IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1158 OF 2009

Vedanta Limited)
A Company Incorporated under the)
Provisions of the Companies Act, 1956)
having its Registered Office at 1st Floor)
C Wind, Unit 103, Corporate Avenue)
Atul Projects, Chakala, Andheri (East))
Mumbai Maharashtra 400 093) ..Petitioner

V/s.

1 Mr. B.D.Naik, Deputy Commissioner)
of Income Tax Range 8(3), Mumbai)
having his office at Room No.204,)
floor, Aayakar Bhavan, M. K. Road,)
Mumbai 400 020)

2 Mr. S.A.Shaikh, Deputy Commissioner)
of Income Tax, Range 8(3), Mumbai)
having his office at Room No.204,)
floor, Aayakar Bhavan, M. K. Road,)
Mumbai 400 020)

3 Commissioner of Income Tax-VIII,)
Mumbai having his office at Aaykar Bhavan)
M. K. Road, Mumbai 400 020)

4 Union of India, Though)
the Secretary, Department of Revenue,)
Ministry of Finance, North Block,)
New Delhi 110 001) …Respondents

Ms Fereshte Sethna a/w Mr. Mrunal Parekh i/b DMD Advocates for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
FIRDOSH. P. POONIWALLA, JJ
DATED : 30th JUNE 2023

(ORAL JUDGMENT PER K. R. SHRIRAM J.)

1 Petitioner is impugning a notice dated 28th March 2008 issued under

Section 148 of the Income Tax Act 1961 (the Act) issued by respondent no.2 relating to AY-2003-2004 and the order on objections dated 22nd May 2009.

2 Petition was originally filed by one Sterlite Opportunities and Ventures Limited. Subsequently, original petitioner was, as per the scheme of amalgamation between original petitioner and one Sterlite Industries (India) Limited, approved by the Hon'ble Madras High Court in its order dated 29th March 2012 amalgamated with Sterlite Industries (India) Ltd. The Hon'ble Madras High Court approved another scheme of amalgamation between Sterlite Industries (India) Ltd. and other companies and Sesa Goa Limited on 25th March 2013. The name of the company, Sesa Goa Limited was changed to Sesa Sterlite Limited on 18th September 2013 and thereafter to Vedanta Limited on 21st April 2015. Petition was accordingly amended pursuant to leave granted by this court by its orders dated 6th January 2022 and 3rd February 2022.

3 Petitioner on 28th November 2003 filed return of income under Section 139 of the Act for AY-2003-2004 showing a total loss of Rs.13,52,36,525/-. Alongwith annual returns, petitioner also filed audited profit and loss account and balance sheet, as also the Tax Audit Report under Section 44AB of the Act and other documents. The return was processed under Section 143(1) of the Act and was subsequently selected for random scrutiny as per score based system. Statutory notices under Sections 143(2) and 142(1) of the Act were issued and petitioner responded to those notices. Petitioner also received letters dated 9th September 2005

and 26th October 2005 from the Assessing Officer (AO), calling upon petitioner to furnish various information and explanation, particularly which is relevant to the matter at hand, i.e., the details of investments made during the year with its sources – Rs.777,61,71,027/- and interest and finance charges on (i) inter corporate deposits – Rs.17,20,75,343/-, (ii) guarantee commission – Rs.3,54,78,171/- (with nature of expenses), (iii) loan arrangement fees – Rs.1,60,79,000/- and (iv) trustee fees – Rs.7,45,583/-.

4 Petitioner responded to the queries and also by letter dated 6th January 2006, gave an explanation in regard to allowability of interest and other expenses as revenue expenditure. Petitioner also relied on various judgments of High Court and Apex Court. Following this, an assessment order dated 6th March 2006 came to be passed, assessing petitioner's income at Rs.(-)13,52,36,525/-.

