IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2468 OF 2008

Cartini India Limited,)
(Formerly Godrej Appliances Ltd.)
Pirojshanagar, Vikhroli (East),)
Mumbai 400 079.)..Petitioner.

V/s.

1) Additional Commissioner of)
Income Tax, 10(2), Mumbai,)
having office at Room No.433,)
Aayakar Bhavan, M.K.Road,)
Mumbai - 400 020.)
)
2) Chief Commissioner of Income)
Tax, having office Aayakar)
Bhavan, M.K.Road,)
Mumbai-400 020)
)
2) Commissioner of Income Tax,)
City X, having office)
Aayakar Bhavan, M.K.Road,)
Mumbai - 400 020.)
)
4) Union of India, through)
the Secretary, Ministry)
of Finance North Block,)
New Delhi 110 001)..Respondents.

Mr.P.J.Pardiwala, senior Advocate for petitioner.

Mr.Parag Vyas, Advocate for respondents.

CORAM : SMT. RANJANA DESAI AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON : 26TH FEBRUARY, 2009.

JUDGMENT PRONOUNCED ON : 25TH MARCH, 2009.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Rule. Rule made returnable forthwith. By

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

2. Whether the notice issued by the assessing officer under section 148 of the Income Tax Act, 1961 ('Act' for short) on 30/3/2007 to reopen the assessment for AY 2002-03 is valid and whether the assessing officer by his order dated 15/9/2008 is justified in rejecting the objections raised by the petitioner regarding the reopening of the assessment are the two questions raised in this petition.

3. The petitioner is engaged in the business of manufacturing and marketing refrigerators, air conditioners and washing machines.

4. The petitioner had filed its return of income in respect of AY 2002-03 on 31/10/2002, declaring loss of Rs.72,57,26,992/-.

5. In the said return of income, the petitioner had claimed deduction of the entire "project launch expenses" incurred during the previous year as revenue expenditure even though in its books of accounts, the petitioner had shown the expenditure spread over a period of 3 years. Similarly, the petitioner had treated tools, dies, jigs and moulds as inventory items

and claimed deduction on the basis of their balance useful life on the last day of the previous year.

6. On scrutiny of the return of income, the assessing officer issued notice under section 143(2) of the Act calling upon the petitioner to furnish particulars, inter alia relating to the above two claims and after considering the reply filed by the petitioner, passed an assessment order under section 143(3) of the Act on 27/1/2005 allowing both the aforesaid claims of the petitioner.

7. On 2/12/2005 the assessing officer issued a notice under section 154 of the Act with a view to rectify the assessment order on the ground that excess relief was granted to the petitioner in respect of the above two claims. By its reply dated 7/12/2005 the Chartered Accountants of the petitioner submitted a detailed note to the effect that there is no mistake apparent on the record warranting rectification of the assessment and, therefore, the notice issued under section 154 of the Act be dropped.

8. Without passing any order on the notice dated 2/12/2005 issued under section 154 of the Act, the assessing officer issued the impugned notice under section 148 of the Act on 30/3/2007 with a view to

reopen the assessment for AY 2002-03 by recording the following reasons:-

" It is seen from the records that the assessee company instead of capitalizing the value of 'Tools, Dies, Jigs & Moulds' claimed it as revenue expenditure as mentioned in Notes appended to Schedule-G. The value of the assets had been included under Schedule-Q - Other Expenses and according to the assessee they are not capital expenditure. This is in addition to the value of stock of stores, loose tools, etc. claimed separately as revenue expenditure. The items viz. Tools, Dies, Jigs & Moulds are not revenue but capital expenditure as they are not consumable items like loose tools. Unlike loose tools, the life of 'Tools, Dies, Jigs & Moulds' are enduring in nature and are used in manufacturing activities for number of years. Therefore it is prudential to classify them as capital. Moreover, it has been laid down that depreciation at 100% will not be allowed on machinery or plant whose cost does not exceed Rs.5000/-. Instead, depreciation at normal rates will be allowed as part of the block of assets in accordance with Rule 5 of the Income Tax Rules, 1962.

