IN THE HIGH COURT OF BOMBAY

Writ Petition No. 2140 OF 2011

KIMPLAS TRENTON FITTINGS LTD

Vs

ASSTT COMMISSIONER OF INCOME TAX, MUMBAI

D Y Chandrachud and A A Sayed, JJ

Dated: November 22, 2011

JUDGEMENT

Per: D Y Chandrachud:

Rule, by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. The Petitioner has challenged a notice dated 25 March 2011 by which an assessment for Assessment Year 2004-05 is sought to be reopened by the Assessing Officer.

3. The Petitioner filed its return of income for Assessment Year 2004-05 on 31 October 2004. As the book profits under Section 115 JB were higher than the tax on the total income, the total income was computed under Section 115JB and a tax of Rs.10.12 lakhs was paid. On 7 January 2005, a revised return of income was filed by which an amount of Rs.1.10 crores representing a loan which was remitted by an Overseas Lender was reduced from the total income declared by the Petitioner.

4. The Petitioner had in 2001 obtained a loan of Swiss Franc one million from a Company based in Switzerland, George Fischer A.G. The loan was availed of for the purpose of financing the acquisition of plant and machinery. The Petitioner entered into an agreement for early repayment of the loan during the previous year relevant to the Assessment Year under which the Petitioner was to make a repayment of a lesser amount against the outstanding principal amount in full and final settlement of the dues. The balance representing 320,000 Swiss Francs equivalent to Rs.1.10 crores was waived.

5. The case of the Petitioner was selected for scrutiny and a notice was issued by the Assessing Officer under Section 142(1) and 143(2) on 6 September 2005. In the course of the assessment proceedings, the Assessing Officer called upon the Petitioner to submit details, inter-alia in respect of the loan write back in the amount of Rs.1.10 crores. At that stage, in response to a query, the Petitioner made the following disclosure in a letter addressed by its Chartered Accountant on 14 September 2006 :-

"During the previous year ending 31 March 2004, the assessee has entered into memorandum of understanding with Mrs. George Fischer AG Switzerland to settle

outstanding balance of their loan account to 4,80,000 Swiss Franc as against the outstanding balance of 8,00,000 Swiss Franc. Thereby the assessee has written back 3,20,000 Swiss Frank equivalent to Rs.1,10,40,000 as the loan not payable.

The writing back of a loan doesn't amount the income under provisions of Income Tax Act 1961. The assessee has relied on the decision of Gujarat High Court in the case of CIT v/s. Chetan Chemicals Pvt. Ltd. 267 ITR page 770. The copy of the said decision is enclosed herewith."

6. Apart from this disclosure, in the revised computation of income, the Petitioner had shown an amount of Rs.1.10 crores as Sundry Credit Balances written back to the Profit and Loss Account and not considered as income. A note appended to the computation of income was as follows :-

" Sundry Credit Balance being Loan – the remission of Liability Written Back Not Considered as income – Relied on the decision of Gujarat High Court in the case of CIT v/s. Chetan Chemicals Pvt. Ltd. 267 ITR Page No.770."

7. The Assessing Officer passed an order of assessment on 29 September 2006, accepting the computation of income. A notice under Section 148 was issued to the Petitioner on 25 March 2011 proposing to re-open the assessment for Assessment Year 2004-05. In response to a request for the disclosure of reasons, the following reasons have been disclosed to the Petitioner by a communication dated 18 August 2011 :

" In the instant case, order u/s. 143(3) of the Act was passed on 29.09.2006 assessing NIL income after set-off of b/f losses to the extent of Rs. 1,19,97,158. Subsequently, it has come to the notice that the assessee had entered into MOA with George Fischer, Switzerland for settlement of outstanding loan of Rs.1,10,40,000. However, the said amount was not offered to tax by the assessee.

Therefore, I have reason to believe that income of Rs.1,10,40,000 has escaped assessment within the meaning of the provisions of Section 147 of the Act by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."

8. The petitioner lodged its objections to the re-opening on 29 August 2011 which have been disposed of by an order dated 9 September 2011. The Assessing Officer has noted that the Petitioner was required to make a full and true disclosure of material facts and by virtue of Explanation 1 to Section 147, the mere production of Books of Account or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer would not necessarily amount to a disclosure within the meaning of the proviso of Section 147. The Assessing Officer has held that the claim of the Petitioner that there was no failure to disclose fully and truly all the facts material to the assessment is not correct.

