Bombay High Court Hindustan Lever Ltd. vs R.B. Wadkar (No. 1) on 25 February, 2004 Equivalent citations: 2004 137 TAXMAN 479 Bom Author: V Daga JUDGMENT V.C. Daga, J. Rule, returnable forthwith. By consent of parties, rule is taken up for final hearing. 2. In this petition, the petitioners are challenging the notice dated 5-11-2002, for reopening the assessment for assessment year 1996-97, issued by respondent No. 1, under section 148 of the Income Tax Act, 1961 ("Act hereinafter referred to as the Act). 2. In this petition, the petitioners are challenging the notice dated 5-11-2002, for reopening the assessment for assessment year 1996-97, issued by respondent No. 1, under section 148 of the Income Tax Act, 1961 ("Act hereinafter referred to as the Act). 3. The petitioners are engaged in the business of manufacture of various consumer products in respect of which excise duty is payable. The petitioners also import certain raw materials for its manufacturing activities subject to payment of customs duty may be leviable under the provisions of the Customs Act, 1962. 3. The petitioners are engaged in the business of manufacture of various consumer products in respect of which excise duty is payable. The petitioners also import certain raw materials for its manufacturing activities subject to payment of customs duty may be leviable under the provisions of the Customs Act, 1962. 4. The petitioners had filed its return of income for the assessment year 1996-97 on 30-11-1996. The computation of income was accompanied by a specific note reading as under : 4. The petitioners had filed its return of income for the assessment year 1996-97 on 30-11-1996. The computation of income was accompanied by a specific note reading as under : "in accordance with the practice followed for the earlier years, the company has not made a provision for excise duty and custom duty on stocks lying at the year ended in bonded warehouse estimated at Rs. 5,85,71,968 (1994-95) Rs. 112,502,531) and accordingly not included the said amount in the valuation of inventories. This has no effect on the profits for the year." The accounts which accompanied the return of income also made a specific reference to this accounting policy which was followed. The audit report which was furnished in accordance with the provisions of section 44AB also made a specific reference to the method of accounting adopted by the petitioners in respect of the goods lying in bonded warehouse. The petitioners submit that it had made a full disclosure of all the material facts along with the return of income that was filed with the department. 5. The aforesaid return of income was revised on 31-3-1998 as a result of amalgamation of M/s. Brooke Bond Lipton India Ltd. into the petitioners. The disclosures made in the original return were reiterated in the revised return that was filed. The respondent No. 2 completed the assessment of the petitioners income under section 143(3) of the Act vide his order dated 29-1-1999 and assessed the petitioners to an income of Rs. 3,39,29,08,460. 5. The aforesaid return of income was revised on 31-3-1998 as a result of amalgamation of M/s. Brooke Bond Lipton India Ltd. into the petitioners. The disclosures made in the original return were reiterated in the revised return that was filed. The respondent No. 2 completed the assessment of the petitioners income under section 143(3) of the Act vide his order dated 29-1-1999 and assessed the petitioners to an income of Rs. 3,39,29,08,460. 6. Subsequently, respondent No. 3 issued notice under

section 263 proposing to revise the petitioners assessment year 1996-97 since, according to him, the same was erroneous and prejudicial to the interest of the revenue. According to him, the central excise and customs duty payable of Rs. 5,85,71,968 in respect of goods lying in bonded warehouse ought to have been included while valuing the inventory. 6. Subsequently, respondent No. 3 issued notice under section 263 proposing to revise the petitioners assessment year 1996-97 since, according to him, the same was erroneous and prejudicial to the interest of the revenue. According to him, the central excise and customs duty payable of Rs. 5,85,71,968 in respect of goods lying in bonded warehouse ought to have been included while valuing the inventory. 7. The petitioners by its letter dated 22-3-2002 objected to the exercise of revisional power by respondent No. 3 contending that the assessment order was dated 29-1-1999 and the said order could not be revised under section 263 of the Act inasmuch as sub-section (2) of section 263 provided that an order could be revised only within a period of two years from the end of financial year in which it was passed. In the circumstances, respondent No. 3 was requested to drop the revisional proceedings. The respondent No. 3, accordingly, accepted the contention of the petitioners and dropped the initiated revisional proceedings vide his order dated 28-3-2002. 7. The petitioners by its letter dated 22-3-2002 objected to the exercise of revisional power by respondent No. 3 contending that the assessment order was dated 29-1-1999 and the said order could not be revised under section 263 of the Act inasmuch as sub-section (2) of section 263 provided that an order could be revised only within a period of two years from the end of financial year in which it was passed. In the circumstances, respondent No. 3 was requested to drop the revisional proceedings. The respondent No. 3, accordingly, accepted the contention of the petitioners and dropped the initiated revisional proceedings vide his order dated 28-3-2002. 8. The petitioners, thereafter, on 7-11-2002 were served with notice dated 5-11-2002 issued under section 148 of the Act by which respondent No. 1 has stated that he had reason to believe that the petitioners income chargeable to tax for assessment year 1996-97 had escaped assessment and he, therefore, called upon the petitioners to furnish its return of income within thirty days from the date of receipt of the said notice. The petitioners by its letter dated 12-11-2002 requested respondent No. 1 to furnish to it the reasons recorded by him prior to the issuance of the said notice so as to enable them to comply with the same. 8. The petitioners, thereafter, on 7-11-2002 were served with notice dated 5-11-2002 issued under section 148 of the Act by which respondent No. 1 has stated that he had reason to believe that the petitioners income chargeable to tax for assessment year 1996-97 had escaped assessment and he, therefore, called upon the petitioners to furnish its return of income within thirty days from the date of receipt of the said notice. The petitioners by its letter dated 12-11-2002 requested respondent No. 1 to furnish to it the reasons recorded by him prior to the issuance of the said notice so as to enable them to comply with the same. 9. The petitioners filed their return under protest and, thereafter, they were served with the notice dated 3-12-2002 under section 142(1) of the Act, issued by respondent No. 2, by which the petitioners were called upon to show cause as to why the sum of Rs. 5,85,71,968

