आयकर अपीलीय अधिकरण
मुंबई पीठ "के", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "K", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

आअसं. 4912/मुं/2013 (नि.व.2004-05)
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 ..... अपीलार्थी /Appellant

बनाम Vs.

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

अपीलार्थी द्वारा/ Appellant by : Shri Rajan Vora
प्रतिवादी द्वारा/Respondent by : Shri Akhtar H. Ansari

सुनवाई की तिथि/ Date of hearing : 29/07/2020
घोषणा की तिथि/ Date of pronouncement : 10/08/2020

आदेश/ ORDER

PER VIKAS AWASTHY, JM:

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals) -24, Mumbai (in short 'the CIT (A)') dated 05/03/2013 for the assessment year 2004-05.

2. The assessee in appeal has assailed reopening of assessment, as well as additions/disallowances on merits. The assessee in appeal has raised 14 grounds.

- Grounds of appeal No.1 to 5 are against reopening of assessment under section 147 of the Income Tax Act 1961 (herein after referred to as 'the Act');
- Grounds of appeal No.6 to 12 are against disallowance of alleged excess provision of royalty; and
- Grounds of appeal No.13 & 14 are against charging of interest under section 234B of the Act.

3. Shri Rajan Vora, appearing on behalf of the assessee made three fold submissions assailing reopening under section 147 of the Act. The first plank of his argument is against initiation of 2nd reopening proceedings during the subsistence of first reassessment proceedings. The ld. AR contended that the assessee filed its return of income on 01/11/2004. The assessment u/s. 143(3) was completed on 28/11/2006. The first notice under section 148 of the Act was issued to the assessee on 02/07/2008. The assessee filed reply to the said notice on 23/07/2008 and filed return on 30/07/2008. No action was taken by the Assessing Officer on the reply and the return filed in response to the notice. Later on, after a gap of almost three years, second notice under section 148 was issued to the assessee on 29/03/2011. The ld. AR asserted that 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. To support his contentions the ld. AR placed reliance on the following decisions:

(1) A.S.S.P. & Co. vs. CIT 172 ITR 274 (Mad)

(2) CIT vs. P. Krishnankutty Menon, 181 ITR 237 (Ker)

3.1. The second plank of argument against reopening of assessment by the ld. AR of the assesse is, that the second notice for reopening was issued beyond the period of four years. The assessee complied with the second notice. The assessee vide letter dated 19/04/2011 requested to provide reasons for reopening. The ld. Authorized Representative of the assessee pointed that a perusal of reasons recorded for second reopening dated 18/3/2011 (at page 331 of Paper Book) would show that the reopening is not on account of any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. It is mere change of opinion. Where assessment has been reopened beyond 4 years it is mandatory that one of the conditions set out in proviso to section 147 are satisfied. To support his contentions the ld. AR placed reliance on the following decisions:

(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)

3.2. The third argument of ld. Authorized Representative of the assesse against reopening is that the Assessing Officer while taking permission from the CIT for issuing notice under section 148 of the Act has expressed his opinion that the case is time barred and hence, cannot be reopened again. However, the CIT in a mechanical manner vide communication dated 25/03/2011 accorded sanction for reopening the assessment under section 147 of the Act. The CIT has given no reason whatsoever overruling the

comments of Assessing Officer against reopening of assessment. The ld. Authorized Representative of the assessee submitted that the manner in which reassessment has been sanctioned by CIT clearly indicate that it is without judicious application of mind and in contravention to the proviso to section 147 of the Act. To buttress his contentions, the ld. AR placed reliance on the following decisions:-

(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.)

3.3. The ld. Authorized Representative of the assessee pointed that assessment for assessment year 2004-05 has been reopened for the reason that excess provision for royalty has been created in the books of accounts for financial year 2003-04. The ld. Authorized Representative of the assessee referred to details of royalty payment made during the period relevant to the assessment year 1999-2000 to assessment year 2005-06 (at page 374 of paper book). The ld. Authorized Representative of the assessee submitted that a perusal of the chart would show that in assessment year 2001-02 and 2003-04 there was short provision for royalty. Additional provision was made to cover short provision in the subsequent assessment years. The excess provision for royalty made in assessment year 2004-05 was reversed in assessment years 2005-06 and 2007-08. The ld. Authorized Representative of the assessee submitted that by the time second notice for reopening was issued to the assesse, assessment for assessment years 2005-06 and 2007-08 were already completed. Thus, excess provision made during 2004-05 was tax neutral. The ld. Authorized Representative of the assessee pointed that the royalty was paid

in accordance with Agreement dated 14/3/2002 (relevant extract at pages 375 to 377 of the Paper Book).

4. Per contra, Shri Akhtar H. Ansari, representing the Department vehemently defended the impugned order and the action of Assessing Officer in reopening assessment. The ld. Departmental Representative submitted that the assessee had made excess provision for royalty as against actual payment of royalty, therefore, the Assessing Officer was justified in reopening the assessment. The ld. Departmental Representative defending reopening of assessment contended that the Assessing Officer had taken due approval from the competent authority before issuing notice under section 148 of the Act. Thus, there is no procedural violation in issuing notice under section 148 of the Act to the assessee. The ld. Departmental Representative pointed that the objections filed by the assessee against reasons recorded for reopening were disposed of by the Assessing Officer by passing a separate speaking order. The assessee has not challenged the same. Thus, the grounds raised by the assessee challenging reopening of assessment are liable to be dismissed.

