

**IN THE INCOME TAX APPELLATE TRIBUNAL "H", BENCH
MUMBAI**

**BEFORE SHRI MAHAVIR SINGH, JM
&
SHRI M.BALAGANESH, AM**

**ITA No.5831/Mum/2014
(Assessment Year : 2006-07)**

M/s. Oleofine Organics (India) Pvt.Ltd. 101/B, Fine House Anandji Lane Off. M.G. Road Ghatkopar (E) Mumbai – 400 077	Vs.	The Deputy Commissioner of Income Tax, Circle-10(2) Aayakar Bhavan New Marine Lines Mumbai – 400 020
PAN/GIR No. AAACO1352Q		
(Appellant)	..	(Respondent)

Assessee by	Shri Ketan Ved & Shri Ninad Patade
Revenue by	Shri Manojkumar Singh
Date of Hearing	22/07/2019
Date of Pronouncement	16/10/2019

आदेश / O R D E R

PER M. BALAGANESH (A.M):

This appeal in ITA Nos.5831/Mum/2014 & 5832/Mum/2014 for A.Y.2006-07 & 2010-11 arise out of the order by the Id. Commissioner of Income Tax (Appeals)-22, Mumbai in appeal Nos.CIT(A)-22/DCIT-10(2)/IT-27/2013-14 & CIT(A)-22/DCIT-10(2)/IT-28/2013-14 respectively dated 07/07/2014 (Id. CIT(A) in short) against the order of assessment passed u/s.143(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter

referred to as Act) dated 28/02/2013 & 25/03/2013 respectively by the Id. Deputy Commissioner of Income Tax, Circle – 10(2), Mumbai (hereinafter referred to as Id. AO).

2. The preliminary issue to be decided in this appeal is on the validity of reopening of assessment made u/s.147 of the Act. The appeal has already been decided by this Tribunal on merits. Later, a miscellaneous application was preferred by the assessee that the ground raised for challenging validity of reopening was not adjudicated by this Tribunal. Accordingly, the appeal was recalled for the limited extent of adjudication of this legal ground.

3. The brief facts of this issue are that the return of income for the A.Y.2006-07 was filed by the assessee on 14/11/2006 declaring total income of Rs.5,86,46,435/-. The assessment was completed u/s.143(3) of the Act on 08/12/2008 accepting the returned income. Subsequently, notice u/s.148 of the Act dated 05/12/2011 was served on the assessee on 09/12/2011 reopening the assessment for the A.Y.2006-07. The assessee responded that the return filed originally may be treated as the return filed in response to notice u/s.148 of the Act. The reasons for the reopening as reproduced in para 4 of the assessment order is as under:-

"It appears from the records that the assessee has claimed deduction u/s, 80IB(3)(ii) of Rs. 2,20,37,5481- which is not admissible to the assessee and is required to be added back to the total income. This has resulted into an under assessment of income of 98,65,724/-.

The assessee has claimed deduction u/s. Section 80IB(3), The provisions of Section 80IB(3)(i) are valid for Companies which begins to manufacture, produce or to operate plants during the period from 1/4/1991 to 31/3/1995 and as such no extension has been made. Therefore, Section 80IB(3)(i) cannot be applicable to the assessee as the relevant A. Y. of the case In question is A.Y. 2006-07.

Thus, the only option available is to claim deduction u/s. 80IB(3)(ii). However, again, 80IB(3)(ii) deduction is applicable to an industrial undertaking being a small scale industrial undertaking which begins to manufacture or produce or things or to operate cold storage plant during the period beginning on the 1st day of April 1995 and ending on the 31st March, 2002. The assessee company is not in the business of cold storage plants and also in not a small scale industrial undertaking as its investment in fixed assets in Plant and Machinery, whether held on ownership basis or on lease or on hire purchase exceeds Rs. 1 crore is not eligible for deduction also u/s. Section 80IB(3)(ii).

A.Y. in the present case involved is A.Y. 2006-07 and therefore provisions of Section 80IB(3) cannot be applied in the case of the assessee.

