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

WRIT PETITION NO.870 OF 2012

M/s.Rabo India Finance Limited, Mumbai ....Petitioner
V/s.
Deputy Commissioner of Income Tax,
Circle-1(3), Mumbai & Ors. ...Respondents

Mr.Percy Pardiwalla, Senior Counsel with Mr.Atul K. Jasani for the Petitioner.

Mr.Suresh Kumar for the Respondents.

CORAM : S.J. VAZIFDAR AND
M.S. SANKLECHA, JJ.
DATE : 9TH JULY, 2012.

ORAL JUDGMENT (PER S.J. VAZIFDAR, J.) :-

1. Rule. With the consent of the parties, the petition is taken up for final hearing.

2. The petitioner has challenged a notice dated 28.3.2011, issued under section 148 of the Income Tax Act, 1961, seeking to re-open the assessment for the A.Y. 2004-2005 and an order dated 27.3.2011 rejecting the petitioner's objections thereto.

3. We have come to the conclusion that the reopening of the

assessment is based only on a mere difference of opinion. It is admittedly not on the basis of any new material or the existence or even the realization of any provision of law or a judgment which had not been noticed earlier. The change of opinion occurred in the assessment proceedings for the A.Y. 2007-2008 leading to the present proceedings for the A.Y. 2004-2005. The very material relied upon had not only been produced before the AO in the previous years but had been brought to his notice and considered by him while passing the assessment orders of the earlier years.

It is to demonstrate this that it is necessary to state the facts in some detail. These facts unfold in the three stages leading to the assessment order.

4. The petitioner is a non banking financial company, registered with the Reserve Bank of India and carries on business relating inter-alia to investments and financial and strategic advisory services.

On 1.4.2002, the petitioner entered into several business support agreements with its ultimate parent company Co-operative Centrale Raiffeisen – Boerenleenbank B.A., Amsterdam (Rabobank International). Under the agreements, Rabobank International was required to provide a variety of services. The petitioner has set out the nature of the services in considerable detail under various heads.

It is not necessary to set them out in this judgment. It would be sufficient to note only some of the heads of services :-

IT Infrastructure, Systems & Development
Credit Risk Management (CRM),
Audit,
General Management Services,
Communication
Telecom, Media and Internet (`TMI')
Legal
Tax
Human Resources
Risk Management and Modeling, and
Administration Strategy and Program Management.

THE FIRST STAGE :

5(A). The petitioner made an application under section 195(2) of the Act to the Deputy Director of Income Tax (International Taxation) for determining the rate of deduction of tax at source in respect of the remittance to be made to Rabobank International in respect of the said services.

(B). The application was decided by an order dated 15.6.2004. The order rejects the petitioner's submission that the remittance to its parent company Rabobank International do not constitute income and therefore did not attract any income tax in India. What is important however, is that the order records not merely the fact that

the support services had been rendered but also records the nature and details in respect thereof. The details of the payments proposed to be made under the agreements were noted and the petitioner was authorized to deduct the tax at the rates specified in the order.

THE SECOND STAGE :

6. The petitioner filed its return of come for the A.Y. 2004-2005 on 30.10.2004.

7. It is important to refer to the material filed before and the facts disclosed by the petitioner to the AO with the return of income.

(A). The return of income was accompanied by a tax audit report in Form No.3 CEB and the annual accounts. Note 6 in the computation filed with the return read as under :-

> "6. The Company has paid support charges to Co-operatieve Centrale Raiffeisen-Boerenleenbank B.A. on which taxes have been deducted in accordance with the orders obtained under section 195(2) of the Act."

The annexure to the same Form No.3 CEB contained the particulars relating to the international transactions. Part "B" of clause 7 of the Annexure required the particulars of the relationship of the assessee with associated enterprises. The details were furnished in Annexure "A" to the said Annexure to Form No.3 CEB. The same disclosed Rabobank International as an associated enterprise as defined under section 92(A) of the Act and stated the business to be

that of banking and financial services.

In clause 10 of the Annexure, the petitioner affirmed that it had entered into an international transaction in respect of the services. In Annexure “B” thereto, the petitioner furnished the name and addressed of the associated enterprises with whom the transactions had been entered into and the description of the services provided.

In clause 12 of Form No.3 CEB, the petitioner affirmed that it had entered into the international transactions with an associated enterprise and furnished the details as per Annexure “B” thereto including the payment for the support services.

