

**HIGH COURT OF BOMBAY**

**ICICI Bank Ltd.**

**v.**

**Deputy Commissioner of Income-tax, Circle 3(1)\***

DR. D.Y. CHANDRACHUD AND A. A. SAYED, JJ.

WRIT PETITION NO. 1765 OF 2011

NOVEMBER 9, 2011

**JUDGMENT**

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**Dr. D.Y. Chandrachud, J.** - 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 challenge in these proceedings under Article 226 of the Constitution of India is to a notice issued by the Assessing Officer on 30 March 2010 under Section 148 of the Income Tax Act, 1961 seeking to re-open an assessment for Assessment Year 2003-04.

**3.** The notice has been issued admittedly after a period of four years from the end of the relevant Assessment Year. The issue which falls for determination before the Court is as to whether, within the meaning of the first proviso to Section 147, there was a failure on the part of the Assessee to "disclose fully and truly all material facts necessary for the assessment for that Assessment Year." The contention of the Assessee which would need to be considered is that the reasons which have been disclosed for re-opening the assessment *ex-facie* do not contain any reference to a failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment. On the other hand, according to the Revenue, the Assessing Officer was acting within his jurisdiction in purporting to re-open the assessment after the expiry of four years of the end of the relevant Assessment Year.

**4.** The Petitioner filed its return of income for Assessment Year 2003-04 on 28 November 2003. A revised return of income was thereafter filed on 11 January 2005 and 31 March 2005. The Assessing Officer issued several questionnaires on 3 August 2005, 6 December 2005 and 30 December 2005. The Assessee filed its replies on 18 November 2005, 5 December 2005, 23 December 2005 and 20 January 2006. The Assessing Officer passed an order of assessment on 28 February 2006.

**5.** During the course of the assessment, the Assessee had made a claim under Section 10(23G) in the total amount of Rs. 124.71 crores. The Assessing Officer allowed the claim to the extent of Rs. 53.80 crores, reducing the deduction as claimed by an amount of Rs. 70.90 crores. The Assessee had also claimed a write off on account of bad debts in the total of an amount of Rs. 1503.06 crores under Section 36(1)(vii) including a write off on fees of Rs. 62.09 crores. The Assessing Officer disallowed the write off on account of bad debts to the extent of Rs. 769.75 crores and allowed the claim in the amount of Rs. 672 crores. The Assessee had filed an Appeal before the CIT (Appeals). The CIT (Appeals), by an order dated 29 September 2010 partly

allowed the Appeal of the Assessee by accepting the claim under Section 36(1)(vii) and Section 36(1)(viii) and allowed a proportionate deduction under Section 10(23G) on the basis of the ratio adopted in the earlier Assessment Years.

6. The Assessing Officer issued a notice under Section 148 on 30 March 2010. The reasons which have been furnished to the Assessee in response to a request for disclosure, on the basis of which the assessment is sought to be re-opened, are as follows :-

"In the case, assessment u/s. 143(3) of the I.T. Act, 1961 was completed on 28.02.2006.

- (i) On perusal of the records, it is found that the assessee has claimed bad debts in respect of such parties in whose respect the income was claimed exempt u/s. 10(23G) of the I.T. Act. As the income was not offered for tax in the previous years, no deduction can be allowed u/s. 36(2) of the I.T. Act. After *prima facie* verification, it is found that the total underassessment of income on this count is to the tune of Rs. 8,11,54,142/-. Therefore, the income to the tune of Rs. 8,11,54,142/- has escaped assessment.
- (ii) Further, it is found that the total income before allowing deduction u/s. 36(1)(vii) and 36(2)(viii) was determined at Rs. 4,14,07,89,503/-. Deduction of Rs. 50,00,00,000 was allowed u/s. 36(1)(viii). Hence for the purpose of allowing deduction u/s.36(1)(vii), the total income should have been taken at Rs. 3,64,07,89,513 and deduction u/s. 36(1)(vii) should have been allowed to the extent of Rs. 27,30,59,213/-. However, it is seen from Assessment order that assessee was allowed deduction of Rs. 31,05,54,214 (7.5% of Rs. 44,07,89,503). It has led to under-assessment of income to the extent of Rs. 3,75,00,006/-. Thus, the income to the tune of Rs. 3,75,00,006/- has escaped assessment.
- (iii) It is found that the assessee has claimed Bad Debts at Rs. 733.31 crores. However, in the NPA return furnished by the assessee to the Reserve Bank of India, the Bad Debt is only Rs. 152.52 crores. Thus, there is excess claim of Bad Debt of Rs. 580.79 crores resulting into short levy of tax of Rs. 213.44 crores.

In view of the above, I have reason to believe that the income aggregating to Rs. 592.66 crores (Rs. 8.12 cr + 580.79 cr.) has escaped assessment resulting into short levy of tax."

7. Learned Senior Counsel appearing on behalf of the Assessee, in assailing the notice for re-opening the assessment submitted that (i) Ex-facie the reasons which have been recorded by the Assessing Officer do not contain even an allegation that there was a failure on the part of the Assessee to fully and truly disclose all the material facts necessary for the assessment. The reasons do not show any failure on the part of the Assessee to make a full and true disclosure; (ii) Consequently, condition precedent for the exercise of the jurisdiction to re-open an assessment beyond the period of four years of the end of the relevant Assessment Year under the first proviso to Section 147 has not been fulfilled; (iii) Admittedly, in the present case, the Assessee had filed an Appeal against the order of assessment including *inter-alia* on the ground that the Assessing Officer had erred in allowing a write off only to the extent of Rs. 672 crores on

account of bad debts under Section 36(1)(vii) since the Assessee had a higher claim to the extent of Rs. 1503 crores. The second proviso to Section 147 precludes the re-opening of an assessment in relation to matters which are the subject matter of an Appeal, Reference or Revision. The powers of the Commissioner (Appeals) under Section 251 are wide enough to enhance or reduce the assessment. The CIT (Appeals) having rendered a final determination on 29 September 2010, the exercise of the power to re-open an assessment was not warranted; (iv) None of the grounds which have been set out in the reasons disclosed would validate the exercise of the power to re-open an assessment beyond the period of four years.

**8.** On the other hand, Counsel appearing on behalf of the Revenue submitted that (i) The Assessee should have disclosed, while filing the returns that the bad debts in respect of which a write off had been claimed under Section 36(1)(vii) pertained at least in part to income which had been exempted under Section 10(23G). In failing to do so, the Assessee must be held to have failed to disclose fully and truly all the material facts necessary for the assessment; (ii) In computing the deduction under Section 36(1)(viiia), the deduction which had been allowed under Section 36(1)(viii) ought to have been excluded. Hence, the Assessing Officer was justified, in the second reason for re-opening the assessment in forming the opinion that income had escaped assessment; (iii) The Assessee, while claiming bad debts in the amount of Rs. 733.31 crores had in the NPA returns submitted to the Reserve Bank of India claimed that non-performing assets were to the extent of Rs. 152 crores; this would warrant an investigation by the Assessing Officer for which the assessment could be reopened.

**9.** Before dealing with the rival submissions, it would be at the outset necessary to have due regard to the nature of the enquiry that was conducted by the Assessing Officer before he passed an order of assessment under Section 143(3) on 28 February 2006. The Assessing Officer had addressed three communications to the Assessee on 3 August 2005, 6 December 2005 and 30 December 2005. In the first notice dated 3 August 2005, the Assessing Officer called upon the Assessee to furnish details of the bad debts, the amounts advanced, duration of the debts outstanding and steps taken to recover the bad debts. In the communication dated 6 December 2005, the Assessee was *inter-alia* called upon to make a disclosure in respect of the following matters :-

"1. The examination of the statement giving details of bad debts written off shows that the information/details furnished so far are incomplete. You are requested to furnish the information party-wise in all cases in the chart form as follows :

- (i) Complete name and the latest postal address of the party in the same column.
- (ii) Principal amount write off.
- (iii) Interest and other charges write off.
- (iv) Total write off.
- (v) Total loan disbursed.

