

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1467 OF 2022

Virbac Animal Health India Private Limited ... Petitioner.

V/s.

Assistant Commissioner of
Income-tax-3(3)(1), Mumbai and ors. ... Respondents.

Mr. Dharan Gandhi for the Petitioner.
Mr. Akhileshwar Sharma a/w. Mr. Vikas Khanchandani for the
Respondent.

CORAM : NITIN JAMDAR &
N.R. BORKAR, JJ.

DATE : 14 JUNE 2022.

JUDGEMENT (*PER N.R. BORKAR, J.*)

. This Petition takes an exception to the notice dated 26 March 2021 issued by Respondent No.1 under Section 148 of the Income Tax Act, 1961 (for short “the Act”) seeking to reopen the assessment for Assessment Year (A.Y.) 2014 -15 and the order on objections dated 25 January 2022 passed by the Respondent No.4.

2. The Petitioner is a Company incorporated under the Companies Act and is engaged in the business of marketing of animal health products.

3. The Petitioner filed its original return of income in terms of Section 139 of the Act for A.Y. 2014-2015 on 27 November 2014 declaring total income of Rs.901328580.

4. The Petitioner's return was selected for scrutiny assessment. The notice under Section 142(1) of the Act dated 17 June 2016 calling upon the Petitioner to file various details / documents to complete assessment was issued. According to the Petitioner, specific details pertaining to sales and advertisement expenditure were called and the same were submitted vide letter dated 22 December 2016.

5. According to the Petitioner, Respondent No.2 after scrutinizing all the details furnished by the Petitioner and examining all the issues passed an assessment order dated 26 December 2016 under Section 143(3) of the Act and made an addition of Rs.1.01 Crores towards Product Development Charges and no other addition was made.

6. According to the Petitioner, the Respondent No.1 thereafter on 26 March 2021 issued impugned notice under Section 148 of the Act stating therein that he has reason to believe that the Petitioner's income chargeable to tax for A.Y. 2014-15 has escaped assessment within the meaning of Section 147 of the Act.

7. According to the Petitioner on 18 November 2021, the Respondent No.1 issued notice under Section 143(2) of the Act and along with the said notice, provided the Reasons recorded for reopening the assessment. The Petitioner on 2 December 2021 submitted its objections to the proposed reassessment. The Respondent No.4, thereafter, by impugned order dated 25 January 2022 rejected the objections of the Petitioner.

8. We have heard Mr. Gandhi, the learned Counsel for the Petitioner and Mr. Sharma, the learned Counsel for the Respondents- Revenue.

9. Mr.Gandhi submits that the existence of a valid reason to believe is a *sine qua non* for the exercise of jurisdiction under Section 147 of the Act. It is submitted that the said reasons to believe cannot be based on surmise or conjecture or an assumption.

10. It is submitted that the reasons recorded for reopening assessment must be based on new information or material, however, in the present case, the Assessing Officer is seeking to reopen the reassessment proceedings based on the same material facts which were before him when he concluded the original assessment proceedings. It is submitted that reassessment without any additional information amounts to change of opinion and the same

is not permissible.

11. It is further submitted that the proviso to Section 147 of the Act provides that where an assessment under Section 143(3) of the Act has been made for relevant assessment year and four years from the end of the relevant assessment year has expired, then no reassessment proceedings can be initiated under Section 147 of the Act unless any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. It is submitted that the Petitioner's case is covered by the said proviso as there is no failure on the part of the Petitioner of the kind envisaged in the proviso and the record would clearly show that the entire issue with respect to sales and advertisement expenditure was duly scrutinized in the original proceedings.

12. It is further submitted that, in the reasons for reopening reliance has been placed on Circular No. 5/2012 dated 1 August 2012 issued by the Central Board of Direct Taxes which was very much in existence when original assessment order was passed and therefore, it cannot be considered as new tangible materials. It is submitted that even otherwise the said Circular is not applicable as the Petitioner has not given any freebies to the Doctors governed by

the Indian Medical Council, but has given items for business promotion to the veterinary Doctors governed by Veterinary Council of India. It is submitted that the impugned notice and impugned order thus, needs to be quashed and set aside.

13. On the other hand, Mr. Sharma submits that on perusal of financials of the company, it was found that the Petitioner debited certain expenses on cost of samples purchased for distribution under head advertisement and sales promotion of Rs.22676984. It is submitted that such expenditure on account of freebies incurred in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2022 is not admissible under Section 37(1) of the Act being expenses prohibited by law. It is submitted that this aspect was not properly examined at the time of original assessment, which resulted in under assessment of income to the tune of Rs.22676984. It is thus submitted that the reopening is based on tangible material and this is not a case of mere change of opinion. It is submitted that petition be dismissed.

14. We have perused the Reasons recorded for reopening the assessment. The Reasons reads thus:

“In this case, assessment for AY 2014-15 was completed on 26.12.2016 assessing total income at Rs.91,36,19,550/-.