From the above facts, it is seen that this has resulted in underassessment of to the extent of Rs. 2,20,37,548/- involving short levy of tax of Rs.98,65,724/-. In the light of above facts, remedial action u/s 148 is being taken. "

3.1. In the re-assessment, the Id. AO ultimately disallowed the claim of deduction u/s.80IB of the Act and added a sum of Rs.2,20,37,548/- to the total income of the assessee. The assessee challenged the assessment before the Id. CIT(A) both on merits as well as on the validity of reopening. The Id. CIT(A) upheld the action of the Id. AO both on validity of reopening as well as disallowance of deduction u/s.80IB of the Act on merits.

4. Aggrieved, the assessee is in appeal before us.

5. We have heard rival submissions. At the outset we find that the Id. AR stated that the notice u/s.148 was dated 05/12/2011 which is

admittedly issued beyond four years from the end of the relevant assessment year. Hence, the applicability of proviso to Section 147 would come into operation wherein the failure on the part of the assessee to make full and true disclosure of the material facts should be clearly pointed out by the Id. AO in the reasons recorded itself. He argued that the reasons recorded by the Id. AO nowhere indicates the failure committed by the assessee with regard to disclosure of full and true facts before the Id. AO in the course of original assessment proceedings. Accordingly, he prayed that the entire re-assessment deserves to be quashed on that count. He placed reliance on the Co-ordinate Bench of this Tribunal in the case of Samarth Lifters Pvt. Ltd. vs. ACIT in ITA Nos.7255–7257/Mum/2016 dated 06/03/2019 in support of his argument. We have gone through the reasons recorded by the Id. AO for reopening the assessment which are reproduced hereinabove. From the perusal of the aforesaid reasons, we find that there is absolutely no whisper in the reasons recorded by the Id. AO indicating the failure on the part of the assessee to disclose fully and truly all material facts necessary for the relevant assessment year. Admittedly, the entire balance sheet wherein the investment in plant and machinery had been duly reflected was furnished before the Id. AO at the time of original assessment proceedings. The original assessment proceedings have been completed after verification of the necessary documents and the balance sheet filed

together with the books of accounts by the assessee. Hence, there cannot be any failure on the part of the assessee to disclose fully and truly all material facts before the Id. AO during the course of original assessment proceedings. Admittedly in the instant case, the reopening has been made beyond four years from the end of the relevant assessment year. Hence, the proviso to Section 147 of the Act would certainly come into operation. We hold that the reasons recorded by the Id. AO absolutely does not indicate any failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment. There cannot be any addition or deletion to the reasons already recorded by the Id. AO. It is well settled that the reasons recorded by the Id. AO should speak for itself. We find that the Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd. vs. ACIT reported in 268 ITR 332 (Bom) had held as under:-

20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the

assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.

5.1. On the contrary, we find that the Id. DR placed reliance on the following decisions:

a) **Decision of Hon'ble Supreme Court in the case of CIT vs. PVS Beedies Pvt. Ltd reported in 237 ITR 13 (SC)**

We find that this decision was rendered in the context of reopening being made based on audit objection pointing out a factual mistake committed by the Assessing Officer. This decision is not applicable to the facts of the instant case.

b) **Decision of Hon'ble Jurisdictional High Court in the case of Hinduja Foundation vs. ITO reported in 2019(2) TMI 1210 dated 15/02/2019**

We find that this decision was rendered in the context of writ petition preferred by the assessee in WP No. 2866/2018 wherein the Hon'ble High Court pointed out that minor inaccuracy in indicating the figure in the reasons recorded, would not shake the very foundation of the reasons so as to nullify the notice of reopening based on such

reasons. We find that the said decision was rendered in the peculiar facts of the said case by the Hon'ble Bombay High Court by holding that near non-mentioning of the figures in the reasons recorded would not nullify the re-assessment, whereas, in the instant case before us, the issue is whether the reasons recorded by the Id. AO would get invalidated by not mentioning the failure on the part of the assessee to make full and true disclosure of the material facts before the Id. AO in accordance with proviso to Section 147 of the Act. We hold that this is a statutory requirement and statutory duty cast on the part of the Id. AO to mention the failure of the assessee in the reasons recorded itself. Hence, the decision relied upon by the Id. DR in the case of Hinduja Foundation supra would not come to the rescue of the revenue.