- (vi) Amount recovered in subsequent years (year-wise).
- (vii) Outstanding amount as on 31.03.2003.
- (ix) Proper supporting documentary evidences regarding the reasons for its inability to recover the loan and the interest amount and the steps taken for recovery. Please note that any claim of bad debt is required to be established to the effect that debt has become bad and written off and the unsubstantiated claim in this regard is to be rejected."

**10.** In the subsequent communication dated 30 December 2005, the Assessing Officer called upon the Assessee to make a further disclosure of why in certain cases only a part of the bad debt had been written off in a number of cases. The Assessee was called upon to disclose what steps have been taken for the recovery of the debts. The Assessee was also called upon to disclose together with supporting evidence whether all the conditions which were laid down under Section 10(23G) were fulfilled for claiming an exemption.

**11.** The Assessee responded to the queries by its letters dated 18 November, 5 December, 23 December 2005 and 20 January 2006.

**12.** In the course of the order of assessment, the Assessing Officer considered the claim to a write off under Section 36(1)(vii) in a considerable amount of detail. The discussion on the subject spans over nearly fifty pages. The Assessing Officer, as already noted earlier, dis-allowed the claim on account of bad debts to the total extent of Rs. 769.75 crores. During the course of Assessment order, the Assessing Officer specifically applied his mind to the deduction under Section 10(23G). The Assessing Officer noted that the Assessee had claimed an exemption under Section 10(23G) in the amount of Rs. 124.71 crores. The claim was allowed in part to the extent of Rs. 53.80 crores.

**13.** Now, it is in this background that the reasons which have been formulated by the Assessing Officer need to be considered.

**14.** The re-opening of the assessment in the present case is sought to be effected admittedly beyond a period of four years of the end of the relevant Assessment Year. The notice under Section 148 was issued on 30 March 2010 and the assessment for Assessment Year 2003-04 is sought to be re-opened. By virtue of the first proviso to Section 147, the jurisdictional condition for the exercise of the power to reopen beyond four years is that there must be a failure on the part of the Assessee to fully and truly disclose all material facts necessary for the assessment. This requirement has been elaborated upon in two Judgments of Division Benches of this Court. In *Hindustan Lever Ltd. v. R.B. Wadkar, Asstt. CIT* [2004] 268 ITR 332/137 Taxman 479 the Division Bench has observed as follows :-

"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."

**15.** The same principle has been reiterated in a subsequent judgment of a Division Bench in *Bhavesh Developers v. Assessing Officer* [2010] 329 ITR 249/188 Taxman 123 (Bom.) in the following observations :-

"Significantly, the reasons that have been disclosed to the assessee do not contain a finding to the effect that there was a failure to fully and truly disclose all necessary facts, necessary for the purpose of assessment. In these circumstances, the condition precedent to a valid exercise of the power to reopen the assessment, after a lapse of four years from the relevant assessment year, is absent in the present case. There is merit in the submission which has been urged on behalf of the assessee that an exceptional power has been conferred upon the Revenue to reopen an assessment after a lapse of four years. The conditions which are prescribed by the statute for the exercise of such a power must be strictly fulfilled and in their absence, the exercise of power would not be sustainable in law."

