

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO.10859 OF 2012

Mukand Limited )  
 a company incorporated under the Indian )  
 Companies Act, 1913 and having its )  
 registered office at Bajaj Bhavan, 3<sup>rd</sup> Floor, )  
 Nariman Point, Mumbai – 400 021 ) ...Petitioner

V/s.

1. The Union of India )  
 Through the Secretary, Ministry of Finance, )  
 Government of India, North Block, )  
 New Delhi – 110 101 )  
 2. The Deputy Commissioner of Income Tax )  
 3(2), having office at Room No.608, Aayakar )  
 Bhavan, M.K. Road, Mumbai – 400 020 ) ...Respondents

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Mr. Jas Sanghavi i/b. M/s. PDS Legal for petitioner.  
 Mr. Akhileshwar Sharma for respondents.

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**CORAM : K. R. SHRIRAM AND  
 FIRDOSH P POONIWALLA, JJ.  
 DATED : 14<sup>th</sup> JULY 2023**

**ORAL JUDGMENT : (PER K.R. SHRIRAM, J.) :**

1 Petitioner has filed this petition challenging the legality and validity of notice dated 26<sup>th</sup> April 2011 issued by respondent no.2 under Section 148 of the Income Tax Act, 1961 (the Act).

2 In respect of Assessment Year 2006-2007, petitioner had filed return of income on 10<sup>th</sup> November 2006 declaring total income at “Nil”. Petitioner also had filed, alongwith return, note to computation of income. In the original return of income, petitioner computed the total income at “Nil” after claiming set off of brought forward unabsorbed depreciation

against the long term capital gains and business income. The total income of petitioner was computed as follows :

	<i>Particulars</i>	<i>Rs.</i>
	<i>Business Income</i>	<i>87,71,91,932</i>
	<i>Long term capital gains</i>	<i>116,23,53,853</i>
	<i>Short term capital gains</i>	<i>1,46,56,987</i>
<i>Less</i>	<i>Set off of unabsorbed depreciation</i>	
	<i>AY 1998-99</i> <i>18,64,85,685</i>	
	<i>AY 1999-00</i> <i>54,33,63,761</i>	
	<i>AY 2000-01</i> <i>44,71,61,394</i>	<i>117,70,10,840</i>
<i>Less</i>	<i>Set off of business losses</i>	
	<i>AY 2001-02</i> <i>55,85,92,862</i>	
	<i>AY 2002-03</i> <i>31,85,99,070</i>	<i>87,71,91,932</i>
	<i>Business Income</i>	<i>Nil</i>

3 By an assessment order dated 16<sup>th</sup> November 2009 passed under Section 143(3) of the Act, respondent no.2 assessed the income of petitioner at “Nil” after setting off unabsorbed depreciation as under :

	<i>Particulars</i>	<i>Rs.</i>
	<i>Business Income</i>	<i>93,04,19,347</i>
<i>Less</i>	<i>Set off of unabsorbed depreciation</i>	
	<i>AY 1998-99</i> <i>18,64,85,685</i>	
	<i>AY 1999-00</i> <i>54,33,63,761</i>	
	<i>AY 2000-01</i> <i>14,93,93,126</i>	<i>87,92,42,572</i>
<i>Less</i>	<i>Set off of business losses</i>	<i>5,11,76,775</i>

	<i>Balance Business Income</i>	<i>Nil</i>
	<i>Long term capital gains.</i>	<i>116,23,53,853</i>
	<i>Short term capital gains</i>	<i>1,46,56,987</i>
	<i>Total capital gains</i>	<i>117,70,10,840</i>
<i>Less</i>	<i>Set off of unabsorbed depreciation</i>	
	<i>AY 2000-01 39,39,81,115</i>	
	<i>AY 2001-02 40,96,24,602</i>	
	<i>AY 2002-03 35,02,99,646</i>	
	<i>AY 2003-04 2,31,05,477</i>	<i>117,70,10,840</i>
	<i>Balance Capital Gain</i>	<i>Nil</i>

4            Thereafter, petitioner received the impugned notice dated 26<sup>th</sup> April 2011. In response to petitioner's request and filing of returns, petitioner was provided with the reasons for re-opening. The reasons for re-opening read as under :

*Reasons for initiating proceedings u/s 147 of the IT Act*

*During the year under consideration, the assessee is having income from business and short term capital gains. In this case, assessment u/s 143 (3) of the IT Act was completed on 16.11.2009, assessing the total income at Rs.Nil after adjustment of brought forward unabsorbed depreciation of Rs.93,04,19,347/- against business income and adjustment of Rs.117,70,10,840/- against income from capital gains. The income was assessed at Rs.189,01,74,827/- u/s 115JB of the IT Act. The income from capital gains was adjusted against brought forward unabsorbed depreciation for AYs 2000-01 to 2003-04.*

*It has been judicially held by the Hon'ble ITAT bench Mumbai in the case of Times Guaranty that unabsorbed depreciation (before AY 2002-03) can be set off only against income under head 'Profits and Gains of Business & Profession' within a period of eight assessment years succeeding the assessment year in which it was first computed. In view of the said decision, the brought forward unabsorbed depreciation of Rs.80,36,05,717/- for AY 2000-01 and 2001-02 cannot be adjusted against income*

*from capital gains for the year under consideration.*

*Thus the capital gains of Rs.80,36,05,717/- constitutes the taxable income of the assessee for the year under consideration. In view of the same, I have reason to believe that income of Rs.80,36,05,717/- has escaped assessment. Issue notice u/s 148 of the IT Act, 1961.*

5           Petitioner filed its objections vide its Chartered Accountants' letter dated 11<sup>th</sup> October 2012. The objections were rejected by an order dated 30<sup>th</sup> October 2012. It is at that stage petitioner has filed this petition. Rule was issued on 22<sup>nd</sup> July 2014 and further proceedings, in pursuance of the impugned notice, was stayed.