C. Decision of Hon'ble Supreme Court in the case of ACIT vs Rajesh Jhaveri Stock Brokers Pvt. Ltd reported in 291 ITR 500 (SC)

This is a case wherein the original assessment was completed u/s.143(1) of the Act and thereafter reopening was made. Even in this case, the Hon'ble Supreme Court specifically observed that even if the re-assessment has been made in respect of assessment originally completed u/s.143(1) of the Act, the necessary ingredients of Section 147 of the Act with regard to availability of tangible material which leads the Assessing Officer to form a belief that income of the assessee had escaped assessment should be present. Hence, this decision also would not

advance the case of the revenue as it is factually distinguishable with the instant case before us.

d) Decision of Hon'ble Jurisdictional High Court in the case of M/s. Pranawa Leafin Pvt. Ltd. vs. DCIT reported in 2013 (3) TMI 536, Bombay High Court dated 14/03/2013.

We find that this decision was rendered by the Hon'ble Bombay High Court in the context of writ petition preferred by the assessee in WP No.167/2013 wherein the Hon'ble High Court had specifically observed that the assessee had failed to disclose in the computation, the fact that the payment of Rs.2.57 Crores for the shares was in fact made on 30/01/2004. Since this fact was not mentioned by the assessee before the Id. AO, the Hon'ble Bombay High Court held that there was a failure on the part of the assessee to disclose full and true material facts before the Id. AO. In the instant case before us, we have already held that the reasons recorded by the Id. AO does not indicate any failure on the part of the assessee to disclose fully and truly all material facts that are necessary for the assessment. Hence, the reliance placed by the Id. DR on this decision would also not come to the rescue of the revenue.

e) Decision of Hon'ble Jurisdictional High Court in the case of Indian Hume Pipe Co. Ltd vs. ACIT reported in 348 ITR 439 (Bom)

We find that in this case, the assessee has challenged the legality of reopening notice issued u/s.148 in writ petition No.1017/11. We find in this case that the assessee had made claim of exemption u/s.54EC of the Act in the computation of income but the date on which the amounts

were invested were not mentioned anywhere in the records available before the Id. AO and the assessment order did not deal with the said aspect. In this factual background of that case, the Hon'ble High Court had held that there was a complete failure on the part of the assessee to disclose full and true facts that are necessary in the assessment. However, there is no such allegation in the instant case before us made by the Id. AO in the reasons recorded. Hence, this decision also would not come to the rescue of the revenue.

5.2. Hence, it could be safely concluded that the aforesaid reliance on various decisions placed by the Id. DR does not come to rescue of the revenue in the given set of facts and circumstances of the case. We find that the Id. DR finally placed reliance on Explanation 1 of Section 147 of the Act which reads as under:-

“Explanation – 1:-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 foregoing proviso.”

In this regard, we find that the Hon'ble Supreme Court had considered this explanation in the case of ITO vs. Lakhmani Mewal Das reported in 103 ITR 437 (SC) at page 445 and held as under:-

The grounds or reasons which lead to the formation of the belief contemplated by section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment

because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income-tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that, the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law. (See observations of this court in the cases of Calcutta Discount Co. Ltd. v. Income-tax Officer [1961] 41 ITR 191 (SC) and S.Narayanappa v. Commissioner of Income-tax [1967] 63 ITR 219 (SC) while dealing with the corresponding provisions of the Indian Income-tax Act, 1922).

Hence we hold that the reliance placed on Explanation 1 to section 147 by the Id DR also does not advance the case of the revenue.

In view of our aforesaid detailed observations on the validity of reopening and respectfully following the decision of Hon'ble Jurisdictional High Court in the case of Hindusthan Lever Limited relied upon supra, we hold that the Id. AO had not indicated the failure on the part of the assessee to make full and true disclosure of material of facts that are necessary for the purpose of assessment in the original assessment proceedings in accordance with proviso to Section 147 of the Act. Accordingly, in view of

this statutory violation of the Id. AO, the reopening made by the Id. AO deserves to be quashed and is hereby quashed. Accordingly, the ground No.1 raised by the assessee challenging the validity of reopening is allowed.

6. In the result, the appeal of the assessee with regard to limited purpose of Ground No.1 is hereby allowed.

Order pronounced in the open court on this 16/10/2019

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 16/10/2019
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai