

Re-assessment affirmed as commission paid to foreign agent was included in cost of asset to escape TDS liability

Summary – The High Court of Bombay in a recent case of Rosy Blue (India) Ltd., (the Assessee) held that where commission paid to foreign party was not shown separately but added to cost of purchase to avoid TDS liability, there had been less than full and true disclosure of all material facts during assessment proceedings and, therefore, reopening of assessment even after four years from end of relevant assessment year was justified in law

ORDER

This petition under Article 226 of the Constitution of India challenges the notice dated 29.3.2012 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (for short "the Act") along with the order dated 25.10.2012 rejecting the petitioner's objection to reopen the assessee's assessment for the Assessment Year 2005-2006.

2. On 30.10.2005 the petitioner filed its return on income tax for assessment year 2005-06 declaring total income as Rs.52.96 crores. The Assessing Officer after having issued notice under Section 143(2) of the Act passed an Assessment Order dated 28.3.2007 under Section 143(3) of the Act assessing the petitioner's income at Rs.53.12 crores.

3. On 29.3.2012 the impugned notice under Section 148 of the Act was issued to the petitioner and the reasons for reopening the assessment beyond the end of four years from the relevant assessment year furnished to the petitioner reads as under:—

'(i) It is seen that the assessee company is paying commission to a foreign party without deduction of TDS. The assessee company pays commission to M/s.Bonus and Company Limited, which is registered in UK, having address- Thavies Inn House, 3-4, Holborn Circus, London EC1N 2PL U.K., for all its DTC imports. It is a commission paid to procure DTC sights. However the same is accounted as cost of import purchase and merged in purchase figures. The said commission is paid to a foreign entity which as per its web-site has two agents in India, namely Amish Patel in Surat (mobile-9824100869 and email-patel.amp@gmail.com) and Parul Merchant in Mumbai (mobile 9833961333 and email-parul@bonas.in). The said company also has its office at 503, Radhe Vallabh Society, Near Opera House, adjacent to French Bridge. *The assessee doesn't have or has ever applied for certificate u/s. 197/197A of the Act. It is further seen that commission or brokerage paid on local purchase has not been added to the cost but has been booked separately in its profit and loss account, however, for imports and commission paid to M/s.Bonas*

and Company Limited, the same is accounted as cost of import purchase and merged in purchase figures. Thus, it is evidence that this differential method of accounting commission for foreign payments is for camouflaging the said commission under the head 'purchases'.

Further M/s.Bonas and Company Limited, has a permanent establishment in India with its office at 503, Radhe Vallabh Society, Near Opera House, adjacent to French Bridge.

The details of payment to M/s.Bonas and Company is as under:—

Name	F.Y. 2004-05 (in Rs.)
M/s.Bonas and Company	3,00,92,729/-

Since the assessee company has made payment of commission to the foreign company having permanent establishment in India without deducting TDS, the same is disallowable in view of the provision of the section 40(a)(i) of the Income Tax Act,1961, which states as under:—

"Section-40: Notwithstanding anything to the contrary in section 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profits and gains of business or profession', —

(a) in the case of any assessee—

(i) any interest (not being interest on a loan issued for public subscription before the 1st day of April,1938), royalty, fees and technical services or other sum chargeable under this act, which is payable:

(A) Outside India; or

(B) in India to a non-resident, not being a company or to a foreign company.

On which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:".

Therefore, I have reasons to believe that income chargeable to tax of Rs.3,00,92,729/- has escaped assessment in the A.Y. 2005-06.' (Emphasis supplied)

4. The petitioner by letter dated 7.5.2012 filed its objections to the reasons and in particular submitted that the notice is without jurisdiction as there was no reason to believe that the income chargeable to tax has escaped assessment nor there was any failure to fully and truly disclose the material facts necessary for assessment. In particular, the petitioner pointed out that the commission is paid to M/s.Bonas & Company Ltd. which is a non residential company established outside India and not having permanent establishment in India during the assessment year 2005-2006. Further the brokerage was

paid to M/s.Bonas & Company Ltd. for services rendered outside. On the aforesaid ground it was submitted that there was only change in opinion and reopening was not warranted.

