



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

**WRIT PETITION NO.46 OF 2008**

Idea Cellular Ltd., a company )  
incorporated under the provisions )  
of the Companies Act, 1956 and )  
having its registered office at )  
Sharada Centre, Erandwane, Off. )  
Karve Road, Pune-411 004. )  
and its Corporate office at 5th )  
floor, East Wing, Windsor Bldg., )  
Off. CST Road, Kalina, Santacruz )  
(East), Mumbai-400 098. )..Petitioner

Versus

- 1) The Deputy Commissioner of )  
Income-tax Range 3(2), having )  
his office at Room No.608, 6th )  
Floor, Aayakar Bhavan, M.K.Road )  
Mumbai-400 020. )
- 2) The Commissioner of Income-tax )  
3, having his office at Room )  
No.667-A, 6th Floor, Aayakar )  
Bhavan, M.K.Road, Mumbai-400020 )
- 3) The Union of India through )  
Secretary, Ministry of Finance )  
Government of India, North )  
Block, New Delhi-110001 )..Respondents

----

Mr.S.E.Dastur, Senior Counsel with Mr.R.Murlidhar  
and Mr.A.K.Jasani for the petitioner.

Mr.Vimal Gupta with Mr.P.S.Sahadevan for the  
respondents.

----

Coram : F.I.Rebello &  
R.S.Mohite, JJ

Date : 13.02.2008

**Judgment :- ( Per : R.S.Mohite,J)**

1. This petition filed by Idea Cellular Ltd., (hereinafter referred to as the "petitioner") impugns a notice dated 26.3.2007 issued by respondent no.1 under Section 148 of the Income Tax Act, seeking to re-open the petitioners' assessment for the assessment year 2001-2002. It also impugns a further order dated 13.12.2007 issued by respondent no.1 rejecting the objections raised by the petitioner to the re-opening of the assessment.

2. The brief chronological facts of the case are as under :-

(a) On 30.10.2001 the petitioner filed a return in respect of the assessment year 2001-2002 which indicated a loss of Rs.133,91,49,737/-. The said return was accompanied by a copy of the petitioner's audited accounts for the year ended 31.3.2001. In the computation annexed to the return, the petitioner had disclosed that a company named Tata Cellular Limited had amalgamated into the petitioner w.e.f.1st January 2001. More details of the amalgamation were given in the directors' report annexed to the audited accounts. In the balance-sheet and in Schedule 2 thereof, the petitioner had disclosed that a sum of Rs.9984.15

lakhs was credited to the "Amalgamation Reserve" account under the head "Reserves & Surplus". In note 4(a) of Schedule 19 to the audited accounts, the petitioner had given full details as to how the said sum of Rs.9984.15 lakhs was arrived at. It explained that the assets and liabilities of Tata Cellular Limited had been accounted for in the accounts as per the "Pooling of Interest method" prescribed in the Accounting Standard on Accounting for Amalgamations (AS-14) as issued by the institute of Chartered Accountants of India. It was explained that the said sum of Rs.9984.15 lakhs was the difference between the net book value of the assets and liabilities so acquired and the share capital to be issued there-against.

(b) On the filing of the return, on 30.1.2004 respondent no.1 issued notices under Sections 142(1) and 143(2) together with a letter of the same date in which he raised a number of queries relating to the return filed by the petitioner. Amongst the various queries were the following :-

- (i) What is the basis for creation of reserve of Rs.9984.15 lakhs and whether same has been brought to tax.
- (ii) Is there any payments towards goodwill.

(iii) How the valuation of business has been worked out.

(iv) How the difference between market value and book value of fixed assets has been adjusted/paid.

. The letter called upon the petitioner to give specific reply on the aforesaid points, failing which it would be assumed that the amount of Rs.9984.15 lakhs which was transferred directly to the capital reserve account would be treated as capital gain in the hands of the petitioner.

(c) By the reply dated 11.2.2004, the petitioner company furnished answers to the queries raised as aforesaid. In paragraph-10 of the letter, the petitioners explained that the said sum of Rs.9984.15 lakhs represented the excess of assets and liabilities acquired by the petitioner as compared to the amount of purchase consideration discharged/paid by the petitioner on the amalgamation of Tata Cellular Limited. It was emphasized that the said amount was merely an accounting entry for recording the difference in the books of account and did not represent income in the hands of the petitioner. The petitioner relied upon the decision of the Privy Council in **CIT Vs. Shaw Wallace Limited** reported in 6 ITC 178 to explain

that "reserves" arising out of the acquisition of the business of Tata Cellular Limited could never have the character of "income" in the hands of the petitioners.

(d) In reply to the petitioners' letter, respondent no.1 issued a show cause notice dated 1.3.2004 in which he stated the following :-

"(3) With reference to our submission on creation of Reserve amounting to Rs.9984.15 lakhs, following facts are observed :-

(i) The assessee has paid Rs.9984.15 lakhs less towards acquisition.

(ii) The assessee has valued its assets more by Rs.9984.15 lakhs, whereas the net consideration discharged or paid by it is lesser by that amount.

(iii) In simple words the assessee has earned discount of Rs.9984.15 lakhs on its acquisition of Total Assets and Liabilities of Tata Cellular Limited.

. Since this discount earned cannot be allocated to a particular asset, it cannot be adjusted against cost of assets. None the less, this discount is income in the hands of the Company and same should

be brought to tax. Since it is evident that this discount is earned in the course of acquisition of a business asset, hence the same should be treated as business income. Petitioner was called upon to make his submissions on these issues, along with detailed working as to how this amount has been worked out."

(e) In reply to the show cause notice the petitioner addressed a letter dated 5.3.2004 in which he dealt with the contentions raised by respondent no.1. In paragraph-4 of the said letter, the petitioner termed the contention of respondent no.1 of treating the reserve arising on amalgamation as business income as "erroneous and absurd" and went on to explain in detail the process by which shares are allotted in an amalgamation. It was explained that in an amalgamation the intrinsic value of the shares was first determined and based on this intrinsic value, the ratio of exchange was determined by the valuer. It was emphasized that the intrinsic value of the shares was equal to the value of the business taken over. The value of the shares over and above the face value was nothing but the premium on issue of the shares though it might be termed as a capital reserve. It was explained that the said premium was a capital receipt which could, by no stretch of imagination be termed as a business receipt. It was also pointed out that acquisition of a business was the acquisition of an additional source of income

and the price paid for the same was a commercially determined price and there was no question of there being a "discount". The petitioner then furnished further clarification on the issue of taxability of the said sum of Rs.9984.15 lakhs. That thereafter, respondent no.1 sought further clarification regarding this issue vide his letter dated 10.3.2004 and this clarification was also given by the petitioner by their letter dated 12.3.2005.

(f) Ultimately, respondent no.1 passed an assessment order dated 31.3.2004 in which he computed the petitioner's loss at Rs.75,04,02,061/- after making several additions and disallowances. However, he did not make any addition in respect of the said amalgamation reserve of Rs.9984.15 lakhs. In the order respondent no.1 made a specific note of the fact of the amalgamation of Tata Cellular Limited with the petitioner and disallowed the expenses incurred by the petitioner on the amalgamation.

(g) On 26.3.2007 respondent no.1 issued the impugned notice under Section 148 of the Act wherein he stated that he had reasons to believe that the petitioner's income chargeable to tax for the assessment year 2001-02 had escaped assessment within the meaning of section 147 of the Act. He directed the petitioner to deliver to him, within 30 days from the date of service of the notice, a

return in the prescribed form of the petitioner's income for the said assessment year.

(h) Vide their letter dated 23.3.2007 the petitioner requested respondent no.1 to provide the reasons recorded for issue of the said notice. In response to this request, respondent no.1 furnished the copy of the recorded reasons to the petitioner.

(i) In reply to the recorded reasons the petitioner addressed a letter dated 13.12.2007 in which they made the following points :-

(1) That the petitioner had made a full and true disclosure of the material facts necessary for the assessment ;

(2) That Respondent No.1 had raised specific queries on the issue and that elaborate submissions had been made by the petitioner and it was only after considering the facts and the details that the assessment order under section 143(3) of the Act was passed ;

(3) It was emphasized that the present proceedings were based on a mere change of opinion ;

(4) That the petitioner relied on a number of judicial precedents including that of the Hon'ble

Supreme Court in CIT vs. Formae France 264 ITR 566 and that of this Hon'ble Court in IPCA Laboratories vs. DCIT 251 ITR 416 to emphasise that the assessment could not be reopened where there was no failure to make a full and true disclosure of the material facts and on the basis of a mere change of opinion.

(5) Without prejudice, the petitioner also dealt with the merits of the matter in detail to explain that an amalgamation reserve could never have the character of "income". The petitioner explained in detail the nature and circumstances in which an amalgamation reserve is created and why it could never be treated as "Income from other sources".

