

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

**WRIT PETITION NO. 1360 OF 2006  
ALONG WITH  
WRIT PETITION NO. 1526 OF 2006**

M/s.Business India

... Petitioner

v/s

Jt. Commissioner of Income Tax 12(1) & ors.

... Respondents

Mr.Firoze Andhyarujina, Senior Counsel along with Mr.Maneck Andhyarujina, Advocate along with Mr.Neerav Merchant, Advocate i/by M/s.Thakordas & Madgavkar for the petitioner.

Mr.Arvind Pinto, Advocate for the respondents.

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

**DATED : 22 SEPTEMBER 2014**

**P.C.:**

These two writ petitions challenge two separate notices dated 23 March 2005 issued under Section 148 of the Income Tax Act, 1961 (the Act), seeking to reopen the assessment for the Assessment Years 1998-1999 and 1999-2000, respectively.

2. The counsel are agreed that the facts and the issues arising for consideration in both the petitions are identical. Therefore, for the sake of convenience, we shall refer to the facts in Writ Petition No.1360 of 2006 before considering the issues involved in this group of petitions.

3. The petitioner filed its return of income for the Assessment Years 1998-1999 on 2 November 1998 disclosing a loss of Rs.4.98 lakh. On 30 March 2001, the Assessing Officer passed an order under Section 143(3) of the Act determining the petitioner's income at Rs.47.11 lakhs. In the course of the assessment, the Assessing Officer held that the interest paid on borrowings was a business expenditure to be allowed as a revenue expenditure. On the above basis, interest to the extent of Rs.10.31 crores paid on borrowings was allowed as expenditure to determine the petitioner's income at Rs.47.11 lakhs.

4. On 23 March 2005, the impugned notice seeking to reopen the Assessment Year for the year 1998-1999 was issued. The reasons in support of the impugned notice as furnished to the petitioner read as under :

*“11. Reasons for the belief that income has escaped assessment:*

*While completing the assessment for A.Y.2001-02, it was held that the advances made to the various concerns for promoting and nurturing, with the end intention of acquiring these concerns was not the part of business activities. Therefore, it was held that these advances were of capital nature.*

*2. During the year under consideration the assessee has claimed that the advances made for promoting and nurturing is a business and the interest of Rs.10,31,89,562/- on the borrowings as business expenditure. However, interest paid on these advances is also of capital nature required to be disallowed. Accordingly interest paid on these advances is also of capital nature requires to be disallowed.*

*3. Therefore, I have reason to believe that income chargeable*

*to tax to the extent of payment of interest of Rs.10,31,89,562/- on borrowings has escaped assessment. Hence, the proposal for reopening assessment under Section 147 of the I.T. Act, 1961 is put up for approval of the CIT-12, Mumbai, under Section 151(1) of the I.T. Act, 1961.”*

5. The petitioner by its letter dated 23 December 2005 objected to the reasons furnished in support of the impugned notice dated 23 March 2005. However, the Assessing Officer by an order dated 20 March 2006 rejected the petitioner's objection by a common order for both the Assessment Years 1998-1999 and 1999-2000.

6. Mr.Andhyarujina, learned senior counsel appearing for the petitioner in support of the petitions submits -

(a) The notices have been issued beyond the period of four years from the end of the relevant assessment year without in any manner indicating any failure on the part of the petitioner to disclose truly and fully all material facts for purposes of assessment in the petitioner's case;

(b) The impugned notices are a result of a mere change of opinion. Therefore there is no jurisdiction to issue it; and

( c) The assessment order dated 30 March 2001 was a subject matter of an appeal proceedings under the Act. Therefore, in view of the doctrine of merger, the original order of assessment sought to be reopened has merged into the Appellate order. Therefore, the impugned notices are not sustainable.

7. As we found substance in the submissions made on the first issue, namely, the impugned notices having been issued beyond a period of four years from the end of relevant assessment year, the reasons in support do not indicate any failure on the part of the petitioner to submit fully and truly all material facts necessary for assessment, we stopped Mr. Andhyarujina from making his submissions in support of the other issues raised by him. We informed Mr. Andhyarujina that we will hear him on the other submissions, if it is necessary, after hearing the Revenue on this issue.

8. We therefore called upon from Mr. Arvind Pinto, learned counsel appearing for the Revenue to address us on the above issue of the failure to disclose truly and fully all material facts necessary for assessment in the absence of there being any indication of the same in the reasons recorded for issuing the impugned notices.

9. Mr. Pinto, learned counsel for the Revenue relies upon the reasons furnished in support of the impugned notices and upon the order dated 20 March 2006 dismissing the petitioners' objections to the impugned notices. Thus, on the above basis it is submitted that the petitions be dismissed.

10. Admittedly, the impugned notices have been issued beyond the period of four years from the end of the relevant assessment year in both the petitions. The reasons as furnished to the petitioner, reproduced herein above, do not indicate even remotely any failure on the part of the petitioner to disclose truly and fully material facts necessary for

assessment. The reasons proceed on the basis that for the subsequent assessment year, the Assessing Officer has held the interest paid on borrowings is capital in nature and, therefore, not allowable as an expenditure. Consequently, it is submitted that income chargeable to tax has escaped assessment. However, the reasons nowhere indicate any failure on the part of the petitioner to disclose truly and fully material facts necessary for assessment. The reliance by Mr.Pinto upon the order dated 20 March 2006 rejecting the petitioner's objections and the affidavit in reply dated 24 July 2006 to contend that there has been a failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment is not permissible. This Court has time and again held that the reopening of assessments under Section 148 of the Act beyond the period of four years from the end of the relevant assessment year has to specify the failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. It is only on satisfaction of the above jurisdictional requirement that a notice under Section 148 of the Act can be issued by the Assessing Officer seeking to reopen an assessment beyond the period of four years from the end of the relevant assessment year. The impugned notices would stand or fall on the basis of the reasons recorded at the time when the impugned notices were issued. These reasons cannot be improved upon, substituted or supplemented either by affidavits or while disposing of the objections of the petitioner as held by this Court in ***Hindustan Levers v/s R.B.Wadkar, Asstt. Commissioner of Income Tax & ors.(No.1)***, reported in ***268 ITR 332***.

11. In view of the above, the respondent Revenue has to justify the

impugned notices only on the basis of the reasons recorded at the time of issuing the notices. The reasons as recorded and furnished to the petitioner, do not disclose even remotely any failure on the part of the petitioner to disclose truly and fully material facts necessary for assessment during the relevant Assessment Years 1998-1999 and 1999-2000. Thus, the impugned notices dated 23 March 2005 being without jurisdiction cannot be sustained.

12. In view of the above, both the impugned notices dated 23 March 2005 issued under Section 148 of the Act seeking to reopen the assessment for the Assessment Years 1998-99 and 1999-2000 are quashed and set aside.

13. Petitions allowed. Rule made absolute. No order as to costs.

**(N.M.JAMDAR, J.)**

**(M.S. SANKLECHA, J.)**