5. By order dated 25.10.2012, the Assessing Officer rejected the petitioner's objection to the reasons for reopening the assessment furnished to them. In the order rejecting the objections, it is recorded that M/s.Bonas & Company Ltd. has an office in Mumbai.

6. The grievance of the petitioner as expounded by Mr.Pardiwala, learned Senior Counsel for the petitioner is that the assessment being sought to be reopened is beyond the period of four years from the end of the relevant assessment year 2005-06. Therefore, it is submitted that conditions precedent to exercise jurisdiction is that there must be reason to believe that income chargeable to tax has escaped the assessment, and such escapement must arise from failure to fully and truly disclose the material facts necessary for assessment. It is his submission that all material facts were disclosed and the reasons recorded erroneously proceeds on the basis that M/s.Bonas & Company Ltd. had a permanent establishment (P.E.) in India. In fact at the hearing before us evidence annexed to the petition was relied upon to indicate that M/s.Bonas Marketing India (P) Ltd. having its office at Opera House, Mumbai was established after the Assessment Year 2005-06. It was also submitted that commission paid abroad was not shown separately but had merged as a part of total purchase cost of diamonds.

7. As against the above, Mr.Pinto, learned Counsel for the Revenue supports the impugned notice dated 29.3.2012 under Section 148 of the Act and order dated 25.10.2012 rejecting the petitioner's objection to reopening of the assessment for Assessment Year 2005-06.

8. There can be no dispute with the submission of Mr.Pardiwala that condition precedent for reopening assessment beyond a period of four years from the end of the relevant Assessment year as in this case is that there must be reason to believe that income chargeable to the tax escaped assessment arising out of failure to make a full and true disclosure of all material facts. In this case there would be an issue of investigation into facts viz. whether or not M/s.Bonas Marketing India (P) Ltd. existed during the Assessment Year 2005-06, would have to be gone into. In its objection to the reasons, the petitioners have not produced any evidence which it now seeks to produce before us. This is best determined by the authorities under the Act. In any case, the reasons recorded for issuing the impugned notice specifically points out that commission paid to M/s.Bonas & Co. Ltd. (a foreign party) is not shown separately but added to the cost of purchase while commission paid on local purchase has been separately shown in the profit and loss account and not added to costs. Thus, there has been less than full and true disclosure of all material facts during the assessment proceedings for Assessment Year 2005-06. This is for reason that if the commission paid to the foreign party was shown separately as in case of local purchase, the question of tax deduction at source would have become the subject matter of examination by the Assessing Officer while assessing the Assessee's income during regular assessment. Moreover, this particular reason for reopening of the Assessment has not been dealt with by the petitioner in its objection to the reasons for reopening the assessment for Assessment Year 2005-

06 furnished to the petitioner. Therefore, at this stage it cannot be concluded that the impugned notice dated 29.3.2012 is without jurisdiction warranting interference of a writ Court.

9. We make it clear that our above view that the impugned notice dated 29.3.2012 is within jurisdiction is a prima facie view. The petitioner may have a complete answer to the reasons set out for reopening the assessment for Assessment Year 2005-06. However, we would exercise our writ jurisdiction to stall and/or quash reassessment proceedings under Section 147 and 148 of the Act only when the notices are on the face of it without jurisdiction. In the present facts, prima facie, we are of the view that there was failure on the part of the petitioner to fully disclose all material facts necessary for assessment, and therefore, reopening of the assessment by notice dated 29.3.2012 as well as the order dated 25.10.2012 rejecting the objections need not be interfered with at this point of time. It would be open to the petitioner in the reassessment proceedings to urge all points including the validity of reopening of assessment for Assessment year 2005-06. All contentions left open to be urged before the Assessing Officer in reassessment proceedings. Accordingly, the petition is dismissed with no order as to costs.