6           It is petitioner's case that the notice having been issued more than four years after the expiry 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 assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year, the notice issued would be without jurisdiction.

7           Mr. Sanghavi submitted that there is nothing in the reasons to believe, as quoted above, to indicate that there was any failure to disclose. Mr. Sanghavi also submitted that even in the affidavit in reply opposing the petition, infact, there is an admission that petitioner had disclosed unabsorbed depreciation for Assessment Year 2000-2001 and 2001-2002. Mr. Sanghavi states that even assuming for the sake of argument that respondent no.2 is correct in stating that the unabsorbed depreciation could

not have been adjusted against income from capital gains still that would not amount to conferring jurisdiction on respondent no.2 because there was no failure to truly and fully disclose. Moreover, Mr. Sanghavi submitted that the Hon'ble Gujarat High Court in the case of *General Motors India Pvt. Ltd. V/s. Deputy Commissioner of Income Tax*<sup>1</sup> has allowed unabsorbed depreciation to be set off against other income without the time limit of eight years and, therefore, has impliedly overruled the decision of the Mumbai Special Bench in the case of *Deputy Commissioner of Income Tax V/s. Times Guaranty Limited*<sup>2</sup> relied upon by the Assessing Officer.

8 Mr. Sharma for respondents submitted that the issue of unabsorbed depreciation and adjustment against capital gains or profit and gains of business and profession was not subject of the scrutiny assessment under Section 143(3) of the Act and, therefore, respondent no.2 was justified in proposing re-opening the assessment.

9 At the outset, the reason for re-opening is because of judicial pronouncement subsequent to the assessment under Section 143(3) of the Act made by the ITAT in the case of *Times Guaranty* (Supra). That is the only basis on which an allegation is made that there is reason to believe that income of Rs.80,36,05,717/- has escaped assessment. Paragraph 10 of the affidavit in reply also reads as under :

*10. I submit that the Assessing Officer, in original assessment proceedings, failed to take into account that brought forward unabsorbed depreciation of Rs.80,36,05,717/- for the A/Y 2000-*

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1. (2013) 354 ITR 244 (Guj)

2. (2010) 4 ITR 210

*2001 and A/y 2001-2002 could not have been adjusted against income from capital gains for A/y 2006-2007. The claim of the Petitioner of set-off of unabsorbed depreciation for the A/Y 2000-2001 and A/y 2001-2002 against income from capital gains for A/y 2006-2007 is a false claim made in the Return of Income and would amount to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for A/y 2006-2007.*

10 This cannot take respondents' case any further because more than four years have expired since the end of the relevant assessment year and the only basis on which it can be re-opened was if there was failure to disclose fully and truly all material facts. There is not even such an allegation in the reasons to believe. Moreover, the Assessing Officer in the assessment order under Section 143(3) of the Act passed on 16<sup>th</sup> November 2009 has considered and discussed this issue under the head "profits and gains of business or profession". Therefore, in our view, it is nothing but a clear case of change of opinion and the Assessing Officer has no jurisdiction to re-open the assessment. Even assuming for the sake of argument, the Assessing Officer should have taken into account that brought forward unabsorbed depreciation for Assessment Year 2000-2001 and 2001-2002 amounting to Rs.80,36,05,717/- should not have been adjusted against income from capital gains but instead against profit and gains of business or profession, still as held by the Apex Court in ***Gemini Leather Stores V/s. Income Tax Officer***<sup>3</sup>, there cannot be a failure on the part of the assessee to disclose truly and fully all material facts as the Assessing Officer, during the proceedings under Section 143(3) of the Act, had material facts before him

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3. (1975) 100 ITR 1 (SC)

when he made the original assessment. The Apex Court held that the Assessing Officer cannot take recourse to re-open to remedy the error. The relevant portion of the judgment reads as under :

*"..... In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income- Tax Officer discovered. After this discovery the Income-tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income-tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income tax officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147 (a) to remedy the error resulting from his own oversight."*

11            Whether it is a disclosure or not within the meaning of Section 147 of the Act would depend on the facts and circumstances of each case and nature of document and circumstances in which it is produced. The duty of the assessee is to fully and truly disclose all primary facts necessary for the purpose of assessment. It is not part of his duty to point out what legal inference should be drawn from the facts disclosed. It is for the Income Tax Officer to draw a proper inference. In this case, petitioner had filed all details and the subject of brought forward unabsorbed depreciation was also considered while passing the assessment order under Section 143(3) of the Act. Therefore, the Assessing Officer had in his possession all primary facts and it was for him to draw proper inference as to whether the brought forward unabsorbed depreciation should be adjusted against

capital gains or profit and gains from business or profession. There was nothing more to disclose and a person cannot be said to have omitted or failed to disclose something when, of such thing, he had no knowledge.

12           We are satisfied that petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. Not only material facts were disclosed by petitioner truly and fully but they were carefully scrutinized and the figures of income as well as deductions were worked out carefully by the Assessing Officer.

13           In the circumstances, we make the rule issued absolute in terms of prayer clause – (a). The impugned notice dated 26<sup>th</sup> April 2011 issued by respondent no.2 under Section 148 of the Act is hereby quashed and set aside. In the circumstances of the case, there will be no order as to costs.

14           Petition disposed.

**(FIRDOSH P POONIWALLA, J.)**

**(K. R. SHRIRAM, J.)**