5 Subsequently, petitioner received the impugned notice dated 28th March 2008, alleging that AO had reason to believe that the income for AY-2003-2004 has escaped the assessment within the meaning of Section 147 of the Act. As reasons were not provided, petitioner filed a Writ Petition No.2724 of 2008. The said petition came to be disposed on 16th December 2008 whereby respondent no.3 was directed to provide the reasons recorded. After the reasons were made available, petitioner, thereafter, responded to the notice by giving detailed reply vide its letter dated 29th December 2008. Notwithstanding the reply, without giving any proper

reasons, respondent no.1, by an order dated 23rd January 2009 rejected the objections. Again petitioner approached this court by filing a Writ Petition No.395 of 2009, which came to be disposed by an order dated 3rd March 2009 by which, this court was pleased to quash and set aside the order dated 23rd January 2009 and respondent no.1 was directed to consider petitioner's objections afresh and decide the matter. Respondent no.1 accordingly decided the matter and passed the impugned order dated 22nd May 2009.

6 Petitioner has approached this court once again and the primary ground of petitioner is the reasons to believe itself indicated nothing but change of opinion, and change of opinion which does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. It is also submitted that in the reasons recorded in writing, it has been stated that Rs.22,43,79,054/- has been claimed as interest on various loans taken by the assessee but the details available in Schedule 9 of the audited balance sheet of the company indicates that the amount of Rs.22,43,79,054/- consisted of interest on intercorporate deposits – Rs.17,20,75,343/-, guarantee commission–Rs.3,54,78,171/-, loan arrangement fees – Rs.1,60,79,000/-, trustee fees – Rs.7,45,583/- and bank charges–Rs.957/-. Therefore, since this break up indicates that Rs.22,43,79,054/- was not only on account of interest but other finance charges as well, the notice under Section 148 has been mechanically issued without any application of mind and without any reason to believe.

7 It is also submitted that just because the assessee revised the return of income for AY-2005-2006 by disallowing the expenses on account of interest income, the refund was for assessment year entirely different from the impugned assessment year, each assessment year is separate and that can never be a ground for re-opening the assessment. The primary thrust was, of course, on change of opinion.

8 Ms Sethna also submitted that in any event the interest on borrowing can never be capitalised because as held by the Apex Court in Deputy ***Commissioner of Income Tax Vs. Core Health Care Ltd.***[1] which was followed by this court in ***Commissioner of Income Tax Vs. Maharashtra Hybrid Seeds Co. Ltd.***[2], interest on moneys borrowed for the purposes of business is on necessary item of expenditure in a business. Ms Sethna submitted that indisputably the original petitioner was an investment company and used to borrow money to invest the money in shares of various entities. The original petitioner decided to carry on metals business in zinc and lead through formation of subsidiary by acquiring shares in the company carrying on zinc and lead business. Therefore, interest on moneys which were borrowed for acquiring shares in the company carrying on zinc and lead business necessarily will be an item of expenditure in a business. It would be useful to refer to paragraph 8 in *Core Health* (Supra) and paragraph 16 in *Maharashtra Hybrid Seeds Co. Ltd.* (Supra), which read as under:

Paragraph 8 of *Core Health* (Supra):

1. (2008) 167 Taxman 206 (SC)
2. (2021) 133 taxmann.com 43 (Bom)

> *"8. Interest on moneys borrowed for the purposes of business is a necessary item of expenditure in a business. For allowance of a claim for deduction of interest under the said section, all that is necessary is that firstly, the money, i.e. capital, must have been borrowed by the assessee; secondly, it must have been borrowed for the purpose of business; and, thirdly, the assessee must have paid interest on the borrowed amount [See: Calico Dyeing & Printing Works v. Commr. Of Income-tax, Bombay City-II (1958) 34 ITR 265]. All that is germane is : whether the borrowing was, or was not, for the purpose of business. The expression "for the purpose of business" occurring in Section 36(1)(iii) indicates that once the test of "for the purpose of business" is satisfied in respect of the capital borrowed, the assessee would be entitled to deduction under Section 36(1)(iii) of the 1961 Act. This provision makes no distinction between money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of the borrowing must be for business which is carried on by the assessee in the year of account. What sub- section (iii) emphasizes is the user of the capital and not the user of the asset which comes into existence as a result of the borrowed capital unlike Section 37 which expressly excludes an expense of a capital nature. The legislature has, therefore, made no distinction in Section 36(1)(iii) between "capital borrowed for a revenue purpose" and "capital borrowed for a capital purpose". An assessee is entitled to claim interest paid on borrowed capital provided that capital is used for business purpose irrespective of what may be the result of using the capital which the assessee has borrowed. Further, the words "actual cost" do not find place in Section 36(1)(iii) of the 1961 Act which otherwise find place in Sections 32, 32A etc of the 1961 Act. The expression "actual cost" is defined in Section 43(1) of the 1961 Act which is essentially a definition section which is subject to the context to the contrary."*

Paragraph 16 of Maharashtra Hybrid Seeds Co. Ltd.(Supra):

> *"16 Coming to the third question, Mr. Suresh Kumar submitted that the Revenue's stand was that deduction for interest under Section 36(1)(iii) of the Act was allowable only if the assets acquired out of the borrowed capital has been put to use. Mr. Suresh Kumar in fairness submitted that the judgment of the Apex Court in* ***Deputy Commissioner of Income Tax V/s. Core Health Care Ltd.***[3] *squarely covers this question and the Apex Court has held that such interest is allowable under Section 36(1)(iii). The Apex Court has held that interest on moneys borrowed for the purposes of business is a necessary item of expenditure in a business. For allowance of a claim for deduction of interest under the said section, all that is necessary is that firstly, the money, i.e., capital, must have been borrowed by the assessee; secondly, it must have been borrowed for the purpose of business; and, thirdly, the assessee must have paid interest on the borrowed amount. The Apex Court has also held that all that is germane is : whether the borrowing was, or was not, for the purpose of business. Paragraphs 8 and 9 of the said judgment read as under :*

3. (2008) 167 Taxmann 206 (SC)

> *8. Interest on moneys borrowed for the purposes of business is a necessary item of expenditure in a business. For allowance of a claim for deduction of interest under the said section, all that is necessary is that firstly, the money, i.e. capital, must have been borrowed by the assessee; secondly, it must have been borrowed for the purpose of business; and, thirdly, the assessee must have paid interest on the borrowed amount [See: Calico Dyeing & Printing Works v. Commr. Of Income-tax, Bombay City-II (1958) 34 ITR 265]. All that is germane is : whether the borrowing was, or was not, for the purpose of business. The expression "for the purpose of business" occurring in Section 36(1)(iii) indicates that once the test of "for the purpose of business" is satisfied in respect of the capital borrowed, the assessee would be entitled to deduction under Section 36(1)(iii) of the 1961 Act. This provision makes no distinction between money borrowed to acquire a capital asset or a revenue asset. All that the section requires is that the assessee must borrow capital and the purpose of the borrowing must be for business which is carried on by the assessee in the year of account. What sub- section (iii) emphasizes is the user of the capital and not the user of the asset which comes into existence as a result of the borrowed capital unlike Section 37 which expressly excludes an expense of a capital nature. The legislature has, therefore, made no distinction in Section 36(1)(iii) between "capital borrowed for a revenue purpose" and "capital borrowed for a capital purpose". An assessee is entitled to claim interest paid on borrowed capital provided that capital is used for business purpose irrespective of what may be the result of using the capital which the assessee has borrowed. Further, the words "actual cost" do not find place in Section 36(1)(iii) of the 1961 Act which otherwise find place in Sections 32, 32A etc of the 1961 Act. The expression "actual cost" is defined in Section 43(1) of the 1961 Act which is essentially a definition section which is subject to the context to the contrary.*
>
> *9. In the case of Commissioner of Income-tax v. Associated Fibre and Rubber Industries (P) Ltd. (1999) 236 ITR 471, the Division Bench of this Court held as follows:*
>
> > *"Even though the machinery has not been actually used in the business at the time when the assessment was made, the same has to be treated as a business asset as it was purchased only for business purposes. In the circumstances, the interest paid on the amount borrowed for purpose of such machinery is certainly a deductible amount."*

In our view, if petitioner would succeed on the issue of change of opinion itself, we do not have to go further on the issue whether the interest paid on moneys for the purpose of business will be an item of expenditure in a business.