5. We have heard the submissions made by rival sides on the issue of reopening. The ld. Authorized Representative of the assessee at this stage has confined his arguments only on the legal issue challenging validity of reopening of assessment. To adjudicate the legal issue assailing validity of reopening of assessment it would be imperative to first examine facts in the case. The chronology of events vital to decide validity of reopening are tabulated herein under:-

01/11/2004	Return of income for A.Y. 2004-05 filed by the assesse.
28/11/2006	Assessment u/s. 143(3) of the Act completed for A.Y.2004-05.
02/07/2008	First notice u/s.148 of the Act issued to the assesse.
23/07/2008	Assessee's reply to the notice u/s 148 of the Act.
30/07/2008	Return filed in response to notice u/s.148 of the Act
18/03/2011	Reasons recorded for reopening assessment 2nd time
29/03/2011	Second notice issued u/s 148 of the Act
03/08/2011	Order passed by the Assessing Officer disposing of the objections against second reassessment proceedings.
10/10/2011	Assessment order passed u/s.143(3) r.w.s. 147 of the Act

6. The sequence of events have not been disputed by the Department. From perusal of above chart, it emerges that after issuance of first notice under section 148 of the Act on 2/07/2008, no action whatsoever was taken by the Assessing Officer to complete the reassessment proceedings. The Department went into slumber for almost three years and, thereafter, reinitiated reassessment proceedings in March, 2011 by issuing second notice u/s 148 on 29/3/2011. Issuance of second notice under section 148 of the Act without completing pending assessment proceedings U/s. 147 of the Act is illegal. The Hon'ble Kerala High Court in the case of CIT vs. P. Krishnankutty Menon (supra) has held that the Income Tax Officer 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."*

Similar view has been expressed by the Hon'ble Madras High Court in the case of A.S.S.P. & Co. vs. CIT (supra). The Hon'ble High Court held:

"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."***

7. Thus, 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. In the present case, reassessment proceedings initiated in pursuance to notice issued under section 148 of the Act on 02/07/2008 were still alive. The Assessing Officer issued second notice

under section 148 of the Act on 29/03/2011. 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.

8. We further observe that second reassessment proceedings were initiated after the expiry of four years from the end of the relevant assessment year. The second notice u/s 148 of the Act was issued on 29/3/2011. 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.

9. The 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. 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. The Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. (Supra) has held:

> ***"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 recompute 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 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 provide 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 oral submissions advanced."*

[Emphasized by us]

Similar, views have been reiterated by the Hon'ble Jurisdictional High Court in Tao Publishing (P) Ltd. (supra) & Akshar Anshul Construction LLP (supra).

10. 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.

11. The third argument against validity of reopening proceedings is that the 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. The ld. Authorized Representative of the assesse has drawn our attention to the communication dated 18/03/2011 (at page 327-328 of the Paper Book) addressed by the Assessing Officer to the CIT. The Assessing Officer has clearly brought the fact to the notice of CIT that the reassessment proceedings are time barred on 31/03/2009 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. For the sake of ready reference relevant extract of the aforesaid communication is reproduced herein below:-

"To
The Commissioner of Income Tax
LTU, Mumbai

(Through Proper Channel)

Sub: Reopening-in the case of M/s. Johnson & Johnson Ltd- A.Y. 2004-05-reg.

****

Please refer to the above.
2. This case had been received on transfer from DCIT-5(2), Mumbai dated 06/05/2010. As per transfer Memo, DCIT-52(2), Mumbai intimated that the case for A.Y.2004-05 was reopened U/s.148 dated 02/07/2008 and served upon assessee who asked for reason of reopening vide letter dated 23/07/2008. However, no further action is seen on records after that and even letter dated 16/04/2010 of DCIT-5(2), Mumbai to CIT-5, Mumbai brings out this fact.

The reason for reopening was that ITO(TDS)-International Taxation -3, Mumbai had written dated 06/05/2008 to ACIT-5(2), Mumbai that assessee had made excess provision for royalty of Rs.2,85,66,130/- in its books which was more than the actual royalty paid u/s.195 during A.Y. 2004-05.

Now, case had been time barred on 31/03/2009 itself u/s 148, long before case was transferred to LTU-Mumbai. Even later on the office of DCIT-5(2), did not take any further action till case transfer to LTU on 06/05/2010.

3. In my opinion, since case had been reopened u/s 148 but order u/s 143(3) r.w.s. 147 was not passed within time barring limit, the case cannot be reopened again.

However, if it is directed that action u/s 148 be taken, the approval may now be given u/s 151. The Performa is enclosed separately.

<u>Please note that last date for issue of section 148 notice is 31/03/2011</u>."

The CIT vide communication dated 25/03/2011 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.

12. 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."

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, is not a mechanical act on his part but 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 assessee 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."

13. 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. 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. The CIT has not recorded his satisfaction on the reasons recorded by the Assessing Officer for reopening. Further, the Assessing Officer had brought the fact to the notice of CIT that earlier notice was issued under section 148 of the Act on 02/07/2008, 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. Thus, 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.

14. The impugned reassessment proceedings suffer from multiple incorrigible legal defects and hence, are unsustainable. 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.

15. Since, the assesse succeeds on the legal grounds, the other grounds raised on merits of additions/disallowances have become academic and hence, are not taken up for adjudication.

16. In the result, the appeal of the assessee is allowed in the terms aforesaid.

Order pronounced on Monday the 10th day of August, 2020.

Sd/-	Sd/-
(MANOJ KUMAR AGGARWAL)	(VIKAS AWASTHY)
लेखा सदस्य/ACCOUNTANT MEMBER	न्यायिक सदस्य/JUDICIAL MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 10 /08/2020

Vm, Sr. PS (O/S)

<u>प्रतिलिपि अग्रेषित</u>Copy of the Order forwarded <u>to</u> :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai