IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10655 OF 2011

Bedmutha Industries Ltd.
(Formerly known as Bedmutha Wire Co. Ltd.),
A-32/35, Stice, Musalgaon, Sinnar,
Dist. Nashik-422 103. ...Petitioner.

Vs.

1 The Dy. Commissioner of Income Tax,
Circle 1, Nashik,
Kendriya Rajaswa Bhawan,
GadkariChowk, Nashik.

2 Union of India, through the
Secretary, Ministry of Finance,
North Block,
New Delhi-110001. ...Respondents.

Mr. S.N. Inamdar Senior Advocate with Mr. Mihir Naniwadekar for the Petitioner.
Mr. Vimal Gupta Advocate for the Respondents.

CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.

DATE : 25th June, 2012

ORAL JUDGMENT (Per M.S. SANKLECHA, J.)

Rule. Rule made returnable forthwith. Counsel for the respondents waives service. At the instance of and request of the parties, the petition is taken up for final hearing.

2 By this petition under Article 226 of the Constitution of India, the petitioner challenges a notice dated 29th November,2010 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the said Act) and the order dated 4th November,2011 rejecting the petitioner's objection to initiation of proceeding under Section 147/148 of the said Act.

3 The relevant facts are as under:

a) By an order dated 18th December, 2006 passed under Section 143(3) of the said Act the assessing officer viz. Deputy Commissioner of Income Tax (Respondent No.1) assessed the Petitioner to a total income of Rs.91.49 lacs for the Assessment year 2004-05.

b) On 29th November, 2010 the Respondent No.1 issued a notice under Section 148 of the said Act seeking to reopen the assessment for the Assessment year 2004-05. On 5th January 2011 the Respondent No.1 furnished to the Petitioner the reasons recorded

by him for issuing notice dated 29th November, 2010 under Section 148 of the said Act. The reasons recorded for reopening of assessment for Assessment Year 2004-2005 are as under:

> "It is seen from the records that the assessee company had claimed deduction of depreciation of Rs.69,04,465/- which included depreciation of Rs.9,12,412/- on Goodwill. Goodwill is an intangible asset which has not been specified for allowance of depreciation nor it can be held to be of similar nature as know how, patents etc and hence is not a capital asset for which depreciation is allowed. Incorrect allowance of depreciation on Goodwill resulted in under assessment to the extent of Rs.9,12,412/.- Further the assessee had computed the taxable income of Rs.49,70,132/- and after set off of unabsorbed depreciation of Rs.3,34.091/- for A.Y. 2000-01 and Rs.16,23,554/-, offered Rs. 30,12,487/- for tax which was accepted by the A.O. However, it is seen from order giving effect to CIT(A)-1, Nashik's order dated 31/3/2005 for A.Y. 2001-02 that the assessee was allowed to carry forward of loss of Rs.8,78,103/- only. Thus, there is excess allowance of set off of loss to the extent of Rs.7,45,451/- (i.e. Rs.16,23,554 minus Rs.8,78,103/-)
>
> Considering the above, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the I.T Act. Issue notice U/s. 148 of the I. T. Act."

(c) On 10th August, 2011, the petitioner filed its

objections to the notice dated 29th.November 2010 issued under Section 148 and the reasons in suport thereof. In its objection, the petitioner has pointed out that the reasons for reopening the assessment do not indicate the satisfaction of the first proviso to Section 147 of the said Act namely failure on the part of the petitioner to fully and truly disclose all material facts necessary for the assessment which took place on 18th December,2006 in respect of the Assessment Year 2004-05. Therefore, the notice was completely without jurisdiction. Besides, the claim for depreciation on goodwill was disclosed in the tax audit report submitted along with the return of income. Similarly the claim for unabsorbed depreciation was also disclosed during the assessment proceedings. On the above facts the Petitioner sought withdrawal of the notice dated 29th November 2010 issued under Section 148 of the said Act.

(d) By an order dated 4th November 2011, Respondent No.1 rejected the petitioner's objection to initiation of proceedings under Section 147/148 of the said Act by recording as under:

> "2. In this connection it is stated that the objection raised by you is not acceptable as
> a) Depreciation of Rs.9,12,412/- is

erroneously allowed, as in tangible asset on goodwill.

b) The set off of unabsorbed depreciation, brought forward from A.Y. 2001-02, has been erroneously allowed at Rs.16,23,554/-.

3. You are therefore requested to attend/comply the enclosed notice u/s. 142(1) and co-operate to complete the assessment proceedings."

(e) The Petitioner has challenged the above proceeding by the Respondent as being without jurisdiction. The Respondents have filed an affidavit in reply dated 16th January,2012 justifying the reopening of asssement for the Assessment year 2004-05.

4 In support of the Petition Mr. S.N. Inamdar, Senior Counsel submits

1) initiation of reopening under Section 148 of the said Act by Notice dated 29th November 2010 is completely without jurisdiction as the condition precedent to reopen assessment after the end of 4 years from the end of the relevant Assessment year in terms of proviso to Section 147 of the said Act is not satisfied. I.e. there was a failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment;

2) there was no tangible materail available with the respondent to reach a conclusion that there was a reasonable belief that income had escaped assessment The reasons recorded for reopening the assessment as well as the order rejecting the petitioner's objection dated 4th November 2011 proceed on the basis that the material on which reassessment is proposed was already on record at the time of the original assessment proceeding;

3) the only reason for reopening the assessment as well as the order rejecting the petitioner's objection to initiation of proceeding under Section 147/148 of the said Act is that the depreciation of goodwill and set off of unabsorbed depreciation was allowed erroneously for the Assessment year 2004-05. This according to him would amount to review of an order and this is not permissible. Therefore the Petition should be allowed.

5 Opposing the Petition Mr. Vimla Gupta Counsel for the respondent submits :

1) initiation of reopening by notice dated 29th November, 2010 is completely justified as the original order of assessment dated 18th December 2006 for the Assessment Year 2004-05 does not indicate that respondent No.1 had applied his mind to the issue of grant of depreciation on goodwill and set off of unabsorbed depreciation as the order

has no discussion with regard to the same;

2) If on merits the petitioner is entitled to the claim of depreciation on goodwill and of unabsorbed depreciation as claimed by them the same would be examined during the reassessment proceedings and this Court should not interdict the respondent from proceeding further for reassessment for the Assessment Year 2004-05; and

3) that the order dated 4th November, 2011 rejecting the petitioner's objection to initiate proceeding under Section 147/148 of the said Act be remanded to enable respondent No.1 to appropriately deal with the objections raised by respondent No.1. In support of his last submission he placed reliance upon the decision of this Court in the matter of Skol Breweries Ltd. v. Dy. Commissioner of Income Tax in Writ Petition No.2542 of 2009 dated 8th March, 2010.

6. We have considered the submissions. In this case, it is an admitted position that the notice dated 29th November 2010 issued under Section-148 of the said Act has been issued more than four years after the end of the relevant assessment year i.e. Assessment Year 2004-05. In terms of the proviso to Section 147of the said Act the jurisdiction to reopen assessments already completed under Section 143(3) of the said Act, after the period of four years from the end of the relevant assessment year can only be exercised on the cumulative satisfaction of two conditions precedent as under:

(a) there must be a reasonable belief on the part of the officer that income has escaped assessment; and

(b) that there must be a failure on the part of the petitioner to fully and truly disclose all material facts necessary for assessment.

7 In the present facts the grounds/reasons supplied to the petitioner on 5th January 2011 for reopening the assessment for Assessment Year 2004-05 under Section 148 of the said Act do not indicate any failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. Further neither the reasons recorded for reopening the assessment nor the order dated 4th November, 2011 indicate that respondent No.1 is relying upon any tangible material which was not disclosed by the Petitioner truly and fully at the time when the assessment order dated 18th December,2006 was passed. Therefore, the jurisdictional requirement to reopen the assessment after more than four years from the end of the relevant assessment i.e. Assessment Year 2004-05 is not satisfied.

In fact this Court in the matter of Hindustan Liver Ltd. v. R. B. Wadkar reported in 268 ITR Page 332 observed as under:

> "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 to 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. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self explanatory and should not keep the assessee guessing for the reasons. Reasons provided 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 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 affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or roal submissions advanced".

Therefore, the jurisdictional requirement is itself not satisfied while issuing a notice under Section 148 of the said Act on 29th November, 2010.

8 In fact, the ground for reopening of the assessment is only that earlier assessment allowing depreciation on goodwill and set off of unabsorbed depreciation was erroneous. This would amount to a mere change of opinion and would not give jurisdiction to reopen the concluded assessment. Correcting an erroneous view taken on the self same material is certainly a review and not permissible under Section 147 of the said Act. The Supreme Court in the matter of CIT v. Kelvinator of India reported in 320 ITR 561 has held that there is conceptual difference between power to review and power to reassess. The power under Section 147 of the said Act is the power to reassess and not the power to review.

9 It was submitted that the issue regarding depreciation on goodwill and set off of unabsorbed depreciation was an issue considered by respondent No.1 in order dated 18th December, 2006 and was not reviewed by him. The only basis for the above submission is that the order of assessment does not discuss the issues raised for the purposes of reassessment.

10 This very issue as raised by the counsel for the Revenue has been considered by this court in the matter of Idea Cellular ltd. **v.** Deputy Commissioner of Income tax in 301 ITR

407 wherein it has been held as follows:

> "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 the material was placed before him."

To a similar effect is the decision of the Full Bench of Delhi High Court in the matter of Commissioner of Income Tax v. Kelvinator of India Ltd. Reported in 256 ITR 1 and the division bench of Gujarat High Court in the matter of CIT v. Nirma Chemical Works reported in 309 ITR 67. In view of the above, the submission of the Revenue that the reopening is not on account of change of opinion as no opinion was expressed in the order of Assessment dated 18th. December 2006 must be negatived.

11. So far as the alternative submission of the Revenue that the matter be remanded to the Assessing officer to appropriately deal with the objection raised by the petitioner with regard to the issue of Section 148 notice is concerned, we find that the reliance upon the decision of this Court in the matter of Skol Breweries Ltd. (supra) does not support the revenue. This is for the reason that the Respondent No.1 in his order dated 4th

November, 2011 has dealt with the objection of the Petitioner and concluded that reopening is being done as the Assessemnt was erroneous. Therefore a finding has been given and sending it back to the Assessing officer will not serve any purpose. Moreover the above submission is not acceptable as the reasons recorded for reopening the assessment itself indicate complete absence of jurisdiction to reopen the assessment for the Assessment Year 2004-05 after more than four years from the end of the relevant assessment year.

12 In view of the above, the notice issued under Section 148 of the said Act on 29th November, 2010 and the order dated 4th November, 2011 are quashed and set aside. Rule is made absolute in the above terms.

The petition is disposed of in the above terms. No order as to costs.

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