It is seen from the records that the assessee company had incurred an expenditure of Rs.1025.30 lakhs towards Product launch expenses for advertisement and publicity in respect of Penta Cool series of Refrigerators. The assessee company contended that as per the accounting policy consistently followed by it, product launch expenses are being amortized for a period of three years. It was, however, seen from the computation of income for A.Y. 2002-03 that though the assessee had debited Rs.341.77 lakhs to the Profit and Loss Account towards Pentacool launch expenses out of total expenditure of Rs.1025.30 lakhs Rs.683.53 lakhs being the remaining balance amount of expenditure has been claimed as deduction in computation of income for the purpose of Income-tax Act. Therefore, as per the practice followed by the assessee in its books of account the same should have been treated as deferred revenue expenditure. The accounting practice followed by the assessee company is correct because the expenditure incurred on product launch is of enduring nature and its benefits will not occur immediately in the year of expenditure.

In view of the above, I have reason to believe that

income chargeable to tax for A.Y. 2002-03 has escaped assessment for failure on the part of the assessing company to disclose fully and truly all the material facts requiring for assessment for A.Y. 2002-03.

9. The petitioner objected to the reopening of the reassessment. However, by his order dated 15/9/2008, the assessing officer rejected the objections raised by the petitioner. Therefore, the present petition is filed to challenge the notice dated 30/3/2007 issued under section 148 of the Act and the order dated 15/9/2008 whereby the objections raised by the petitioner against the reopening of the assessment have been rejected.

10. Section 147 of the Act empowers the assessing officer to reopen the assessment in respect of any assessment year, if he has reason to believe that any income chargeable to tax has escaped assessment. The object of reassessment is to assess the correct income. Under section 147 of the Act, the assessing officer can assume jurisdiction to reopen the assessment only if there exists tangible material on the basis of which he forms a reasonable belief that the income chargeable to tax has escaped assessment.

11. The Apex Court in the case of **ACIT V/s. Rajesh Jhaveri Stock Brokers P.Ltd.** reported in **291**

I.T.R. 500 (S.C.) after considering various decisions rendered by it in the past construed the word "reason to believe" in section 147 of the Act and held that if the assessing officer has cause or justification to know or suppose that any income has escaped assessment, then it could be said that the assessing officer had reason to believe that the income chargeable to tax has escaped assessment. The Apex Court further held that the expression "reason to believe" in section 147 of the Act cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The Apex Court further held that at the stage of issue of notice under section 148 of the Act the only question to be considered is, whether there was relevant material on which a reasonable person could have formed a requisite belief and not whether the materials would conclusively prove escapement of income.

12. Applying the ratio laid down by the Apex Court in the aforesaid case, we have to see that in the present case, whether the assessing officer had any cause or justification to form a reasonable belief that income chargeable to tax has escaped assessment.

13. In the present case, on the basis of the material on record, the assessing officer claims to

have formed a reasonable belief that income chargeable to tax has escaped assessment on two counts. Firstly, in the original assessment, the assessing officer ought not to have considered that tools, dies, jigs, moulds are inventory items but ought to have considered those items as capital items and accordingly allowed depreciation instead of allowing deduction based on the useful life of the said items. The claim allowed on the basis of value determined by the petitioner is more than the claim allowable by way of depreciation and, therefore, the amount of the excess relief granted has escaped assessment. Secondly, the project launch expenses ought to have been considered as deferred revenue expenditure over a period of 3 years as amortized in the books of account maintained by the petitioner and allow deduction proportionately instead of allowing the entire project launch expenses.

