Analysis of decision of
Hon'ble Income Tax Appellate Tribunal,
Mumbai Bench, "K", Mumbai
{Proceedings initiated u/s 148 of the Income Tax Act, 1961 held is bad ab initio}

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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER
ITA NO. 4912/MUM/2013 (A.Y.2004-05)

Johnson & Johnson Private Limited
(Earlier known as Johnson & Johnson Limited)
501, Arena Space, Off JVLR,
Behind Majas Bus Depot, Jogeshwari (East)
Mumbai 400 060
PAN: AAACJ0866E
(Appellant)

vs.

Additional Commissioner of Income Tax,
Large Taxpayer Unit,
29th Floor, Centre No.1, World Trade Centre,
Cuffe Parade, Mumbai 400 005
(Respondent)

Appellant by : Shri Rajan Vora
Respondent by : Shri Akhtar H. Ansari

Date of hearing : 29/07/2020
Date of pronouncement : 10/08/2020

ORDER

PER VIKAS AWASTHY, JM

Salient facts of the case

1. Assessee filed its return of income for the assessment year 2004-05 on 1.11.2004.

2. The assessment u/s. 143(3) was completed on 28.11.2006.

3. The first notice under section 148 of the Act was issued to the assessee on 2.7.2008.

4. The assessee filed reply to the said notice on 23.4.2008 and filed return on 30.7.2008.

5. No action was taken by the Assessing Officer on the reply and the return filed in response to the notice.

6. Later on, after a gap of almost three years, second notice under section 148 was issued to the assessee on 29.3.2011.

7. The assesse filed objections against the reasons recorded.

8. On 3.8.2011 the Assessing Officer passed order disposing of the objections against second reassessment proceedings.

9. On 10.10.2011 the Assessing Officer passed assessment order u/s.143(3) r.w.s. 147 of the Act

10. The sequence of events have not been disputed by the Department.

Where the proceedings from first notice issued for reopening assessment are still pending, second notice issued u/s 147/148 of the Act for reopening is bad in law.

11. After issuance of first notice u/s 148 of the Act on 2.7.2008, no action whatsoever was taken by the Assessing Officer to complete the reassessment proceedings and the Department went into slumber for almost three years.

12. Thereafter, reinitiated reassessment proceedings in March, 2011 by issuing second notice u/s 148 on 29.3.2011.

13. ITAT opined that issuance of second notice under section 148 of the Act without completing pending assessment proceedings U/s. 147 of the Act is illegal. For this ITAT placed reliance on the following judgments:

(1) CIT vs. P. Krishnankutty Menon, 181 ITR 237 (Ker)
{Commercial Art Press v. CIT (1978) 115 ITR 876 (All.) – relied upon by Kerala High Court}
(2) A.S.S.P. & Co. vs. CIT 172 ITR 274 (Mad)

14. **Kerala High Court in the case of CIT vs. P. Krishnankutty Menon *{supra}***

Hon'ble Kerala High Court in the case of P. Krishnankutty Menon *{supra}* has held that the AO is not authorised to initiate successive reassessment proceedings when assessment proceedings are already pending. The relevant extract of the judgment on this issue is reproduced herein below:-

*"4. Having heard the rival contentions, we are of the view that the Tribunal was justified in holding that the reassessments are illegal and unsustainable. It is common ground that the ITO issued notices **under section 147(b)** to Ambika R. Menon, Devaki Thampuran and Echukutty Menon on 31-3-1975. The notice was served on 11-4-1975. Under section 153(2)(b)(ii) of the Act the assessments, based on this notice, should have been completed on or before 11-4-1976. It was not so done. What more the assessment was kept pending. No final orders were passed. Apart from the fact that the assessments, having been made after 11-4-1976, are barred, a further notice was sent to all the legal heirs **under section 147(a)** on 21-12-1978. **On the day when such a notice sent under section 147(a), reassessment proceedings initiated under section 147(b) were pending.** The second notice issued under section 147(a), dated 21-12-1978, is incompetent and unauthorised. The ITO is not authorised to initiate successive reassessment proceedings when assessment proceedings are already pending. We are fortified in this view by the decision in Commercial Art Press v. CIT [1978] 115 ITR 876 (All.). On this short ground, the assessments are barred and unsustainable."*

15. **Madras High Court in the case of A.S.S.P. & Co. vs. CIT *{supra}***

Similar view has been expressed by the Hon'ble Madras High Court, as follows:

"2. ……………………………… In fact,

it is a settled legal principle that once reassessment proceedings are initiated by the issue of a notice under section 148, the original proceedings are set at large and the finality attached to the reassessment order no longer exists and the whole assessment proceedings are open for a further consideration.

It is true that it is not necessary to revise the order in pursuance of that notice ultimately and the proceedings may be dropped.

But that makes no difference to the legal principle that when the whole matter is set at large, the original assessment ceases to be final and no reassessment is possible therefore without a fresh order made in pursuance of the first notice issued under section 148.

There could also be no dispute that after the reassessment order is made in pursuance of the first notice issued under section 148, if the ITO has any reason to believe that there is any escapement of the income which will be covered under section 147 of the Act, he can issue fresh proceedings with reference to the reassessment order already made in pursuance of the notice under section 148 and in that way he can make any number of times revised order,

but that cannot affect the position that when a return has been made in pursuance of the notice under section 148, till that return is disposed of by any assessment order or reassessment order, no further notice can be issued under section 148."

16. Thus, the ITAT opined that from the reading of above two decisions rendered by Hon'ble High Courts, it is explicitly clear that where second notice under section 148 of the Act is issued during the subsistence of earlier reassessment proceedings, the subsequent reopening is invalid.

17. ITAT observed and opined that in the present case, reassessment proceedings initiated in pursuance to notice issued under section 148 of the Act on 2.7.2008 were still alive. The Assessing Officer issued second notice under section 148 of the Act on 29.3.2011. The second notice was evidently not in consonance with the law set out by the Hon'ble High Courts. Thus, the second notice issued u/s 148 of the Act on 29.3.2011 is bad in law and the subsequent proceedings arising therefrom are vitiated.

Where assessment has been reopened beyond four years it is mandatory that one of the conditions set out in proviso to section 147 are satisfied.

18. In this regards ITAT observed that second reassessment proceedings were initiated after the expiry of four years from the end of the relevant assessment year.

19. The second notice u/s 148 of the Act was issued on 29.3.2011.

20. Proviso to section 147 mandates that reassessment proceedings can be initiated after the expiry of four years only if one of the following conditions are satisfied:

(1) The assessee has failed to file return of income u/s. 139 of the Act; or

(2) The assessee has failed to respond to notice issued u/s. 142(1) or section 148 of the Act; or

(3) The assessee has failed to disclose fully and truly all material facts necessary for the assessment.

21. ITAT observed that assesse has undisputedly filed return of income u/s 139 of the Act and has also responded to notice issued under section 148, therefore, the first two conditions does not get attracted in the present case.

22. ITAT further observed that as regards condition no. (3), the ***reasons recorded for reopening does not indicate*** that income chargeable to tax has escaped assessment in the impugned assessment year by reason of failure on the part of assessee to disclose fully and truly all the material facts, necessary for the assessment.

23. On this aspect ITAT finally observed and opined that in the present case, reading of the reasons for reopening **does not suggest that the reopening of assessment beyond four years is a result of failure on the part of assessee to disclose fully and truly all material facts necessary for the assessment.** The present case does not fall within any of the conditions set out in proviso to section 147 of the Act for initiating reassessment proceedings. Ergo, the reassessment is liable to be quashed on this ground as well. For this ITAT placed reliance on the following judgments:

(1) Tao Publishing (P) Ltd. vs. Dy. CIT, 370 ITR 135 (Bom.)
(2) Hindustan Lever Ltd. vs. R.B. Wadkar, 268 ITR 332 (Bom.)
(3) Akshar Anshul Construction LLP vs. Asstt. CIT, 264 Taxman 65 (Bom.)
(4) Parashuram Pottery Works Co. Ltd. vs. ITO, 106 ITR 1(SC)

24. **In the case of Hindustan Lever Ltd. vs. R.B. Wadkar *{supra}***

On this aspect ITAT placed reliance on the decision of Bombay High Court, wherein the Hon'ble High Court observed and held as follows:

"18. Reading of proviso to section 147 makes it clear that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceeding under section 147, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be for the concerned assessment year.

However, where an assessment under sub-section (3) of section 143 has been made for relevant assessment year, no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year, **unless** any income chargeable to tax has escaped assessment for such assessment year **by reasons of** the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year. (Emphasis supplied)

19. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31st March, 1997 and from that date if four years are counted, the period of four years expired on 1st March, 2001. The notice issued is dated 5th November, 2002 and received by the assessee on

7th November, 2002. Under these circumstances, the notice is clearly beyond the period of four years.

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

(i) the reasons are required to be read as they were recorded by the Assessing Officer.

(ii) No substitution or deletion is permissible.

(iii) No additions can be made to those reasons.

(iv) No inference can be allowed to be drawn based on reasons ***not*** recorded.

(v) It is for the Assessing Officer to disclose and open his mind through reasons recorded by him.

(vi) He has to speak through his reasons.

(vii) 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.

(viii) It is for the Assessing Officer to form his opinion.

(ix) It is for him to put his opinion on record in black and white.

(x) The reasons recorded should be **clear and unambiguous** and should not suffer from any vagueness.

(xi) The reasons recorded must **disclose his mind**.

(xii) Reasons are the **manifestation of mind of the Assessing Officer.**

(xiii) The reasons recorded should be **self-explanatory** and should not keep the assessee guessing for the reasons.

(xiv) Reasons provide **link between conclusion and evidence**.

(xv) The reasons recorded must be **based on evidence**.

(xvi) The Assessing Officer, in the event of challenge to the reasons, must be able to **justify the same based on material available on record**.

(xvii) 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**.

(xviii) That **vital link** is the **safeguard against arbitrary reopening of the concluded assessment.**

{It means that a completed assessment, i.e. which has attained its limitation under the laws, cannot be reopened arbitrarily}

(xix) 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 oral submissions advanced."

[

Sanction by CIT in a mechanical manner
for reopening the assessment under section 147 of the Act
is bad in law.

25. On this aspect, approval for issue of second notice under section 148 of the Act was given by the Commissioner of Income Tax (CIT) in a **mechanical manner without proper application of mind**.

26. In this regards the Assessing Officer on 18.3.2011 communicated and clearly brought the fact to the notice of CIT that the reassessment proceedings are time barred on 31.3.2019 itself and hence, reassessment order under section 143(3) r.w.s. 147 was not passed within time barring limit, the case cannot be opened again.

27. The CIT *vide* communication dated 25.3.2011 accorded permission to the Assessing Officer to reopen assessment under section 147 of the Act **ignoring comments of the Assessing Officer** and the reasons recorded for reopening.

28. On these facts ITAT opined that the CIT without commenting on the observations made by the Assessing Officer, approved permission for reopening the assessment. **Evidently, the permission was granted in a -**

(i) **mechanical manner**
(ii) **without application of mind.**

29. For this ITAT placed reliance on the following judgments:

(1) German Remedies Ltd. vs. DCIT, 287 ITR 494 (Bom.)
(2) My Car (Pune) (Pvt.) Ltd. vs. ITO, 263 Taxman 626 (Bom.)
(3) Sesa Sterlite Ltd. vs. ACIT, 417 ITR 334 (Bom.)

30. **In the case of German Remedies Ltd. vs. DCIT {supra}**

The Hon'ble Bombay High Court in the case of German Remedies Ltd. vs. DCIT {supra} has held that while granting approval to reopen assessment it is **obligatory on the part of Commissioner** to verify whether there was any failure on the part of the assessee to disclose full and true relevant facts in the return of income, where the assessment is reopened beyond a period of four years. The Hon'ble High Court observed:

"24. It is not in dispute that the Assessing Officer on 15-9-2003 had himself carried file to the Commissioner of Income-tax and ***on the very same day, rather same moment in the presence of the Assessing Officer****, the Commissioner of Income-tax granted approval.*

As a matter of fact, while granting approval it was ***obligatory*** *on his part to verify whether there was any failure on the part of the assessee to disclose full and true relevant facts in the return of income filed for the assessment of income of that assessment year.*

It was also ***obligatory*** *on the part of the Commissioner to consider whether or not power to reopen is being invoked within a period of 4 years from the end of the assessment year to which they relate.*

None of these aspects have been considered by him which is sufficient to justify the contention raised by the petitioner that the ***approval granted suffers from non-application of mind****.*

In the above view of the matter, the impugned notices and consequently the order justifying reasons recorded are unsustainable. The same are liable to be quashed and set aside."

31. **In the case of My Car (Pune) (Pvt.) Ltd. vs. ITO*{supra}***

The Hon'ble Bombay High Court in another judgment rendered in the case of My Car (Pune) (P.) Ltd. vs. ITO *{supra}* reiterated that where sanction has been granted by the Commissioner **without application of mind**, the notice issued under section 148 of the Act is bad in law. The Hon'ble High Court held:

"8. ……………… It is a settled position in law that grant of the sanction by the Commissioner of Income Tax under Section 151 of the Act,

*(i) is **not a mechanical act** on his part **but***
*(ii) it requires **due application of mind** to the reasons recorded before granting the sanction.*

*This has been so provided as to **safeguard** against issue of reopening notice (which seek to disturb the settled position) to ensure that assesse is not troubled with reopening issues without satisfactory reasons.*

Therefore, it must pass muster of the Superior Officer in the context of Sections 147 and 148 of the Act, before it is issued to the party."

32. In the light of above facts and the judicial pronouncements, ITAT observed on this aspect that -

(i) in the present case, we observe that the CIT has granted permission to the Assessing Officer for initiating reassessment proceedings **without properly examining reasons** for reopening.

(ii) the reassessment proceedings were initiated beyond period of four years and nowhere in the reasons it has been brought out that the assessee has failed to disclose fully and truly all material facts necessary for the assessment.

(iii) the CIT has **not recorded his satisfaction** on the reasons recorded by the Assessing Officer for reopening.

33. ITAT further observed that the Assessing Officer had brought the fact to the notice of CIT that earlier notice was issued under section 148 of the Act on 2.7.2008, however, no assessment order under section 143(3) r.w.s. 147 of the Act was passed within time barring limit, hence, the case cannot be reopened again. The CIT **without commenting** on the observations made by the Assessing Officer, approved permission for reopening the assessment. Evidently, the **permission was granted in a mechanical manner without application of mind**.

34. Thus, ITAT concluded that in the facts of the case and in the light of law laid down by the Hon'ble Jurisdictional High Court, notice dated 29/3/2011 u/s 148 of the Act is held invalid, reassessment proceedings arising therefrom are vitiated and hence, liable to be quashed.

Conclusion and judgment
{Notice issued u/s 148 quashed}

35. In the light of above issues, facts and circumstances of the case and judicial pronouncements ITAT held that the **impugned reassessment proceedings suffer from multiple incorrigible legal defects** and hence, are **unsustainabl**e. The notice dated 29.3.2011 issued u/s 148 of the Act is itself invalid. For the detailed reasons recorded above, we quash reassessment proceedings. The ground No.1 to 5 of the appeal are thus,
allowed.

Disclaimer

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By CA. Rajiv Kumar Jain
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21.8.2020