9. Counsel appearing on behalf of the Petitioner submitted that (i) The reopening of the assessment in the present case is beyond a period of four years of the end of the relevant Assessment Year; (ii) The jurisdictional condition for reopening an assessment in such a case is that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that Assessment Year; (iii) Both in the computation of income as well as during the

course of the assessment proceedings by a letter dated 14 September 2006, the assessee had made a disclosure of all primary facts viz. amount of the loan, the agreement under which the loan liability was settled at a lesser amount and the contention that the writing back of the loan amount did not constitute income under the Income Tax Act, 1961; (iv) The Assessing Officer in his order under Section 143(3) accepted the computation of income. Hence, on a mere change of opinion, it is not open to the Assessing Officer to reopen the assessment.

10. On the other hand, Counsel appearing on behalf of the Revenue submitted that (i) The assessee had not made a full and true disclosure of the material facts; (ii) The assessee ought to have disclosed whether the loan represented a capital liability; (iii) The loan was taken for the purchase of plant and machinery. It is not clear as to whether the asset was reflected in the balance-sheet of the assessee. The learned Counsel for the Revenue has states before the Court that the Revenue does not intend to file a reply to the Petition, and submissions would be urged on the record before the Court.

11. In the present case, admittedly, the reopening of the assessment is beyond a period of four years of the end of the relevant Assessment Year. The jurisdictional condition under Section 147 in such a case is that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for that Assessment Year. As noted earlier, in the narration of facts, there was a disclosure by the assessee during the course of the assessment proceedings of the fact that (i) During the previous year ending 31 March 2004, a Memorandum of Understanding (MOU) was entered into with a Swiss Company; (ii) Under the MOU, the outstanding balance of the loan was settled at Swiss Francs 480,000 as against the outstanding balance of 800,000 Swiss francs; (iii) The assessee has written back an amount equivalent to Swiss Francs 320,000 equivalent to Rs.1.10 crores as a loan not payable. The assessee relied upon a decision of the Gujarat High Court in *CIT v/s. Chetan Chemicals Pvt. Ltd. 267 ITR 770* in support of the submission that the writing back of a loan did not constitute income. Whether the assessee is right in making this submission would assume significance if the jurisdictional requirement is met. The reopening of the assessment is not within a period of four years. Where the re-opening is beyond four years, the escapement of income is not sufficient in itself to validate the reopening. The jurisdictional requirement where an assessment is opened beyond four years is a failure to disclose all material facts necessary for the assessment. Unless that condition is fulfilled, the re-opening cannot be sustained. All material facts were within the knowledge of the Assessing Officer and were placed on the record by the assessee. The reasons which have been recorded by the Assessing Officer for reopening the assessment purport to state that subsequently, that is to say after the order of assessment under Section 143(3) was passed on 29 September 2006, it has come to notice that the assessee had entered into an MOU with the Swiss Company for settlement of the outstanding loan which was however not offered to tax. Ex-facie, this reason is contrary to the record. This is not a fact which has subsequently come to notice but is something which was within the knowledge of the Assessing Officer. The Revenue has not either by filing an affidavit or in the submissions of Counsel disputed that a disclosure was made in the assessee's letter dated 14 September 2006. Explanation 1 to Section 147 which is sought to be relied upon by the Assessing Officer has no application. This is not a case where an assessee has merely produced account books and other evidence from which material evidence could have with due diligence been gathered by the Assessing Officer. The assessee had both in a note appended to the computation of income and in its letter dated 14

September 2006 brought the attention of the Assessing Officer to bear on the primary facts. Hence for this case, the correctness of the claim of the assessee, as granted upon the acceptance of the computation in the original order of assessment, does not fall for determination here. All primary facts for making the claim were disclosed to the Assessing Officer. Even assuming that there was an error on the part of the Assessing Officer, that cannot legitimately be the basis for re-opening assessment beyond four years unless a failure of the assessee to disclose truly all material facts for the assessment caused it. That is not the case here.

12. In the circumstances, on the basis of the record, as it stands, it is not possible to come to the conclusion that there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment. The Petitioner is, therefore, entitled to succeed. Rule is made absolute by setting aside the notice under Section 148 dated 25 March 2011, purporting to reopen the assessment for Assessment Year 2004-05. There shall be no order as to costs.