(B). The petitioner filed the annual report which also accompanied the return. The same mentioned the operating costs. Note 19 in respect thereof bifurcated the operating costs and stipulated the amount towards the business support services. Note 23.1 mentioned the relationship between the petitioner and Rabobank International. Note 23.5 furnished the particulars of the transactions between the petitioner and related parties which included reimbursement expenses including towards the business support services. Note 27 which pertains to the expenditure in foreign currency mentioned the amounts paid towards the business support services.

8(A). It is equally if not more important to note that respondent No.1 issued a notice dated 22.9.2006 under section 142(1) of the Act requiring the petitioner inter-alia "To produce or cause to be produced the accounts and / or documents specified overleaf (As per Annexure)."

Clause 22 of the Annexure :

> "22. Justify the finance charges, i.e. fees, debentures issued expenses, stamp duty expenses, and issuing and paying agents fees, totaling to Rs.59.85 lakhs claimed during the year."

(B). By a letter dated 5.10.2006 the petitioner furnished the details of the amounts paid to Rabobank International towards the guarantee fees issued in favour of some of its clients. The same pertained to the transactions in question.

9. The AO made a reference under section 92CA (1) to the Transfer Pricing Officer (TPO).

Section 92CA (1) and (2) read as under :-

> **"92CA. Reference to Transfer Pricing Officer. -**
>
> (1) Where any person, being the assessee, has entered into an international transaction in any previous year, and the Assessing Officer considers it necessary or expedient so to do, he may, with the previous approval of the Commissioner, refer the computation of the arm's length price in relation to the said international transaction under section 92C to the Transfer Pricing Officer.
>
> (2) Where a reference is made under sub-section (1), the Transfer Pricing Officer shall serve a

> notice on the assessee requiring him to produce or cause to be produced on a date to be specified therein, any evidence on which the assessee may rely in support of the computation made by him of the arm's length price in relation to the International transaction referred to in sub-section (1).”

10(A). The TPO issued a notice dated 12.6.2006 under sub section 2 seeking information from the petitioner in connection with the proceedings under sub-section (1).

(B). The petitioner by his reply dated 5.7.2006 specifically referred the TPO to the accountants report, which had been forwarded with the income tax return and the Transfer Pricing Study Report for the financial year ending 31.3.2004.

(C). It is also important to note that under cover of a letter dated 16.11.2006, the petitioner forwarded to the TPO the copies of the agreements and stated that the same specify the nature of the support services to be provided thereunder and the basis of the charge. The letter also enclosed the invoices raised in respect of the services.

(D). Ultimately, the TPO by an order dated 12.6.2006, inter-alia concluded as under :-

> “Considering the facts and circumstances of the case, and, the assessee's submissions and documents furnished, the value of the international transactions with the associated enterprises, with regards to the arm's length price is not being disturbed.”

THE THIRD STAGE :

11. The roznama of the proceedings before the AO indicates that the AO had in fact considered the entire matter including the arm's length price in detail.

(A). The roznama of 6.11.2006 records that the petitioner was called upon to justify / explain the process of the international transaction audited in the said report in Form No.3 CEB.

The roznama of 20.12.2006 records that the petitioner was called upon to furnish the complete receipts and details inter-alia regarding the quantum and purpose of support charges payment made to Rabobank International and to justify the same.

(B). By a letter dated 7.11.2006, the petitioner forwarded the information. Paragraph 9 of the letter reads as under :-

> **"Details of support charges paid to Cooperative Centrale Raiffeisen - Boerenleenbank B.A.**
>
> Cooperative Centrale Raiffeisen – Boerenleenbank B.A. ("CCRB") is the ultimate holding company of Rabo India Finance Private Limited. During the year under consideration, CCRB has rendered some support services to the company.
>
> Please find enclosed herewith details of support services as "Annexure 4"
>
> The company has deducted tax in accordance with the orders obtained under section 195(2) of the Act.
>
> Further, please find enclosed herewith copies of invoices and orders obtained under section 195(2) of the Act."

(C). Thereafter the roznama dated 4.12.2006 before the AO

indicates that the petitioner was again called upon to explain / justify the supporting fees expenses and the bills in respect of the support expenditure. It is not contended that the petitioner had not forwarded the same.

(D). A final assessment order was made on 20.12.2006 in respect of A.Y. 2004-2005. Mr.Pardiwalla's reliance upon the following extract from the assessment order is well founded.

> "(d) **Disallowance u/s 40A(i)** :
>
> During the year, the Regional Office of Rabo Group has rendered certain support services to the assessee company and other group companies, allocated in the Asia Pacific Region, on a cost sharing basis. The Regional office is located in Singapore and is a branch of Co-operative Central Raiffeisend, Boerleenbank, B.A., Amsterdam, Netherlands, which is ultimate holding company of the assessee company. As per the agreement, the assessee company has made a provision of regional allocation charges of Rs.129,86,403/- and Rs.175,00,000/- for global and head office charges for the month of Jan to Mar, 04 against these support charges and for providing services to the company. However, the invoices of these expenses were raised in the subsequent F.Y. It is further noticed that the assessee company has not deducted TDS on above provisions amounting to Rs.3,04,87,859/-. Accordingly, vide order sheet noting dt. 04.12.06, the assessee company was requested to justify along with supporting documentary evidences, the provisional expenditure of Rs.1.29 crs. and Rs.1.75 crs for the month of Jan to Mar 2004, for which the actual bills were raised in the subsequent F.Y. i.e. 2004-05,. In compliance to above, vide reply dt. 11.12.06, inter-alia, the assessee company has submitted as under :
>
> *"During the year under consideration, the Regional*

Office of Rabo group has rendered certain support services to our Company and the other group companies located in the Asia Pacific Region on a cost sharing basis. The Regional Office is located in Singapore and is a branch of Co-operative Central Raiffeisend, Boerleenbank, B.A., Amsterdam, Netherlands ("CCRB") which is our ultimate holding company. Towards these support charges, the Company has made a provision for Regional Allocation charges of Rs.1,29,86,403/- for the month of January, 2004 to March, 2004. Similarly, the Company has also made a provision for Global and Head Office charges of Rs.1,75,01,456/- for the month of January,2004 to March,2004, CCRB charges only costs for providing such services to the company.

The invoices for the same are raised after the year end. Hence, the Company made the provision of such expenses during the year under consideration, based on an estimate of expense and the actual amount is determined only on receipt of the actual invoice subsequently.

The Company has not deducted tax on the above provisions amounting to Rs.3,04,87,859/-. Hence, the Company wishes to offer the same as income for the captioned assessment year in accordance with provisions of Sec 40(a)(i) of the Act."

Keeping in mind the above submissions of the assessee company, nature of expenditure incurred, actual bill raised in the next F.Y., the offer is Rs.3,04,87,859/- for tax as above of the assessee company is hereby accepted. Accordingly, same is added back to the income of the assessee company. Penalty proceedings u/s 271(1)(c) are initiated separately."

It is clear therefore, that the AO had before him the agreement. The AO also came to the conclusion that the deduction sought was allowed under section 37. This is clear from the fact that

a part of the claim for deduction was disallowed. Implicit therein is the finding that the deduction is allowable but due to the provisions of section 40A(1)(a) a part had to be disallowed on account of the petitioner not having deducted the TDA.

12. Lastly, it is also relevant to note the assessment order dated 28.12.2006 made in respect of Rabobank International. Rabobank International has been taxed in respect of the amounts paid to it for the said services provided to the petitioner. The assessment order records that the same constituted the revenue attributable to the India from its PE in India.

Paragraph 3.2 of the assessment order reads as under :-

> "From the above, it becomes obvious that a large percentage of Rabo India's income is passed on to the Assessee through its back to back arrangement ivs.a.vis its clients in India. As these transactions pertain to Financial Sector and the assessee is receiving advisory fees, guarantee fee/indemnity fee as percentage of interest income of Rabo India and other remittances guised in the of the forms of reimbursements, it is held that 80% of the operations are carried out in India. Accordingly, the revenue attributable to India from its PE in India is computed at 80% of Rs.86,814,553/- amounting to Rs.69,451,642. As the assessee is engaged in the financial sector and especially engaged in providing credit facility and advisory services, 30% of the above is taken to the profits of the assessee from its Indian operations.
>
> 4. Subject to the above, total income of the assessee is as under :-
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> Interest Income Rs. 76,34,718/-

Business income as discussed in para 3	Rs.2,08,35,493/-”

13. It is clear therefore, that the details of the transactions including the agreements between the petitioner and the Rabobank International had been forwarded to the AO and the TPO. The TPO and the AO had obviously considered the same as well as all the relevant documents in connection therewith including the invoices raised by the Rabobank International on the petitioner.

14. The facts thus far indicate that the respondents were aware not merely of the existence of the transactions between the petitioner and Rabobank International but also the details thereof. They also establish that the AO had specifically considered the same. If an AO calls for specific information relating to or in connection with the material before him, absent anything else, it is reasonable to presume that he had considered the material filed before him as well as the material called for by him before making the assessment order. Had he not considered the material filed before him originally there would be no question of his seeking further information in relation thereto. It is logical therefore, to presume that he had considered the material in relation to which he sought further information. It would equally follow that the AO would also have considered the information furnished pursuant to such demand. A view to the contrary would presume that the AO had ignored the very

information that he specifically sought. We are not inclined to presume negligence or indifference on the part of an AO in such circumstances. It is reasonable therefore, to presume that the AO had applied his mind to the agreements and matters connected therewith relating to the agreement.

15. This brings us to the impugned notice under section 148 dated 28.3.2011 and the impugned order dated 27.3.2011 rejecting the petitioner's objections thereto.

16. Upon receiving the notice dated 28.3.2011 under section 148 of the said Act, the petitioner by a letter dated 15.4.2011, requested for the reasons for reopening the assessment. The same, furnished under cover of a letter dated 19.4.2011, read as under :-

> "The assessee company is a wholly owned subsidiary of a Scottish bank. It is paying business support charges, guarantee fees and other service charges to its holding company. During the assessment year 2007-08, the AR was asked to produce the details of business support charges etc. received from the holding company. The details furnished by the AR shows that no substantial or specific services have been rendered by the holding company. Hence, the business support charges, guarantee fees paid to the holding company are not for business expediency and are to be disallowed. During the assessment proceedings, the exact nature of these payments was not disclosed. The facts being the same for the AY 2004-05, the above expenses need to be disallowed.
>
> There is a failure on the part of the Assessee to make a full and true disclosure of the nature of the services and assistance received from the Holding co for which payments have been made to the Holding co.

> I have therefore reasons to believe that the income of Rs.9,37,54,925/- has escaped assessment under the provisions of Income-Tax Act, 1961 for the AY 2004-05 and remedial action by issuance of notice u/s. 148 will be appropriate in the case because all the conditions for issue of such notice are fulfilled in this case. This assessment is being re-opened with prior approval of CIT-1, Mumbai given vide letter dated 24.03.2011 as per sub-section (2) of section 151 of the I.T. Act.
>
> Issue notice u/s. 148 of the Income Act Act, 1961".

17. The petitioner raised the objections to the said notice, which were rejected. However, respondent No.1 did not dispose of the objections separately but did so while passing a reassessment order dated 16.12.2011 under section 143(3) of the Act.

The petitioner therefore challenged this order as well as the impugned notice by filing Writ Petition No.371 of 2012.

By an order dated 2.3.2012, this Court quashed the order of reassessment and directed respondent No.1 to pass a fresh order on the objections raised by the petitioner to the proposed reassessment.

18. Thereafter respondent No.1 heard the matter afresh and passed the impugned order dated 27.3.2012, rejecting all the objections raised by the petitioner to the impugned. After setting out the above facts and submissions on behalf of the parties, respondent No.1 held as under :-

> "4.9 I have gone through the submission of the assessee very carefully and find the same without any merit. The above case laws relied upon by the assessee are materially on different facts than the facts of the assessee's case. It has been discussed in detail in the foregoing paras that the disclosure made by the assessee during the course of maiden assessment proceedings was inadequate. Since the Assessing Officer in those proceedings had not made any opinion on the said issue of "Business Promotion Expenses", the question of "change of opinion" does not arise. Accordingly, I hold that this is not a case of change of opinion and therefore the various case laws relied upon challenging the validity of reopening assessment u/s 147 on this ground is of no help to the assessee."

19. The first respondent in the reasons stated that during the A.Y. 2007-2008, the petitioner was asked to produce the details of the business support charges received from Rabobank International ; that the details showed that no specific and substantial services had been rendered by Rabobank International and that the amounts paid by the petitioner to Rabobank International are not for business expediency and are therefore, to be disallowed. These constitute the opinion of the AO.

The reasons seek to justify the notice stating : "During the assessment proceeding, the exact nature of these payments was not disclosed and that there is a failure on the part of the assessee (petitioner) to make a full and true disclosure." The assessment proceedings referred to in the sentence pertain to the relevant A.Y. 2004-2005. The impugned order also merely states that what

preceded paragraph 4.9 indicated that the disclosure made by the petitioner during the course of the assessment proceedings was inadequate.