2. The Board vide Circular No.5/2012 [F.No. 225/142/2012-ITA.II], dated 1-8-2012 stated that Indian

Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (the regulations) on 10-12-2009 imposed a prohibition on the medical practitioner and their professional associations from taking any Gift, Travel facility, Hospitality, Cash or monetary grant from the pharmaceutical and allied health sector industries. Section 37(1) of Income Tax Act provides for deduction of any revenue expenditure (other than those falling under sections 30 to 36) from the business Income if such expense is laid out/expended wholly or exclusively for the purpose of business or profession. However, the explanation appended to this subsection denies claim of any such expense, if the same has been incurred for a purpose which is either an offence or prohibited by law. Thus, the claim of any expense incurred in providing abovementioned or similar freebees in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 shall not be admissible under section 37(1) of the Income Tax Act being an expense prohibited by the law. This disallowance shall be made in the hands of such pharmaceutical or allied health sector industries or other assessee which has provided aforesaid freebees and claimed it as a deductible expense in its accounts against income.

In the instant case, on verification of records, it revealed that the assessee is debiting expenses on cost of samples purchased for distribution under head Advertisement and Sales Promotion of Rs.2,26,76,984/-. As noted above, such expenditure on account of freebees are categorised as incurred in violation of the provisions of Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and therefore not admissible under 37(1) of the Income Tax Act being expenses prohibited by the law, the entire expenditure on account of cost of

samples purchased for distribution of Rs.2,26,76,984 is required to be disallowed by the assessee while computing the total income for the year under consideration. It resulted in underassessment of income by the amount of Rs.2,26,76,984 and the same has escaped assessment.

3. *Considering the above, it is clear that the assessee company has not disclosed the full and true material in the return of income filed and therefore, the condition specified in the proviso to Sec. 147 are fulfilled. It is pertinent to mention here that even though the assessee has e-filed the audited P & L Account and Balance Sheet or other details/schedules, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discover by the AO and could not have been discovered with due diligence. For the above reasons, it is not a case of change of opinion. Therefore, I am satisfied that the assessee had failed to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration.*

4. *In view of the above, it is a fit case for initiation of proceedings u/s. 147 of Income Tax Act, 1961, in order to frame proper assessment to bring to tax appropriate income attributable to the above, which has escaped assessment.”*

15. Respondent No.1 in its affidavit in reply dated 26 April 2022 in paragraph 6 has stated thus:

“6. With reference to paragraph 3 and 4 of the Petition, I say that it is true that Petitioner had filed return declaring income Rs.90,13,28,580/- for the relevant assessment year 2014-2015 on 27.11.2014, the said return was then processed u/s.143(1) of the Income Tax Act, 1961 and later

the case of Petitioner was selected for scrutiny which resulted in Assessment Order dated 26.12.2016 u/s.143(3) of the Act (copy of Order dated 26.12.2016 is at Exhibit - 'C' to the Petition) assessing total income at Rs.91,36,19,550/-. I say that it is subsequently it came to the knowledge of the Assessing Officer that the Petitioner – assessee is debiting certain expenses on cost of samples purchased for distribution under the head advertisement and sales promotion of Rs.2,26,76,984/- such expenditure on account of freebees are categorized as incurred in violation of provisions of the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2022 and therefore not admissible under section 37(1) of the Income Tax Act being expenses prohibited by law and are required to be disallowed which resulted in under assessment of Income by the amount of Rs.2,26,76,984/- and the same has escaped assessment. Thus the Petitioner – assessee company had not disclosed the full and true material in the return of the income filed and therefore, these Respondents based on the available financial information of Petitioner – Assessee recorded reasons, obtained necessary satisfaction / sanction u/s. 151 of the act and issued the present notice dated 26.03.2021 u/s. 148 of the act thus the inferences drawn by the Petitioner – Assessee in these paragraphs that the proceedings conducted pursuant to present notice dated 26.03.2021 are illegal and bad in law is/are untenable. I crave leave to refer and rely upon the true import of these proceedings at the time of hearing.”

16. It is evident from the affidavit-in-reply that the Assessing Officer had all material facts before him when he made the original assessment. Apart from it, specific query in respect of expenditure in question was raised at the time of original assessment and the same

was replied by the Petitioner by its letter dated 22 December 2016.

17. This Court in *Ananta Landmark Pvt. Ltd. vs. Deputy Commissioner of Income Tax Central Circle 5(3) and ors.*¹ has held:

“The Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee.”

18. In the present case, the Petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. They were carefully scrutinized and figures of income as well as deduction were carefully reworked by the Assessing Officer at the time of original assessment. In fact, in the reasons for reopening, there is not even a whisper as to what was not disclosed. In our view, this is not a case where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the

¹ (2021) 439 ITR 168

assessment sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of income. The same is not permissible, in view of proviso to Section 147 of the Act.

19. Consequently, Petition is allowed. The notice dated 26 March 2021 issued by the Respondent No.1 under Section 148 of the Act seeking to reopen the assessment for the A.Y. 2014-15 and the order dated 25 January 2022 passed by the Respondent No.4 are quashed and set aside.

20. Petition is disposed of with no order as to costs.

(N.R. BORKAR, J.)

(NITIN JAMDAR, J.)