

(2012) 02 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition (Lodg.) No. 2606 of 2011

Siemens Information Systems Limited

APPELLANT

Vs

Assistant Commissioner of Income Tax, Range 7(2), Mumbai
and others

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Income Tax Act, 1961 — Section 10A, 143(3), 147, 148

Citation : (2012) 114 BOMLR 1922 : (2012) 343 ITR 188

Hon'ble Judges : M.S. Sanklecha, J; D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Atul K. Jasani, for the Appellant; Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Dr. D.Y. Chandrachud, J.—The challenge in these proceedings is to (- i) a notice issued by the Assessing Officer on 9 August 2010 u/s 148 of the Income Tax Act 1961 seeking to reopen the assessment for Assessment Year 2004-05; (ii) an order dated 14 November 2011 rejecting the objections of the Petitioner; and (iii) an order of reassessment dated 21 November 2011 disallowing the exemption u/s 10A for Assessment Year 2004-05. The Petitioner filed its return of income for Assessment Year 2004-05 declaring a nil income after claiming a deduction of Rs. 23.93 Crores u/s 10A of the Income Tax Act 1961. An order of assessment was passed u/s 143(3) on 29 December 2006. The Assessing Officer allowed a deduction u/s 10A in the amount of Rs. 23.93 Crores. The Assessing Officer did not specifically deal with the eligibility of the Petitioner to claim a deduction u/s 10A in the course of the assessment year. On 9 August 2010 a notice was issued to the Petitioner u/s 148. The following reasons have been disclosed for reopening the assessment for Assessment Year 2004-05:

During the course of the assessment proceedings " for A.Y. 2006-07, it has been established on the basis of the details filed by the assessee that the assessee is not entitled to deduction u/s. 10A for the following reasons :

- 1) Units are not independent units and constitute one integrated unit.
- 2) No independent accounts of units are maintained.
- 3) There is complete overlapping of work and use of resources amongst units through leased lines.
- 4) The Tax Audit Report and Audit report u/s. 10A is not correct or assessee is claiming expenses / depreciation of 10A units in non 10A units.
- 5) Several non 10A activities are being carried on from 10A units which is evident from service tax returns.
- 6) The assessee has declined to file a reconciliation of Service Tax / VAT returns with IT returns. Since both these taxes are location wise, the reconciliation would have shown the overlapping of receipts / expenses.

As the assessee has claimed deduction of Rs. 23,93,12,934/u/s. 10A in its return filed for A.Y. 200405 and the material facts brought out during the course of assessment proceedings for A.Y. 200607, remain the same in the A.Y. 200405, I have reason to believe that there is an under assessment of Rs. 23,93,12,934/in A.Y. 200405.

Further the facts brought out during the course of assessment proceedings of A.Y. 200607 have not been truly and fully disclosed by the assessee in A.Y. 200405. Therefore it cannot be said that the assessee had disclosed fully and truly all the material facts in respect of the units on which 10A deduction is claimed.

2. Counsel appearing on behalf of the Petitioner submits that

(i) The reopening of the assessment has taken place beyond a period of four years of the end of the relevant assessment year and hence, the jurisdictional condition is that there must be a failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment for that assessment year;

(ii) The assessment is sought to be reopened on the basis of the material which emerged before the Assessing Officer during the course of the assessment proceedings for Assessment Year 200607. An assessment which has been concluded u/s 143(3) cannot be reopened in exercise of powers conferred by Section 148 on the basis of an order of assessment which has been passed for a subsequent assessment year as held by a Division Bench of this Court in *Siemens Information System Ltd. v. Assistant Commissioner of Income Tax* (2007) 295 ITR 333 (Bom);

(iii) The Assessing Officer had made an enquiry during the course of the assessment proceedings for Assessment Year 200405 in response to which the Petitioner had submitted relevant information in regard to the eligibility of the petitioner to claim a deduction u/s 10A. Hence, the assessment cannot be

reopened beyond a period of four years.