**16.** Now, in the present case, *ex-facie*, there is no statement in the reasons disclosed by the Assessing Officer that there was a failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment for Assessment Year 2003-04. The first and the third reasons both have a bearing on the claim of the Assessee to a write off of bad debts under Section 36(1)(vii). As noted earlier, the Assessee had claimed a total write off in the amount of Rs. 1503.06 crores of which the Assessing Officer dis-allowed the claim to the extent of Rs. 769.75 crores. The ground on which the assessment is sought to be re-opened is that the Assessee had claimed bad debts in respect of parties where the income had been exempt under Section 10(23G). The case of the Revenue is that since the Assessee had claimed a benefit of Section 10(23G), it could not to that extent have claimed a write off under Section 36(1)(vii).

**17.** In this regard, it needs to be noticed that the second proviso to Section 147 stipulates that the Assessing Officer may assess or re-assess such income other than the income involving matters which are the subject matter of any Appeal, Reference or Revision, which is chargeable to tax

and has escaped assessment. In the present case, it has emerged from the affidavit in reply of the Revenue that the Assessee had filed an Appeal to the CIT(Appeals) against the order of assessment. Paragraph 4(v) of the reply states that by his order dated 29 September 2010, the CIT (Appeals) partly allowed the Appeal filed by the Petitioner by accepting the claim under Section 36(1)(vii) and Section 36(1)(viii) and by allowing a proportionate deduction under Section 10(23G) on the basis of the ratio adopted in the earlier Assessment Years. That being the position, in view of the clear provisions of the second proviso to Section 147, the Assessing Officer cannot purport to re-open the assessment in respect of a matter which squarely formed the subject matter of the Appeal before the CIT(Appeals). Under Section 251, the powers of the CIT(Appeals) are wide. The CIT(Appeals) is entitled while disposing of an Appeal against an order of assessment to confirm, reduce, enhance or annul the assessment. Consequently, it was open to the Revenue in the Appeal before the Appellate Authority to urge that the claim to a write off under Section 36(1)(vii) ought to have been dis-allowed to the extent to which income had been claimed to be exempt under Section 10(23G). The object and purpose underlying the second proviso to Section 147 is that upon an assessment being re-opened, the Assessing Officer is entitled to assess or re-assess such income which is chargeable to tax which has escaped assessment. However, matters which are the subject matter of an Appeal, Reference or Revision, are excepted from the jurisdiction of the Assessing Officer. In the present case, the exercise of the power to re-open the assessment on the first and third ground, both of which relates to the write off of bad debts under Section 36(1)(vii) is in excess of jurisdiction, once the write off formed the subject matter of an appeal before the CIT(Appeals) and which resulted in an order of 29 September 2010 of the appellate authority. The power to reopen an assessment cannot be exercised to re-open what formed the subject matter of an appeal to the CIT (Appeals).

**18.** The second ground that has weighed with the Assessing Officer is that according to him, there has been an excessive deduction under Section 36(1)(viiia). Now, so far as this aspect is concerned, the order of Assessment would show that the Assessing Officer allowed a deduction to the extent of 7.5% of the total business income computed at Rs. 414.07 crores. The total income of the Assessee has been computed at Rs. 1241.63 crores. *Ex-facie*, Section 36(1)(viiia) allows a deduction in respect of a provision for bad and doubtful debts made by a Scheduled Bank of an amount not exceeding 7.5% of the total income (computed before making any deduction in that clause and Chapter VI-A). As a matter of fact, it is the grievance of the Assessee, which forms the subject matter of a separate application for rectification that the officer ought to have granted a deduction of an amount of 7.5% of the total income and not of the lesser amount of the business income. Hence, on this aspect of the matter, we are of the view that there is merit in the contention urged on behalf of the Assessee that any Assessing Officer duly informed in law could not possibly come to the conclusion that there is an escapement on this ground.

**19.** For these reasons, we are of the view that the Assessing Officer has acted in excess of his jurisdiction in purporting to re-open the assessment after the expiry of a period of four years of the end of the Assessment Year. The jurisdictional condition for the exercise of the power to re-open in such a case has not been fulfilled.

**20.** Accordingly, we make the rule absolute by setting aside the notice dated 30 March 2010. There shall be no order as to costs.