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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 16th July, 2012.*

\+ W.P. (C) 1884/2012

SAK INDUSTRIES PRIVATE LIMITED & ANR. ..... Petitioners
Through: Mr. Ajay Vohra with Mr. Amit Sachdeva and Mr. Somnath Shukla, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 7(1) & ANR. ..... Respondents
Through: Mr. Sanjeev Rajpal, Sr. Standing Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

R. V. EASWAR, J.: (OPEN COURT)

1. M/s. Sak Industries Pvt. Ltd. has filed the present writ petition under Article 226/ 227 of the Constitution of India seeking a writ of certiorari or prohibition or any other appropriate writ or direction to quash the Notice dated 08.03.2010 issued by the first respondent under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and also to quash the order passed on 16.03.2012 by the said respondent dismissing the objections filed by the petitioner to the reasons recorded to reopen the assessment for which notice under Section 148 of the Act was issued. A prayer is also made for quashing of all consequent proceedings.

2. The petitioner is a private limited company. In respect of the assessment year 2003-04 it filed a return of income declaring income of ₹2,21,43,438/- computed under the provisions of the Act. The return was accompanied by the audited profit and

loss account and balance sheet as also the tax audit report dated 20.08.2003 under Section 44AB of the Act. In the computation of the income appended to the return the petitioner also computed its "book profit" for the purpose of Section 115JB of the Act. While computing the total income under the normal provisions of the Act, the petitioner did not include the amount of ₹66.6 crores received as settlement amount from M/s. Meturit AG on settlement of a dispute subsisting between the parties concerning the power of another company by name M/s. Milacrom INC, US to dispose of the share holding in Widia India Ltd. which was jointly owned by the petitioner and Milacrom INC. The amount was not included in the computation as income on the ground that it represented capital receipts in the assessee's hands. However, the petitioner had filed the balance sheet as on 31.03.2003 in which that amount received by it was shown as capital reserve and Note No.10 attached to the balance sheet recorded the receipt as a settlement amount which was not liable to income tax. Additional information was also given in Sub-note 3 to Note 3. The tax audit report distinctly disclosed the receipt of the aforesaid amount by pointing out that the amount was received on settlement and represented a capital receipt not liable to tax and was therefore not credited to the profit and loss account. The petitioner also furnished the settlement agreement as annexure to the report under Section 115JB in Form No.29B. Further the petitioner had also attached a legal opinion rendered by a former Chairman of the CBDT opining that the receipt was in the nature of capital receipt not liable to tax.

3. In the computation of book profit under Section 115JB, the petitioner did not add back the provision of ₹16,59,906/- being provision for gratuity as also the amount of ₹2,62,30,297/- being provision for diminution in the value of mutual funds. In respect of the provision for the gratuity the petitioner had furnished the profit and loss account which showed a separate debit under the head "administrative and other expenses", the details of which were shown in Schedule 8 to the profit and loss

account. In the computation of income filed by the petitioner showing taxable income under the normal provision of the Act, the provision for gratuity was added back to the profit as per the profit and loss account. The report of the Chartered Accountant in Form No.29B required to be given under Section 115JB of the Act also disclosed that no adjustment on account of provision for gratuity had been made to the book profit. In addition to these particulars, Schedule 1 to the return of income, which declared the book profit under Section 115JB as ₹ nil expressly referred to the report of the Chartered Accountant in Form No.29B and also recorded that no adjustment had been made to the book profit on account of provision for gratuity.

4. As far as the provision for diminution in the value of investment of mutual funds is concerned, the petitioner had stated in Schedule 5 to the balance sheet, which contained the details of the investments made, that the provision for diminution in the value of investment in mutual funds had been created and the value of the investment had been recorded after reducing the aforesaid provision. As in the case of provision for gratuity, a separate debit had been shown in Schedule 8 to the profit and loss account which contained details for administrative and other expenses debited to the profit and loss account and this was as per the requirement of Accounting Standard 13. Note No.6 in Schedule 9 to the balance sheet stated that "long term investment are carried at loss less provision, if any, for diminution in value". In the Chartered Accountant's report dated 20.08.2003 issued in Form No.29B, in Annexure-A thereto, the details of book profit were shown in point No.10 and therein it was stated that no adjustment in terms of the Explanation to sub-section 2 of Section 115JB was made.