9 We are satisfied that it is a clear case of change of opinion. The reasons to believe that it was a fit case for re-opening, reads as under:

> *"In this case return of income was filed on 28-11 2003 declaring the income of Rs. (-) 135236525. Assessment u/s 143(3) was completed on 6-03-2006 on income of Rs.(-) 135236525. While going through the Profit & Loss Account it is seen that the loss is arised mainly due to the payment of interest of Rs224379054 on the various loans taken by the assessee. It also seen that the entire loans have been taken for the purchase of the shares of the Hindustan Zinc Ltd. The total investment is at Rs.777,61,71,027. It is noteworthy to mention here that the said investments are made to have the controlling stake in the said company and not for the business purpose Whenever an investment is made to have the controlling stake in the company then the interest paid on the loans taken for the financing such transactions has to be disallowed as capital expenditure. As the assessee has claimed excess expenditure of Rs. 224379054/- and the same is allowed by the AO it has resulted into under assessment to the extent of Rs. 224379054/-. It is also found that the assessee has revised the return of income for AY 2005-06 by disallowing the expences on account of interest income. In view of this I have reason to believe that excess loss has been allowed to the assessee and this is a fit case to reopen u/s 147 of the IT Act. Issue notice u/s 148 of the IT Act".*

10 The same issue of investment of Rs.777,61,71,027/- and interest on loans taken etc., were subject matter of a query raised by the AO as can be seen from the letter dated 26th October 2005 issued to petitioner. The said portion of details of investments of the said letter reads as under:

> *"(a) …….*
> *(b) Investments made during the year with its sources – Rs.777,61,71,027/-.*
> *(c) …….*
> *(d …….*
> *(e) …….*
> *(f) Interest and finance charges :*
> *(i) On inter corporate deposits – Rs.17,20,75,343/-*
> *(ii) Guarantee Commission – Rs.3,54,78,171 (with nature of expenses)*
> *(iii) Loan Arrangement Fees – Rs.1,60,79,000/-*
> *(iv) Trustee Fees – Rs.7,45,583/-*
> *(g) ……"*

Petitioner also addressed a communication dated 6th January 2006 to

give an explanation in regard to allowability of interest and other expenditure as revenue expenditure, in which petitioner has pitched its case as under:

> *"The Assessee-Company is registered as a Non-banking Financial Company ("NBFC") with the Reserve Bank of India. Interest and other expenses incurred by the company is allowable as a deduction as the same is revenue in nature and has been incurred exclusively for the purpose of business, investment being a business for a NBFC. The assessee company submits that the interest expenses incurred by the assessee company is allowable as deduction under Section 36(1)(iii) of the Act. As the money is actually borrowed by the company, it has paid interest on the same and it is for the purpose of business of the company as the main business is to make investment since it is NBFC. The propositions laid down by the following case laws support the allowability of interest expenses."*

11 After considering these submissions, the assessment order dated 6th March 2006 came to be passed. Mr. Suresh Kumar states there is no discussion in the assessment order. As held in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax-2(1)***[4], once a query is raised during the assessment proceedings and the assessee has replied to it, it follows the query raised was a subject of consideration of the assessing officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. In *Aroni Commercial* (Supra) the court said " it is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an assessing officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is

4. (2014) 44 taxmann.com 304 (Bombay)

satisfied, it would be impossible for the assessing officer to complete all the assessments which are required to be scrutinised under Section 143(3) of the Act. Paragraph 14 of *Aroni Commercials* (Supra) reads as under:

> *"14) We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the ASN 18/23 WP-137-14 .sxw same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original ASN 19/23 WP-137-14 .sxw assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the*

> *basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."*

12 In the circumstances, in our view, the notice to reopen dated 28th March 2008 is merely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings leading to the assessment order dated 6th March 2006. This change of opinion, in our view, does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

13 In the circumstances, we do not wish to go further on the other points raised. Petition allowed. Rule granted on 1st September 2009 made absolute in terms of prayer clause (a), which reads as under:

> *"(a) that a writ in the nature of certiorari or any other similar writ under Article 226 of the Constitution of India calling for the records of the case and after going through the same and examining the legality thereof to quash and cancel the notice issued under Section 148 of the Act dated 28th March 2008 by the respondent no.2 relating to the assessment year 2003-04 read with the recorded reasons dated 28th March 2008 and the order on objection dated 22nd May 2009 and all proceeding thereunder and/or pursuance thereof (being Exs. D F and J.)."*

14 Petition disposed. No order as to costs.

(FIRDOSH P POONIWALLA, J.) (K.R. SHRIRAM, J.)

Meera Jadhav