14. It is pertinent to note that even in the past the petitioner has been incurring expenditure on acquisition of tools, dies, jigs and moulds and has been incurring from time to time expenditure to promote sales of the products manufactured by the petitioner. Even in the past, the same method of accounting was followed in respect of the above items as followed in AY 2002-03. In all the earlier assessment years and also in AY 2002-03, deduction on the above two claims

has been allowed in the assessment orders passed under Section 143(3) of the Act, after considering the accounting system adopted by the petitioner in its books of account. Thus, the deduction on the two items in question have been consistently allowed in the past after due scrutiny of the books of account maintained by the petitioner.

15. The question, therefore, to be considered in the present case is whether, on the basis of the material on record, the assessing officer could form a reasonable belief that income has escaped assessment and accordingly reopen the assessment for A.Y. 2002-03 with a view to disallow the deduction on the two claims which were allowed in the assessment order passed under Section 143(3) of the Act ?

16. In the present case, admittedly, the reopening of the assessment is based on the materials which were already on record at the time of passing the assessment order under Section 143(3) of the Act. In fact, during the assessment proceedings, the assessing officer was initially of the opinion that the deduction on the two items in question were not allowable and accordingly had called upon the petitioner to explain as to why deduction on the two items in question should not be disallowed in view of the accounting system maintained

by the petitioner. The petitioner submitted a detailed note and explained that tools, dies, jigs & moulds have been regarded as inventory items in the books of account as per the Accounting Standard 2 issued by the Institute of Chartered Accountants of India. It was explained that although the petitioner is entitled to claim deduction of the entire cost of tools, dies, jigs & moulds in the year of acquisition, in view of the fact that the tools, dies, jigs & moulds being inventory items as per the Accounting Standards, the petitioner had debited the cost of acquisition of the said items to 'purchase account' and valued the same at the end of the year at the lower of cost or net realizable value determined on the basis of the estimated life of the inventory items. The closing inventory was then carried forward to the next year and the process continued till the value became Nil. Thus, the petitioner had explained that irrespective of the method of accounting followed, the deduction was allowable on the value of the inventory items such as, tools, dies, jigs & moulds as allowed in the past.

17. Similarly, it was explained that the expenditure incurred by way of advertisements on television, newspaper advertisements, hoardings, seminars, exhibitions, etc. to promote the products launched by the petitioner being revenue in nature were

allowable in full in the year in which those expenses were incurred. It was explained that the effect of the advertisements would ordinarily be in the mind of the public approximately for three years and, therefore, the advertisement expenses are spread over for a period of three years in the books of account. It was explained that by advertising, no tangible asset is acquired by the petitioner which could be considered to be of enduring nature. Moreover, there is no concept of deferred revenue expenditure in computing the income liable to tax. Therefore, irrespective of the fact that the petitioner in its books of accounts had spread over the product launch expenses over a period of three years, the assessing officer was bound to allow the entire cost of the product launch expenses in the assessment year in question.

18. After considering the aforesaid explanation the assessing officer arrived at a conclusion that the petitioner is entitled to the deduction as claimed and accordingly allowed the deduction in the assessment order passed under section 143(3) of the Act. Thus, in the present case, specific query was raised by the assessing officer as to why the two claims in question should not be disallowed on the basis of the accounting system adopted by the petitioner. Detailed explanation given by the petitioner to the assessing officer are

all to be found at pages 148 to 173 of the affidavit in rejoinder. It is only after considering the explanation given by the petitioner and arriving at a conclusion that the petitioner was entitled to the relief, the assessing officer had allowed deduction on the two items in question.

19. In such a case, after having arrived at a conclusion on the basis of the material on record that the petitioner was entitled to the deduction on the two items in question and accordingly having allowed the claim by passing assessment order under section 143(3) of the Act, was it open to the assessing officer to entertain a reasonable belief on the basis of the very same material that income chargeable to tax has escaped assessment and reopen the assessment ?

20. In our opinion, once the assessing officer at the time of original assessment entertains a prima facie belief that the deduction claimed cannot be allowed in view of the accounting system adopted by the assessee and after considering the explanation given by the assessee deems it fit to allow deduction as claimed by passing an assessment order under section 143(3) of the Act, then, it will not be open to the assessing officer to form a contrary opinion based on the very same material and reopen the assessment. In other

words, once the assessing officer on consideration of the material on record and the explanation offered, arrives 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.

21. As noted earlier, in the present case, the assessment is sought to be reopened on the basis of the materials which were already on record at the time of assessment. The question as to whether the expenditure on acquisition of tools, dies, jigs and moulds could be treated as capital expenditure was raised during the assessment proceedings and allowed after considering the explanation given by the petitioner. Similarly, the question, as to whether the project launch expenditure was allowable as revenue expenditure was raised during the assessment proceedings and allowed only after considering the explanation given by the petitioner.

22. What section 147 of the Act contemplates is the existence of material on record on the basis of which a prima facie opinion could be formed by the

assessing officer that any income chargeable to tax has escaped assessment and not the material on record on the basis of which a final decision has already been taken at the time of assessment under section 143(3) of the Act.

23. Where the material on record has already been considered and adjudicated upon, it would not be open to the assessing officer to disagree with the view already taken on the material on record. In such a case, reopening of the assessment based on the materials already considered and adjudicated, would amount to reviewing the assessment order by reappreciating the material on record which is not contemplated under section 147 of the Act. It is not the case of the revenue that the reopening of the assessment is covered under Explanation 2(c) to section 147 of the Act based on any material other than the material considered by the assessing officer at the time of assessment under section 143(3) of the Act. Therefore, in the facts of the present case, where, the materials on record have already been considered and conclusively decided in the regular assessment, we are clearly of the opinion that the prima facie opinion to the contrary formed by the assessing officer on the basis of the very same material would be mere change of opinion, and therefore, the reopening of the assessment

based on mere change of opinion cannot be sustained.

24. Placing strong reliance on the decisions of the Apex Court in the case of **Rajesh Jhaveri Stock Brokers P.Ltd. (supra), Central Provinces Manganese Ore Co.Ltd. V/s. I.T.O. (191 ITR 662), I.T.O. V/s. Selected Dalurband Coal Co.P.Ltd. (217 I.T.R.597)** and **Raymond Wollen Mills Ltd. V/s. I.T.O. (236 I.T.R. 34)**, learned counsel for the revenue submitted that once there is material on record to form a prima facie opinion on the part of the assessing officer that any income chargeable to tax has escaped assessment, then, it is not open to the Court to look into the sufficiency of the material and interfere with the jurisdiction invoked by the assessing officer. There is no merit in the above contention. No doubt that the judicial review in cases relating to reopening of the assessment is restricted to consider as to whether any material exists and not the sufficiency of the material on record so as to form a belief that income chargeable to tax has escaped assessment. But 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. Similar view has been taken by this Court in the case of **Siemens Information System**

Limited V/s. ACIT reported in **295 ITR 333 (Bom)**. Moreover, the view taken by us in the present case is not contrary to any of the propositions of law laid down by the Apex Court in any of the aforesaid cases relied upon by the counsel for the revenue. In none of the cases relied upon by the counsel for the revenue, it is held that where the assessing officer has already considered the material on record and passed an assessment order under section 143(4) of the Act taking a particular view, the assessment can be reopened by the assessing officer on the basis of the very same material by taking a prima facie view to the contrary. Therefore, in the present case, in our opinion, the assessment is sought to be reopened on the basis of the material based on which a final decision has already been taken, and therefore, the reopening of the assessment based on the very same materials to take a contrary view constitutes reopening on account of change of opinion which is not permissible under section 147 of the Act.

25. For all the aforesaid reasons, we quash and set aside the impugned notice dated 30/3/2007 issued under section 148 of the Act as well as the order dated 15-9-2008. Rule is made absolute in the above terms with no order as to costs.

(SMT. RANJANA DESAI, J.)

(J.P.DEVADHAR, J.)