5. The first respondent completed the assessment of the petitioner under Section 143 (3) of the Act after making various disallowances and additions. This order was passed on 20.10.2005. In the assessment order, however, no disallowance of the provision for gratuity and the provision for diminution in the value of the investment was made, even though the assessment was made on the book profit as per Section

115JB of the Act. The Assessing Officer had also computed the taxable income under the normal provision of the Act for purposes of comparison with the book profit under Section 115JB and in this computation, he did not add back the amount of ₹66,44,20,487/- which was claimed to be a capital receipt by the petitioner.

6. On 08.03.2011 the first respondent issued notice under Section 148 of the Act proposing to reopen the assessment of the petitioner for the assessment year 2003-04. He recorded the following reasons for reopening the assessment as required by Section 148 (2) of the Act: -

> "*The provision for gratuity amounting to ₹16,59,906/- claimed in the profit and loss account and offered it for tax while computing the income under normal provision of the act. But while computing the income under special provision u/s 115JB of the IT Act, it was not added back. This provision was required to be added back being unascertained liability. The mistake has resulted in underassessment of income by ₹16,59,906/- with consequent short levy of tax by ₹1,72,873/- including interest u/s 234B.*
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> *The assessee had credited a capital reserve of ₹66,64,20,487/- as settlement amount in terms of settlement agreement with foreign promoters (Milacron Inc. USA, Widia Gmbh and Meturit AG) the amount of ₹66,64,20,487/- accrued to assessee on discharge of his liabilities on account of debts, dues, bonds, bills contracts, agreements, promises, damages, executions, claims, demands, etc. The assessee acknowledged and confirmed that on after the date of settlement agreement, any of the foreign promoters were entitled at their discretion to carry on the business as they may deem fit, or to transfer and deal with all or any of the shares or assets of the company, or to terminate the operations of the company & or wind up the company. Since the amount had accrued to assessee in the course of business, it should have been taxable as business income. Omission to do so has resulted in underassessment of income of ₹66,64,20,487/- involving undercharge of tax of ₹32,38,92,850/- including interest.*
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> *The assessee debited 'Provision for dimunition in value of investment of mutual funds' amounting to ₹2,62,30,297/- his profit and loss account and offered it for tax while computing the income under*

> *normal provision of the act. But while computing the income under special provisions of the act, it was not added back. The mistake has resulted in underassessment of income by ₹27,31,802/- including interest under section 234B.*"

The above reasons show that the Assessing Officer proposed to add back the provision for gratuity and the provision for diminution in the value of investment in mutual funds as also the amount of ₹66,44,20,487/- claimed to represent capital receipt, to the book profit under Section 115JB.

7. The petitioner filed a revised computation of the income under protest and requested the first respondent to furnish the reasons recorded for reopening the assessment in terms of the judgment of the Supreme Court in *GKN Drivershaft India Ltd.*, (2003) 259 ITR 19. The petitioner also filed objections to the reassessment proceedings on 26.10.2010 after getting the reasons recorded from the first respondent and in these objections it was contended that all the three issues on which the assessment was proposed to be reopened had been examined by the respondent in the original assessment proceedings and that no fresh information or facts had come to his possession after the completion of the original assessment and therefore the reassessment proceedings were invalid, being based on a mere change of opinion. Objection was also taken to the reopening on the ground that the notice having been issued after a period of 4 years from the end of the relevant assessment year, the first proviso to Section 147 was attracted and it was incumbent upon the first respondent to show, to validly assume jurisdiction, that the petitioner had failed to furnish full and true particulars necessary for its assessment at the time of the original assessment proceedings.

8. On 02.11.2010 the first respondent passed a cryptic order rejecting the objections without assigning any reasons. The petitioner filed W.P. (C) No.7933/2010 before this court and accepting the contentions of the petitioner, this court quashed the

order dated 02.11.2010 and directed the first respondent to hear and dispose of objections afresh by passing a speaking order. Before the court the Revenue submitted that the reassessment order had also been passed in the meantime on 19.11.2010. At the request of the petitioner the court permitted the petitioner to amend the writ petition so as to also assail the reassessment order. The order of the Court was passed on 16.02.2012 and on 16.03.2012 the first respondent dismissed the objections raised by the petitioner to the reassessment proceedings, prompting the petitioner to file the amended writ petition which is the present one.

9. We find no difficulty in accepting the contention of the petitioner to quash the notice under Section 148 and all consequent proceedings and orders initiated and passed by the first respondent, who is the Assessing Officer. The assessment year concerned is 2003-04. The notice under Section 148 of the Act was issued on 08.03.2010 i.e. after a period of 4 years from the end of the relevant assessment year. This can be done only under the first proviso to Section 147 of the Act which reads as under: -

> "*Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section 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 reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.*"

Since the proviso has been invoked, it is the duty of the Assessing Officer to show that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Section 142 (1) or Section 148 or to disclose fully and truly all material facts necessary for his assessment for the relevant assessment year. We have already

referred to the particulars furnished by the petitioner along with the return of income in respect of the three items which according to the first respondent ought to have been added back to the book profit, but were omitted to be added back in the original assessment. In the leading case of *Calcutta Discount Company Ltd. v. ITO*, (1961) 41 ITR 191, K. C. Das Gupta, J. speaking for the Constitution Bench of the Supreme court stated that the duty of the assessee is limited to the disclosure of primary facts and that the duty does not extend to advising the Assessing Officer as to what inferences, factual or legal, he should draw from the disclosed facts. It is not for the assessee or someone else to tell the assessing authority what inference of facts or law should be drawn. It was further held that where more than one inference could be drawn from primary facts, it would not be possible to say that the assessee should have drawn any particular inference and communicated the same to the assessing authority. The duty of the assessee is thus to disclose fully and truly all primary relevant facts and it does not extend beyond this. What facts are material and necessary for the assessment may, however, differ from case to case.

10. Judged in the light of the aforesaid observations, we are satisfied that the petitioner in the present case had placed all the primary and relevant facts before the Assessing Officer in the original assessment proceedings. The Assessing Officer (the first respondent herein) has not alleged, in the reasons recorded, what further primary, material or relevant fact was omitted or had not been disclosed by the petitioner. The reasons recorded show that the only thing remained to be disclosed by the petitioner was the inference that the three items in question were to be added back to the book profit, a duty which is not placed on the assessee. The reasons also show that it was from the same facts which were disclosed by the petitioner, the first respondent formed the view or drew the inference that the items were to be added to the book profit. The question then is what was the petitioner's failure.

11. Explanation 1 to Section 147 reads as under: -

> "*Explanation 1. – Production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.*"

This Explanation cannot come to the rescue of the first respondent. As to the true effect and purport of the Explanation, we must go back to *Calcutta Discount Company Ltd. (supra).* It was observed as under: -

> "*There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet the possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example – "I have produced the account books and the documents : You, the assessing officer, examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account books and the documents." His omission to bring to the assessing authority's attention those particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them – including particular entries in account books, particular portions of documents, and documents and other evidence which could have been discovered by the assessing authority, from the documents and other evidence disclosed.*"

12. The petitioner has placed before the first respondent the profit and loss account and the balance sheet which are audited. It has also placed the relevant Schedules and Notes on accounts which form part of the audited financial statements. The function

of the Notes to the accounts is to highlight the particular special or unusual entries in the profit and loss account and balance sheet and explain the stand taken by the assessee with respect to them. It is in keeping with this that in the present case the petitioner had separately debited the provision for gratuity and the provision for diminution in the value of investment in mutual funds under the head "administrative and other expenses", the break up for which is given in Schedule 8 to the profit and loss account. In Schedule 5 to the balance sheet which explains the investments of ₹119,26,13,296/- the petitioner reduced the provision for diminution in the value of investment in mutual funds from the aggregate investment in mutual funds (unquoted). As regards the amount of ₹66,64,20,487/- which the petitioner received under the settlement and claimed the same to be a capital receipt not liable to tax, a separate Note (Note No.10) was made under the head "notes of accounts" which reads as under: -

> "*10. During the year the company has received ₹666,420,487/- (net) in terms of settlement agreement as settlement amount. This amount as per the legal opinion had been accounted for as Capital Receipt and credited to Capital Reserve and is not liable to tax.*"

In Note No.8 under the head "retirement benefit" it has been stated as under: -

> "*8. RETIREMENT BENEFIT*
>
> *(a) Provision for gratuity payable to employee is made on the basis of actuarial valuation.*"

13. As to what further disclosure was required to be made by the petitioner at the time of original assessment proceedings has not been explained in the reasons recorded for reopening the assessment. The words "not necessarily" appearing in Explanation 1 signify that the answer to the question whether production of account books or other evidence from which material evidence could be gathered by the Assessing Officer by the exercise of due diligence will amount to full and true

disclosure, will depend on the facts and circumstances of the each case. There can be cases where such production may amount to full and true disclosure of primary facts and there can be other cases where it may not amount to complete disclosure. This aspect has been considered by this court in *Rakesh Aggarwal v. Assistant Commissioner of Income Tax*, (1996) 221 ITR 492. D. K. Jain, J. (as he then was) explained the position in the following manner: -

> "*At this stage we may notice the significance of the words "not necessarily" as appearing in Explanation 2. In our view, these words only indicate that whether there is a disclosure or not within the meaning of section 147 (a) of the Act would depend on the facts and circumstances of each case. To put it differently it would be the nature of documents and the circumstances in which these are produced before the Assessing Officer that will determine the question. For instance, if material evidence is not writ large on the document but is embedded in some voluminous records/ books of account requiring a careful scrutiny and delving deep into it to notice the necessary material, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and the case would attract application of Explanation 2 to hold that mere production of the books of account or the documents, etc., without pointing out the relevant entries therein, does not amount to disclosure within the meaning of section 147 (a) of the Act.* "

The Explanation therefore cannot be interpreted to mean that production of account books or other evidence before the Assessing Officer from which he could gather material evidence by the exercise of due diligence on his part will in no case amount to full and true disclosure of primary facts. In the case before us, nothing more was required to be done by the assessing authority except to read the audited profit & loss account, balance sheet etc. along with the schedules and notes on accounts in order to draw the inference whether the three items in question were to be added back to the book profit or not. The tax audit report and audit report in Form No.29B along with its annexures including the settlement agreement were also before him. The petitioner

is a company to which the provisions of Section 115JB are attracted. For the purpose of applying the section, the most important, basic and relevant documents to be looked into are the company's audited profit and loss account, balance sheet (with their schedules, notes, etc.), audit report under Section 115JB in Form No.29B with its annexures etc. These were filed at the time of the original assessment proceedings. No further documents were to be called for or examined in order to apply the provision and compute the book profit in accordance with the same. The first respondent was not bound to accept the stand taken by the petitioner that in the computation of book profit the three items in dispute were not includible. The alleged escapement of income cannot be attributed to any failure on the part of the petitioner to furnish full and true particulars. Going by the reasons recorded for the reopening of assessment in the present case we are unable to uphold the reassessment proceedings on the ground that the petitioner failed to disclose fully and truly all material facts relevant to its assessment at the time of the original assessment proceedings.

14. For the above reasons we are of the opinion that the writ petition has to succeed. It is allowed. The impugned notice dated 08.03.2010 and the order dated 16.03.2012 rejecting the petitioner's objections are accordingly quashed. No costs.

S. RAVINDRA BHAT, J

R.V. EASWAR, J.

JULY 16, 2012
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