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

WRIT PETITION NO. 2115 OF 2009

Trent Ltd. ...Petitioner

vs.

1. The Deputy Commissioner of Income Tax-2(3)
& Anr. ...Respondents

Mr.P.J. Pardiwalla, Senior Advocate i/b Mr.Atul K. Jasani for petitioner.
Mr.Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.

DATE : 6th JANUARY, 2022
(THROUGH VIDEO CONFERENCE)

ORDER :

1. Petitioner is a company engaged in the business of retailing of readymade garments etc. through its chain of stores called 'WESTSIDE'. Petitioner has filed this petition to challenge the issue of notice dated 31st March 2009 under section 148 of the Income Tax Act,1961 ('the Act') for reopening the assessment for Assessment Year 2004-05. By the said notice, assessment is sought to be reopened on the allegation that income of petitioner for Assessment Year 2004-05 has escaped assessment. According to petitioner, the notice is without jurisdiction inasmuch as the same has been issued without formation of a valid belief that the income of petitioner has escaped assessment for the assessment year 2004-05, since the issues raised have been the subject matter of consideration while

framing the original assessment. Therefore, reopening is sought on the basis of change of opinion relying on the same set of material.

2. Mr.Pardiwalla also submitted that it is quite obvious from the reasons for reopening recorded by a jurisdictional Assessing Officer that there has been non-application of mind while recording the reasons. Consequently, even the approval granted under section 151 of the Act must have been issued without application of mind. Mr.Pardiwalla submitted that even in the affidavit in reply, contents of paragraph 4 therein confirmed petitioner's allegation that there has been non-application of mind while recording the reasons for reopening.

3. The basis for reassessment is to disallow "store launching expenses" incurred during the year on the ground that these are classifiable as 'capital expenditure'. In the reasons for reopening, the JAO is proposing to reassess based on the material for subsequent years.

4. Petitioner had debited the revenue expenses incurred till the opening of new stores under the head "store launching expenses" in its books of accounts. Such expenditure incurred by petitioner prior to launching a new retail store comprised of cost of advertisement and promotion, employee recruitment and training, travel etc. and petitioner was booking these costs as revenue expenditure.

5. Until 31st March 2003, petitioner treated these expenses as 'deferred revenue expenses' in its books of account as per its accounting policy. The accounting policy is explained in Note No.8 to Schedule 'M' forming part of its Annual Accounts for the year 31st March 2004.

6. During the year under review, petitioner amortized Rs. 186.23 lakhs of store launch expenses under 'Manufacturing and Other Expenses' forming part of Profit and Loss Account for the year 31st March 2004. Such expenses amounting to Rs.293.34 lakhs incurred during the year were debited to natural heads of account under the Profit and Loss Account for the year under review. Petitioner in its return on income for the assessment year under review had claimed 'store launch expenses' actually incurred during the year of Rs.293.24 lakhs as 'revenue expenditure' and also added back Rs.186.23 lakhs of such amortized expenses of earlier years under its 'Computation of Business Income'. The JAO has now sought to reopen the assessment under section 148 of the Act in order to disallow the above deduction in respect of 'store launch expenses' incurred on the ground that its in the nature of 'capital expenditure'.

7. The details mentioned above are contained in computation of assessable profits filed by petitioner alongwith is annual accounts. During the hearing, the Assessing Officer had also raised query relating to change in accounting policy of store launching expenses with effect from 1st April 2003 appearing in Note No. 8 in the audited accounts. Petitioner gave an explanation/clarification/details vide its letter dated 30th October 2006.

Thereafter the assessment order dated 31st October 2006 was passed. In our view, therefore, since there was a full and true disclosure by petitioner, there was no reason as stated for the Assessing Officer to come to the conclusion for income chargeable to tax had escaped assessment.

