity amounting to Rs. 2,09,764/- are not supported by proper bills or vouchers. The specific details and purpose of these expenses could also not be explained convincingly. In view of this, an amount of Rs.1,25,000/- would be disallowed out of the Repair & Maintenance Expenses to cover up the expenses which are not verifiable. This would result in an addition of this amount to the total income."

A notice was issued to the assessee under Section 148 on 31 March 2014 stating that the Assessing Officer had reason to believe that the income of the assessee which was chargeable to tax for A.Y. 2007-08 had escaped assessment within the meaning of Section 147. On the request of the assessee which was made on 7 April 2014, a copy of the reasons for reopening the assessment was supplied. The reasons which had weighed with the Assessing Officer in reopening the assessment are thus.

> "In this case the return of income has been filed on 06.10.2007 through online declaring total income of Rs.Nil. Subsequently assessment was completed u/s 143(3) of the I.T. Act, 1961 at total Income of Rs.2,95,514/- on 16.03.2009.
>
> From perusal of assessment records it revealed that during the previous year assessee had not done any Manufacturing & Trading activities and the company had

> given its 'plant & machinery' and 'land & building' on lease and claimed depreciation on such assets amounting to Rs.24,31,484/-, which were not allowable as per conditions provided u/s 32(1) of the Income Tax Act, 1961.
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> Therefore, I have reason to believe that income to the tune of Rs.24,31,484/-, which was chargeable to tax has escaped assessment for A.Y. 2007-08 within the meaning u/s 147 of the income-tax Act, 1961."

The assessee submitted its objections on 27 May 2014 principally on the ground that there was no failure on its part to disclose all the relevant and material facts for the completion of the assessment and the reopening which had taken place beyond the period of four years under Section 148 was not lawful. The objections have been disposed of by an order dated 25 July 2014.

In the present case, the reopening of the assessment has taken place beyond a period of four years of the end of the relevant assessment year, A.Y. 2007-08. The notice under Section 148 was issued on 31 March 2014. Under the proviso to Section 147, the jurisdictional requirement is that where a reopening of the assessment takes place beyond a period of four years after the expiry of the relevant assessment year, there should have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, for that assessment year. In the present case, there is merit in the submission which has been urged on behalf of the petitioner that the reasons which have been disclosed, in fact, would indicate that it is from a perusal of the assessment records that the Assessing Officer formed an opinion that income had escaped assessment.

The reasons which have been extracted earlier clearly indicate that, according to the Assessing Officer, it was from a perusal of the assessment records that it was revealed to her that during the previous years, the assessee had not carried out any manufacturing or trading activities and that the company had given its plant & machinery and land & building on lease, while claiming depreciation which according to the Assessing Officer was not allowable under Section 32(1). In other words, besides the fact that there is not even an averment in the reasons to the effect that the assessee had failed to fully and truly disclose all material facts necessary for the assessment, it is evident that the reasons for reopening are based on the assessment records. Hence there was no failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment, for the relevant assessment year. The jurisdictional condition for reopening an assessment beyond four years has hence not been fulfilled.

The learned counsel appearing on behalf of the revenue relied upon a judgement of a Division Bench of the Bombay

High Court in **Rabo India Finance Ltd. v. Deputy Commissioner of Income-tax**[1]**.** That was a case where the reopening was within a period of four years. Where a reopening of an assessment is within a period of four years, the relevant test which has been laid down in the judgement of the Supreme Court in **CIT v. Kelvinator of India Ltd.**[2] is whether the Assessing Officer has tangible material to come to the conclusion that there is an escapement of income from assessment. The distinction between a situation where an assessment is reopened within four years from a case where an assessment is sought to be reopened beyond four years is set out in the following extract from the judgement of the Division Bench of the Bombay High Court:

> "In the present case, the assessment is sought to be reopened within a period of four years of the end of the relevant Assessment Year. Where an assessment is sought to be reopened beyond a period of four years, the proviso to Section 147 stipulates as a jurisdictional requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that Assessment Year. Such a requirement which the proviso to Section 147 stipulates in respect of a reopening beyond a period of four years is evidently not extrapolated to a situation where as in the present case the reopening is within a period of four years. Where a reopening of an assessment under Section 148 takes place

1 [2013] 34 taxmann.com 228 (Bombay)
2 [2010] 320 ITR 561

> within a period of four years, the test that has been laid down by the Supreme Court in the CIT v. Kelvinator of India Ltd. is whether the Assessing Officer had tangible material to come to the conclusion that there is an escapement of income from assessment. The Supreme Court has held that the "reason to believe" that any income chargeable to tax has escaped assessment cannot be founded on a mere change of opinion. The power to reassess is not in the nature of a power to review. Hence, the true test to be applied, where a reopening takes place within a period of four years, as in the present case, is whether there exists tangible material on the basis of which the Assessing Officer has proceeded to reopen the assessment. That determination has to be made on the basis of the reasons which are disclosed to the assessee. For it is those reasons which form the foundation of the action of the Assessing Officer and form the basis on which the belief that income has escaped assessment is formed. *Hindustan Lever Ltd v. R.B. Wadkar, Asstt. CIT [2004] 268 ITR 332 / 137 Taxman 479 (Bom.).”*

Hence, the decision would not advance the case of the revenue.

For these reasons we are of the view that the reopening of the assessment is contrary to law since the requirement of the proviso to Section 147 has not been fulfilled.

We may note that the learned counsel appearing for the petitioner has submitted, on the basis of the decision of the

Supreme Court in **Industrial Credit and Development Syndicate Limited. v. Commissioner of Income Tax, Mysore and another**[3] that even on merits, the assessee was entitled to claim depreciation.

For the purposes of these proceedings, it is not necessary for the Court to inquire into that aspect since once it is held that the requirement of the jurisdictional condition for reopening an assessment beyond four years was not fulfilled, the notice of the reopening would be unlawful.

We, accordingly, allow the petition and quash and set aside the notice dated 31 March 2014 purporting to reopen the assessment under Section 148 for A.Y. 2007-08.

There shall be no order as to costs.

Order Date :- 29.10.2014 (Dr.D.Y.Chandrachud,C.J.)
RK

(P.K.S. Baghel,J.)

3 (2013) 3 SCC 541