3. On the other hand, it has been urged on behalf of the Revenue that

(i) As a matter of law, it is open to an Assessing Officer to reopen an assessment on the basis of material which emerges in the course of the assessment proceedings for a subsequent assessment year. This has been held to be permissible in the judgments of the Supreme Court in *Sri Krishna Private Ltd. Etc. Vs. I.T.O., Calcutta and Others*, and *Ess Ess Kay Engineering Co. P. Ltd. Vs. Commissioner of Income Tax*, which were followed in a judgment of a Division Bench of this Court in *Multiscreen Media (P.) Ltd. v. Union of India* (2010) 324 ITR 54 (Bom.). The judgment in *Siemens Information System* (supra) was also considered in the subsequent judgment of the Division Bench of this Court in *Multiscreen Media*;

(ii) During the course of the assessment proceedings for Assessment Year 200405 a bare reading of the assessment order would reveal that the Assessing Officer did not consider the eligibility of the Petitioner to claim a deduction u/s 10A. This issue was considered in the course of the assessment proceedings for Assessment Year 200607. The material which has come on the record in the course of those assessment proceedings has revealed that the units of the Petitioner are not independent units; no independent accounts are maintained; there is an overlapping of work and use of resources amongst units and several non Section 10A activities are being carried on from Section 10A units. Hence, it was submitted that the reopening of the assessment is not based on a mere change of opinion and the Assessing Officer has tangible material on the record to reopen the assessment on the basis of the order of assessment for Assessment Year 200607. The jurisdictional condition has also been fulfilled. The material which came on the record during Assessment Year 200607 was as a result of the disclosures made by the assessee before the Assessing Officer. Those disclosures ought to have been made, but were not made during the course of the assessment proceedings for Assessment Year 200405. In these circumstances, the Assessing Officer was within his jurisdiction in reopening the assessment even beyond the period of four years.

4. The reopening of the assessment in the present case u/s 148 has taken place beyond a period of four years of the end of the relevant assessment year. The jurisdictional requirement that must be fulfilled in such a case is that there must be a failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment for that assessment year. It is also trite law that an assessment cannot be reopened on the basis of a mere change of opinion and there must be some tangible material before the Assessing Officer, before he proceeds to reopen an assessment. Beyond the period of four years, it must also be demonstrated that there was a failure on the part of the assessee to make a true and full disclosure of material facts necessary for the assessment. Bearing in mind this requirement, and as a matter of first principle, the contention of the assessee that an assessment cannot be reopened on the basis of an order of

assessment for a subsequent assessment year cannot be accepted. In *Ess Ess Kay Engineering Co. P. Ltd. Vs. Commissioner of Income Tax*, , the Supreme Court held in a civil appeal arising out of the judgment of the Punjab and Haryana High Court in an income tax reference, that there was material on the basis of which the Assessing Officer could proceed to reopen the case and it was not a case of a mere change of opinion. Merely because the case of the assessee was accepted as correct, in the original assessment for the assessment year in question, that would not preclude the income tax officer to reopen the assessment for the earlier year on the basis of a finding of fact made on the basis of fresh material in the course of an assessment for the next assessment year. A similar principle of law was enunciated in a judgment of a Division Bench of this Court in *Anusandhan Investments Ltd. Vs. M.R. Singh*, Deputy Commissioner of Income Tax and Another, where the Court noted that it is a well established position in law that an assessment can be reopened on the basis of information contained in an assessment of a subsequent year. These decisions were followed by another Division Bench of this Court in *Multiscreen Media* (supra). In its judgment in *Multiscreen Media*, the Division Bench after considering the judgment of this Court in *Siemens Information System* (2007) 295 ITR 333 (Bom), held that, that judgment does not state as an absolute principle of law that an Assessing Officer would not be entitled to seek recourse to the power to reopen an assessment u/s 147 on the basis of an assessment made for a subsequent assessment year. As the Division Bench of this Court noted, the judgment in *Siemens Information System* (supra) cannot be construed to lay down a proposition of law inconsistent with the law laid down by the Supreme Court in *Sri Krishna (P.) Ltd.* (supra) and *Ess Ess Kay Engineering Co. (P.) Limited* (supra). As this Court noted the judgment of the Division Bench in *Siemens Information System* properly considered involved a case where recourse to the provision for reopening an assessment was taken in the absence of any additional material. As the Supreme Court has held in *Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited*, , a mere change of opinion is not enough and there must be additional or tangible material to warrant the reopening of an assessment in the absence of which the exercise of the power would be only akin to a review or reappraisal.

5. In the present case, during the course of the order of assessment for Assessment Year 200405 the Assessing Officer has not dealt with the eligibility of the assessee to claim a deduction u/s 10A. Subsequently, during the course of the Assessment Year 200607 disclosures were made by the assessee before the Assessing Officer in the course of the assessment proceedings. In the order of assessment for Assessment Year 200607, the Assessing Officer after having regard to the material on the record which was produced by the assessee came to the following conclusion:

Therefore assessee is not entitled to " deduction u/s 10A for the following reasons.

- (1) Units are not independent units and constitute one integrated unit.
- (2) No independent accounts of units are maintained.
- (3) There is complete overlapping of work and use of resources amongst units through leased lines.
- (4) The Tax Audit Report and audit report u/s. 10A is not correct or assessee is claiming expenses / depreciation of 10A units in non 10A units.
- (5) Several non 10A activities are being carried on from 10A units which is evident from service tax returns.
- (6) The assessee has declined to file a reconciliation of Service Tax / VAT returns with IT return. It claims in letter dated 04/09/09 that Revenue recognition is different and reconciliation cannot be made. Again it says in letter dated 12/11/09 that, any attempt to reconcile will lead to misleading results and says that it will take time of eight weeks i.e. beyond the limitation date. Interestingly more than 8 weeks had passed by that time since the submission letter dated 04/09/09. Since both these taxes are location wise, the reconciliation would have shown the overlapping of receipts / expenses.

For Delhi Unit III (Gurgaon) it is the first year of claim of deduction, and it is held that it is only an expansion of existing units. Further the facts discussed in this order were also not disclosed by the assessee in earlier years. Therefore it cannot be said that the assessee had disclosed fully and truly all material facts in those years in respect of units which started in earlier years. Therefore those units are also not eligible for 10A deduction.

6. Now it is on the basis of the material which has come on the record in the course of the assessment proceedings for Assessment Year 200607, based on the disclosures of the assessee and the order of assessment for that year, that the Assessing Officer has purported to reopen the assessment for Assessment Year 200405. Beyond a period of four years, the reopening of an assessment is conditioned by the requirement that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that Assessment Year. A full disclosure and a true disclosure are what the statute mandates. A full disclosure is a disclosure which provides a complete statement of all material facts. A true disclosure is a disclosure which does not suppress material facts from the Assessing Officer and does not contain any taint of falsehood. In the present case, during the course of the assessment proceedings for Assessment Year 200405 the assessee made a claim for deduction u/s 10A. The assessee by its letter dated 10 October 2006 disclosed unit wise statements as regards the computation of profit and loss. The Assessing Officer had addressed a notice to the assessee on 29 November 2006 in response to which the assessee by its reply dated 6 December 2006 submitted - (i) details of the unrealized export turnover upto 30 September 2004; (ii) consolidated figures for the year ending 31 March 2003 in respect of the non

STP / EOU units. By a further letter dated 14 December 2006 the assessee furnished an allocation of expenses as between the eligible and non eligible units. The Assessing Officer has, however, come to the conclusion that it was during the course of the assessment proceedings for Assessment Year 200607 that facts were brought out which were not truly and fully disclosed by the assessee in Assessment Year 200405. The order for Assessment Year 200607 is based on disclosures made by the assessee during the course of assessment proceedings for that year and it is not the submission of the assessee before this Court that the same disclosures were also made during the course of Assessment Year 200405. In the circumstances, we are of the view that though the reopening of the assessment in the present case has taken place beyond a period of four years, the jurisdictional condition for reopening the assessment u/s 147 has been fulfilled.

7. Following the order of reopening the Assessing Officer has passed an order of reassessment. The Assessing Officer passed an order of reassessment u/s 143(3) read with Section 147 on 21 November 2011. The assessee would be at liberty to espouse the remedies available against the order of reassessment and nothing contained in this judgment shall amount to an expression of any opinion on merits. Since there was an ad interim order passed in these proceedings on 14 December 2011 in terms of prayer clause (c), the stay shall be extended for a further period of four weeks from today to enable the assessee to file an appeal within the aforesaid period.

The Petition is for these reasons dismissed. There shall be no order as to costs.