It is true that these points have not been discussed in the assessment order but as held by this Court ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-Tax-2(1)*** [1]**,** once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

8. From the reasons recorded, we also find no new or fresh

1 [2014] 44 taxmann.com 304 (Bombay)

information or fact that has come to the notice of the JAO subsequent to the assessment so as to initiate proceedings under section 148 of the Act. It is quite obvious that the reopening is based on the material which was already on record at the time of passing the assessment order under Section 143 of the Act. Once, the Assessment Officer, on consideration of the material on record, and the explanation offered, arrived at a final conclusion that the assessee is entitled to the deduction as claimed, then on the basis of the very same material, the Assessing Officer cannot form a *prima-facie* opinion that the deduction is not allowable and, accordingly, reopen the assessment on the ground that income chargeable to tax has escaped assessment. A Division Bench of this Court in ***Cartini India Limited, (Formerly Godrej Appliances Ltd. Vs. Additional Commissioner of Income Tax & Ors.*** [2] has observed that where on consideration of the material on record, one view is conclusively taken by the assessing officer, it would not be open to the assessing officer to reopen the assessment based on the very same material with a view to take another view. This has been followed by another Division Bench of this Court in ***3i Infotech Limited Vs. Assistant Commissioner of Income-Tax & Ors.*** [3] :

> *"13 The record before the court, to which a reference has been made earlier, is clearly reflective of the position that during the course of the assessment proceedings the assessee had made a full and true disclosure of all material facts in relation to the assessment. As a matter of fact, it would be*

2 (2009) 314 ITR 275 (Bom.)
3 (2010) 192 Taxman 137 (Bom.)

> *necessary to note that the notice to reopen the assessment on the first issue is founded entirely on the assessment records. There is no new material to which a reference is to be found and the entire basis for reopening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. In* ***Cartini India Ltd. v. Addl. CIT****, [2009] 314 ITR 275 (Bom), a Division Bench of this court has observed that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to the Assessing Officer to reopen the assessment based on the very same material with a view to take another view. The principle which has been enunciated in Cartini must apply to the facts of a case such as the present. The assessee had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for a disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be postulated that the condition precedent to the reopening of an assessment beyond a period of four years has been fulfilled."*

9. The facts of this case that the claim for deduction of 'store launch expenses' are almost similar to that of ***Cartini India Limited*** (Supra), where 'project launch expenses' were claimed by petitioner as 'revenue expenses' even though in its books of accounts, the petitioner had shown the expenditure spread over a period of 3 years and was allowed to deduct it by the department.

10. In the circumstances, it is quite clear that the Assessing Officer had in his possession all primary facts when the original assessment order was passed. It would not be open to reopen the assessment based on the very same material with a view to take another view, as noted earlier. It is a clear case of change of opinion. An Assessing Officer cannot initiate

proceedings for reassessment on the basis of mere change of opinion as held by the Full Bench of Delhi High Court in the landmark case of ***CIT Vs. Kelvinator of India Ltd.*** [4] and followed by many other Courts. On this ground alone, the impugned notice dated 31st March 2009 under section 148 of the Act together with order dated 16th October 2009 dealing with the objection are required to be quashed and set aside.

11. Before we part, we have to agree with Mr. Pardiwalla's submission that there has been non-application of mind while recording the reasons for reopening. First of all, in the reasons, it is stated *"Further as per Apex Court decision cited above"*, but there is no decision cited anywhere. Moreover, the reasons record *"In view of above, I am satisfied and have reason to believe that the income to the extent of Rs.3.02 lakhs chargeable to tax has escaped assessment within the meaning of the provision of section 147 of the I.T. Act."*

12. In the affidavit in reply, the respondents admit that there is a mistake in the reasons recorded for reopening and according to respondents it is a typographical error that the figure of Rs.3.02 lakhs was mentioned instead of Rs.293.24 lakhs. In our view, this mistake demonstrates non-application of mind by respondent No.1 at the time of

4 [2010] 320 ITR 561/187

recording of the reasons for reopening the assessment. Though we do not find the approval under section 151 of the Act in the record and proceedings, we can certainly hazard a guess that even the Approving Authority would not have applied its mind or read the reasons recorded before granting approval. If it had only been read, these errors would have come to light at that stage itself. Therefore, for all the aforesaid reasons, we quash the impugned notice dated 31st March 2009 under section 148 of the Act together with order dated 16th October 2009.

13. Rule is made absolute in the above terms with no order as to costs.

(N. J. JAMADAR, J.) (K.R. SHRIRAM, J.)