



IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 08.08.2014

W.P.(C) 1909/2013

M/S SWAROVSKI INDIA PVT LTD

..... Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr M.S. Syali, Sr. Advocate with Ms Husanl Syali and Mr Mayank Nagi, Advocates.

For the Respondent : Mr Kamal Sawhney, Advocate with Mr Sanjay Kumar, Advocate.

CORAM:

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SIDDHARTH MRIDUL

J U D G M E N T

BADAR DURREZ AHMED, J (ORAL)

1. By way of this writ petition a writ of certiorari has been sought for quashing the notice dated 23.03.2012 issued by the Assistant Commissioner of Income Tax under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') as also the order dated 25.02.2013 passed by the



Deputy Commissioner of Income Tax disposing the objections raised by the petitioner in respect of the assessment year 2005-2006.

2. Admittedly, the issuance of the notice under section 148 of the said Act is beyond the period of four years from the end of the relevant assessment year i.e. assessment year 2005-2006. Consequently, there is no dispute that the first proviso to section 147 of the said Act would be relevant.

The first proviso to Section 147 of the said Act is reproduced hereinbelow:-

“147. Provided that where an assessment under sub-section (3) of section 243 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.”

3. The facts are that the petitioner had filed its return of income on 31.10.2005 whereunder it had claimed a deduction of ₹6,34,90,243/- under section 10B of the said Act on the ground that it is a 100 per cent export oriented unit at Pune which had been set up in the assessment year 2000-2001 and had earned profit to the extent of ₹6,34,90,243/- which were not



exigible to tax on account of the fact that it was engaged in manufacturing/production activity in the said unit. According to the petitioner it was engaged in the business of manufacturing/processing of raw beads into finished imitation pearls.

4. The assessment order was passed by the Assessing Officer on 28.11.2008 under section 143(3) of the said Act after incorporating the order passed by the Transfer Pricing Officer (TPO) under section 92CA of the said Act with regard to computation of the Arms Length Price in relation to international transactions with associated enterprises reported in form 3CEB.

5. Thereafter a notice under section 154 of the said Act was issued on 21.04.2010 whereby it was proposed that the deduction of ₹6,34,90,243/- claimed under section 10B of the said Act ought to be disallowed inasmuch as the petitioner had undertaken activities on 'job work' basis. There was another proposal also that the 'other income' of ₹1,32,97,000/- had not been taxed separately and had been included in the deduction claimed under section 10B of the said Act.

6. The petitioner filed detailed submissions in reply to the said notice on 24.05.2010. The petitioner indicated that it would eligible for the deduction under section 10B of the said Act for the Pune Unit inasmuch as the



petitioner was engaged in the manufacturing/production of finished imitation pearls after carrying out the processing activities on raw beads. On the submission of the said reply by the petitioner, no further action was taken by the Department pursuant to the said notice under section 154 of the said Act.

7. In the meanwhile, a notice under section 148 of the said Act had been issued on 19.03.2010 within the period of four years from the end of the relevant assessment year (i.e., 2005-06). The said notice culminated in the re-assessment order dated 26.10.2010. Subsequent thereto the impugned notice dated 23.03.2012 was issued under section 148 of the said Act. The purported reasons for issuance of the said notice were also furnished to the petitioner. Thereafter, the petitioner filed its objections dated 14.01.2013, which have been rejected by virtue of the order dated 25.02.2013. It is in this background that the present writ petition has been filed challenging the notice dated 23.03.2012 and the order dated 25.02.2013.

8. The point urged by Mr Syali, the learned Senior Counsel appearing on behalf of the petitioner, was that in a case where the proviso to section 147 of the said Act was applicable, it must be clearly indicated that the escapement of income was on account of the failure on the part of the assessee to fully and truly disclose all material facts necessary for the



assessment. Mr Syali took us through the purported reasons behind the issuance of the notice under section 148 of the said Act. The purported reasons as indicated by the Assistant Commissioner of Income Tax were as under:-

1	Reasons for the belief that income has escaped assessment	The original assessment u/s 143(3) was completed in December 28/11/2008, at 64,36,160 u/s 143(3) as against the returned loss of Rs.(-)4,71,20,033/-. Perusal of records revealed that the assessee had claimed deduction u/s 10B on Pune Unit amounting to Rs.6,34,90,243/- as 100% EOU, which undertook activities on job work basis. This section applies to any undertaking which manufacturing or produces any article on things or computer software. Hence, the deduction u/s 10B should have been disallowed. This has resulted in incorrect allowance of deduction u/s 10 amounting to Rs.6,34,90,243/-. Secondly, the assessee has not taken the income from the other sources to the tune of Rs.1,32,97,000/- separately and included in deduction which should have been separately considered and taxed. The mistake resulted in under assessment of income to the tune of Rs.1,32,97,000/- involving
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	<p>potential tax effect.</p> <p>I have therefore, reason to believe that an amount of Rs.7,67,87,243/- has escaped assessment within the meaning of section 147(c) of the IT Act, 1961. The escapement of the income has been by the reason of failure on the part of the assessee to disclose fully and truly, all material fact necessary for assessment. Since the assessment has been completed u/s 143(3) of the IT Act, 1961 and 4 years have since elapsed. The assessment record is being submitted for kind perusal and approval u/s 151(1) of the IT Act, 1961 for issuance of notice u/s 148 of the IT Act, 1961.</p>
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9. On going through the above reasons, it is evident that while the Assessing Officer mentioned that income had escaped assessment because of the failure on the part of the assessee to fully and truly disclose the material facts for assessment, he has not indicated as to which material fact had not been fully and truly disclosed by the assessee. Presumably the material fact could have been the fact that the assessee was carrying out its activities at its Pune unit on a 'job work' basis. In this backdrop, the point we have to consider in this case is whether the petitioner had, in fact, failed to disclose fully and truly all the material facts which were necessary for the purposes of



assessment.

10. The learned counsel for the petitioner placed reliance on a decision of this court in the case of *Haryana Acrylic Manufacturing Co. vs. Copmmissione rof Income-Tax and Another*: [2009] 308 ITR 38 (Delhi).

While considering the provisions of sections 147 and 148 of the said Act, in particular the first proviso thereof, this court observed as under:-

“29. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in *Wel Intertrade Private Ltd.* [2009] 308 ITR 22 (Delhi) we had agreed with the view taken by the Punjab and Haryana High Court in the case of *Duli Chand Singhania* [2004] 269 ITR 192 that, in the absence



of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our view-point, we hold that the notice dated March 29, 2004, under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated March 2, 2005, are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.”

(underlining added)

11. The same view has been expressed in **Rural Electrification Corporation Ltd. vs. Commissioner of Income Tax: [2013] 355 ITR 356.** It may not be out of place here to mention that this court in **Microsoft Corporation (I) Pvt Ltd vs. Deputy Commissioner of Income Tax & Anr: [WP(C) 284/2013 decided on 23.05.2013]** had observed as under:-

“From the above, it is evident that merely having a reason to believe that income had escaped assessment is not sufficient for reopening the assessment beyond the four year period referred to above. It is essential that the escapement of income from assessment must be occasioned by the failure on the part of the assessee to, *inter alia*, disclose material facts, fully and truly. If this condition is not satisfied, there would be a bar to taking any action under Section 147 of the said Act.”

12. It is clear that the escapement of income by itself is not sufficient for reopening the assessment in a case covered by the first proviso to Section



147 of the said Act unless and until there is failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment. In the present case, it has not been specifically indicated as to which material fact or facts was/were not disclosed by the petitioner in the course of its original assessment under Section 143(3) of the said Act. We can, as pointed out above, presume that the assessing officer had in mind the fact that the petitioner was carrying out its activities on 'job work' basis when he observed that the petitioner had failed to disclose fully and truly all material facts. But even on this presumption we find that the Assessing Officer was not correct. This is so because in the Transfer Pricing Report submitted by the assessee it had been clearly indicated that it had processed raw beads to the extent of 1,03,213 Kgs into finished imitation pearls in the financial year 2004-2005 which related to the assessment year 2005-2006. The entire process had been set out in the Transfer Pricing Report as under:-

“The following are the steps of processing carried out by SIPL:

1. Raw beads are examined by SIPL;
2. Raw beads are fixed on the frames;
3. Beads are dipped in a lacquer based on nitro cellulose (made of nitro cellulose, Butyl Acetate & Ethanol) within DSW developed machinery supplied to EOU.
4. Subsequent to dipping the glass beads are



subjected to several coating processes, which impart the qualities of a pearl.

5. Beads are then enameled.
6. After dipping and coating, the semi-finished pearls are pre-dried and removed from the frames.
7. Thereafter the pearls are baked in ovens to ensure that the layers coated on the glass beads are permanently stable.
8. The next step is to wash the pearls in soft water to remove any extraneous material.
9. Process of visual quality control.
10. Quality control is carried out on the standard operating procedures of DSW.
11. Pearls are knotted, packed, babeled and sent back to DSW.”

13. Apart from this, in the course of the original assessment proceedings the petitioner, in response to a notice under Section 143(2) and 143(1) of the said Act submitted information on the point raised by the Assessing Officer with regard to the business activity of the petitioner. The petitioner had submitted a letter dated 09.09.2008 which clearly indicated as under:-

“2. Point 2: Brief Note on Business Activity.

Swarovski India Pvt. Ltd. is a group company of Swarovski AG, Austria and has two divisions in India viz. Pune Unit and Delhi Unit.

Pune Unit is a 100% Export Oriented Unit (EOU) and is undertaking activities such as coating of raw beads, polishing, stringing and knotting, quality control customs bonded warehousing etc. on job work basis.”

(underlining added)



14. It is evident from the above that the petitioner had categorically stated that the Pune Unit was a 100 per cent export oriented unit and was undertaking activities on raw beads such as coating, polishing, stringing and knotting etc., on “job work basis”. Therefore, it is abundantly clear that the petitioner had on a specific query raised by the Assessing Officer informed the Assessing Officer that it was carrying out the manufacturing/production activity on “job work basis”.

15. It may be further pointed out that even in the re-assessment order dated 26.10.2010, pursuant to the first re-assessment notice for this very year i.e. assessment year 2005-06, the Assessing Officer has categorically noted that the petitioner was engaged in the business of manufacturing/processing imitation pearls and in the business of import and sale of crystal and related items in India. From this, also, it is evident that the entire activity and particularly the nature of manufacturing/production activity carried out by the petitioner “on job work basis” was clearly revealed before the Assessing Officer in the original round as well as in the round of re-assessment. Therefore, the statement of the Assessing Officer in the purported reasons in support of the impugned notice dated 23.03.2012 that there had been failure on the part of the petitioner/assessee to fully and truly disclose the material



facts, is completely belied by the records of the case.

16. Consequently, the notice dated 23.03.2012 as also the order dated 25.02.2013 are liable to be quashed and set aside. It is ordered accordingly.

All the proceedings pursuant to the said notice dated 23.03.2012 also stand quashed.

17. The writ petition is allowed. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SIDDHARTH MRIDUL, J

AUGUST 08, 2014

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