(j) In reply to the aforesaid letter of the petitioner, respondent no.1 passed a further impugned order dated 31.12.2007 in which he made the following points :-

(1) That in view of Explanation 1 to section 147, the mere production of account books and other evidence would not necessarily amount to full disclosure ;

(2) That as the issue had not been discussed in the assessment order, it could not be said that Respondent No.1 had formed any opinion and that there was consequently no change of opinion.

(3) That the other contentions would be dealt with in the reassessment order.

(k) That thereafter, after taking inspection of the relevant files the petitioners have chosen to file the present petition.

3. The first point that was argued was that this was a case where an assessment was sought to be reopened after the expiry of 4 years from the end of the relevant assessment year. The assessment year in question was 2001-2002 and the notice under Section 148 had been issued in the year 2007. It was contended that the proviso to section 147 of the Income-tax Act provides that where an assessment under section 143(3) of the Act has been made for the relevant assessment year, no action shall be taken under section 147 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 :-

(1) to make a return under section 139 or in response to a notice issued under section 142(1) or section 148 or ;

(2) to disclose fully and truly all material facts

necessary for his assessment for that assessment year.

. It was contended that the first requirement was not attracted to the facts of the present case and as far as the 2nd requirement was concerned, the petitioner had disclosed fully and truly all material facts necessary for the assessment for that year. It was contended that the petitioner's case was covered by the said proviso because the assessment order passed on 31.3.2004 was for the assessment year 2001-2002 and more than 4 years had elapsed from the end of the assessment year. It was contended that there was no failure on the part of the petitioner of the kind envisaged by the proviso as the petitioner had disclosed that the sum of Rs.99185 had been credited to the amalgamation reserve in their returns and had also replied to the several queries relating to this aspect of the matter as detailed hereinabove.

4. On behalf of the respondents an affidavit-in-reply dated 21.5.2008 came to be filed. As regards the aforesaid point raised, it was contended that though the assessee was confronted on this issue, no official opinion has been formed in the assessment order by the Assessing Officer and therefore, it was contended that this was not a case of change of opinion. It was contended that since

the assessee had failed to disclose the income accruing on amalgamation, provisions of section 147 were applicable.

5. In the affidavit-in-rejoinder dated 7.2.2008 it was contended on behalf of the petitioners that the stand taken by the respondents was casual and was taken without appreciating the statutory precondition for validly assuming jurisdiction under section 147, which was that there must be a "failure to make a full and true disclosure of the material facts".

6. In the circumstances of the present case, we find that this is not a case where it can be said that there was failure on the part of the petitioners to disclose fully and truly all material facts necessary for assessment in the relevant assessment year. The accounting entry for the amount of Rs.9984.15 lakhs was mentioned in the returns for the relevant years. In reply to the requisition made by respondent no.1 on 30.1.2004 concerning this issue, the queries raised were replied to by the petitioner's letter dated 11.2.2002. Again respondent no.1 raised further queries by show cause letter dated 1.3.2002 and this was replied to by the petitioner by letter dated 5.3.2002. On 3rd occasion queries were raised by respondent no.1 by his letter dated 10.3.2005 and

this was replied to by the petitioner by letter dated 12.3.2005. Again, after the issue of the notice dated 26.3.2007 and after receipt of recording reasons, the petitioner addressed the issue vide their letter dated 13.12.2007. There was a full and true disclosure of all material facts placed before the assessing officer at the first instance and thus there was no suppression of any material from the assessment officer. Therefore, all materials were placed before the assessing officer when he passed the order.

7. In our opinion, therefore, the pre-requisite condition contained in the proviso to section 147 to enable the re-assessment to be opened after period of 4 years have elapsed have not been met.

8. We further find that in the impugned order dated 13.12.2007 reference has been made to the provisions of explanation-1 to section 147 which provides that the production before the Assessing Officer of Account Books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing officer will not necessarily amount to disclosure within the meaning of the section. In our view, this is not a case which attracts explanation- (1) to section 147. This was a case in which the assessing officer raised specific queries on several occasions and all

the queries were answered.

9. It was also sought to be contended that since the assessing officer had not expressed any opinion regarding this matter in his original assesment order, it could not be said that there was any change of opinion in this case. In our view, once all the material was before the assessing officer and he chose not to deal with the several contentions raised by the petitioner in his final assesment order, it cannot be said that he had not applied his mind when all material was placed by the petitioner before him.

10. Petitioner had also contended that there was no reason to believe that any income chargeable to tax had escaped assessment. In view of the finding above, it is not necessary to go into this aspect of the matter.

11. In the net result, Writ petition is allowed in terms of prayer clause-(a). There shall be no order as to costs.

(R.S.Mohite,J)

(F.I.Rebello,J)