20. There is not a whisper as to the nature of the inadequate disclosure. Respondent No.1 nowhere specifies even the nature of the information that was not furnished in the earlier proceedings. There is no mention of the disclosure of the nature of payments in the assessment proceedings for A.Y. 2007-2008 which were absent in the proceedings for the relevant assessment year. The basis of the notice was thus unfounded on facts. Nor does he state that the absence of this unspecified lack of disclosure was not noticed by the AO.

21. Mr.Suresh Kumar, the learned counsel appearing on behalf of the respondents was unable to indicate what actually was the alleged inadequacy of the disclosure by the petitioner. He did not contend that the material before the AO while considering the assessment proceedings during the A.Y. 2007-2008 contained any additional material which indicated any alleged inadequacy in the disclosure during the relevant assessment year. The material respondent No.1 considered, construed and relied upon during the A.Y. 2007-2008 was the same as the material that was considered by the AO in the assessment proceedings for A.Y. 2004-2005. This

therefore, clearly is a case of a plain and simple difference of opinion and nothing more.

22. Mr.Suresh Kumar then relied upon paragraph 4.9 of the impugned order to the effect that the Assessing Officer in earlier had not expressed any opinion on the issue of business promotion expenses and that therefore, the question of change of opinion does not arise.

23. This finding is ex-facie incorrect. It ignores the detailed consideration by the AO in respect of the A.Y. 2004-2005 disallowing a part of the claim under section 40A(i), which we have set out earlier. The same material had been considered by the TPO and the AO in the assessment proceedings for the A.Y. 2004-2005. As stated earlier, it is evident from the roznama, the requisitions by the TPO and the AO and the petitioner's response thereto in the assessment proceedings for the year 2004-2005 that the material had been furnished by the petitioner and considered by the AO and the TPO.

24. Even if the assessment order had itself not dealt with the point expressly, it would have made no difference. A Division Bench of this Court, to which one of us (M.S. Sanklecha, J.) was a party, in a judgment dated 10.2.2012 in *NYK Line (India) limited v. Deputy Commissioner of Income Tax 1(3)* in Writ Petition No.159 of 2012 held :-

> "17 Now, in this background and considering these tests, the facts of the present case would have to be evaluated. The Assessee in the present case had made a disclosure in the notes forming part of the accounts of the nature of payments required to be made to the foreign principal on account of Container Detention Charges. A reference was made to the fact that as a result of a circular issued by the Reserve Bank of India, the Assessee was not permitted to remit a certain proportion equivalent to US $ 1.5 for each container. The statutory auditors had also included a note in the report. During the course of assessment proceedings, the Assessee addressed a comprehensive letter dated 18 November 2009 making a full disclosure of facts. Now it is in this background that the order of assessment under Section 143(3) must be considered. The Assessing Officer specifically discussed in the course of the assessment order the matters in respect of which he has made a disallowance either fully or in part. Since the Assessing Officer did not find any justification to reject the claim of the Assessee in respect of the issue of container detention charges, there was no specific discussion in the course of order. In this regard the following observations of a Division Bench of this Court in **Idea Cellular Ltd. v/s Deputy Commissioner of Income Tax ((2008) 301 ITR 407 (Bom)** have relevance:
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> > 9. It was also sought to be contended that since the Assessing Officer had not expressed any opinion regarding this matter in his original assessment 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 assessment order, it cannot be said that he had not applied his mind when all material was placed by the petitioner before him."

25. A Division Bench of the Delhi High Court in *CIT vs. Eicher*

Ltd. 294 ITR 310 held :-

> "15. In Hari Iron Trading Co. v. CIT [2003] 263 ITR 437, a Division Bench of the Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of an (sic) which the assessee's explanations are rejected and additions/ disallowances are made. We agree.
>
> 16. Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessment Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.
>
> 17. In so far as the present appeal is concerned, we find that the assessee had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the assessee in its letter dated November 8, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view

> was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee."

We are in respectful agreement with the judgment. The judgment applies to the present case.

26. It was not even contended before us on behalf of the respondents that if it is a case merely of a change of opinion, the AO has jurisdiction under sections 147 and 148 of the said Act. It is therefore not necessary to refer to the authorities relied upon by the parties on the question whether even an incorrect decision by an AO can be rectified in the proceedings under section 147 read with 148 of the said Act.

27. The Writ Petition is therefore made absolute in terms of prayer (a). The impugned notice dated 28.3.2011 and the impugned order dated 27.3.2012 are quashed and set aside. There shall be no order as to costs.

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