should not be added to the value of the closing stock and their income for the relevant year be not increased to that extent. The petitioners were also required to explain the deductions claimed by them under section 80HHC and 80-IA as well as on account of the leave salary that was debited. 9. The petitioners filed their return under protest and, thereafter, they were served with the notice dated 3-12-2002 under section 142(1) of the Act, issued by respondent No. 2, by which the petitioners were called upon to show cause as to why the sum of Rs. 5,85,71,968 should not be added to the value of the closing stock and their income for the relevant year be not increased to that extent. The petitioners were also required to explain the deductions claimed by them under section 80HHC and 80-IA as well as on account of the leave salary that was debited. 10. The petitioners finding failure on the part of the assessing officer to disclose the reasons in spite of specific request filed this petition under article 226 of the Constitution of India to challenge notice dated 5-11-2002 issued under section 148 of the Act. 10. The petitioners finding failure on the part of the assessing officer to disclose the reasons in spite of specific request filed this petition under article 226 of the Constitution of India to challenge notice dated 5-11-2002 issued under section 148 of the Act. 11. On being noticed, respondents appeared and filed their counter affidavit disclosing the reasons recorded prior to issuance of the notice under section 148. The said reasons recorded read as under : 11. On being noticed, respondents appeared and filed their counter affidavit disclosing the reasons recorded prior to issuance of the notice under section 148. The said reasons recorded read as under : "From the Notes to the audited accounts, it is seen that while valuing closing stock, Central Excise and Customs Duty leviable on stock lying in godown was not considered as forming part of cost of the closing stock. Although no such duty was paid during the relevant previous year, liability to pay such duty arises immediately on manufacture of excisable goods. Also, Boards Instruction No. 1389, dated 24-3-1981 provides for inclusion of Central Excise and Custom duty in valuation of inventory. In view of this position, I have reason to believe that income chargeable to tax has escaped assessment inasinuch as excise and custom duty leviable, Rs. 5.85 crores has not been added to the value of closing stock, while completing the scrutiny assessment under section 143(3) on 29-1-1999." 12. Firstly, the learned counsel for the petitioners contend that the notice issued under section 148 of the Act is barred by limitation in view of proviso to section 147. He further submits that nowhere in the reasons it is recorded or stated that the petitioner-assessee has failed to disclose fully and truly all material facts necessary for the assessment for that assessment year as such the assessing officer has no jurisdiction to reopen the concluded assessment after expiry of four years from the last day of the relevant assessment year. He, therefore, submits that the notice under section 148 cannot be held to be within limitation. 12. Firstly, the learned counsel for the petitioners contend that the notice issued under section 148 of the Act is barred by limitation in view of proviso to section 147. He further submits that nowhere in the reasons it is recorded or stated that the petitioner-assessee has failed to disclose fully and truly all material facts necessary for the assessment for that assessment year as such the assessing officer has no jurisdiction to re-

open the concluded assessment after expiry of four years from the last day of the relevant assessment year. He, therefore, submits that the notice under section 148 cannot be held to be within limitation. 13. Secondly, on merits he submits that all the material facts necessary for the assessment for that assessment year were fully and truly disclosed. He submits that along with return Profit & Loss Account, Tax Audit Report with explanatory note were enclosed and the assessment was completed under section 143(3) of the Act. 13. Secondly, on merits he submits that all the material facts necessary for the assessment for that assessment year were fully and truly disclosed. He submits that along with return Profit & Loss Account, Tax Audit Report with explanatory note were enclosed and the assessment was completed under section 143(3) of the Act. 14. Learned counsel for the petitioners also contends that excise duty and customs duty have been paid before due date of furnishing return of income. He submits that proviso to section 147 will clearly apply to the facts of this case and it cannot be said that the income has escaped assessment on account of failure on the part of the petitioner to disclose all material facts. Learned counsel also relied upon the case of Hindustan Lever Ltd. v. V.K. Pandey, Joint CIT (2002) 25 DTC 904 (Bom-HC) : (2001) 251 ITR 209 (Bom) and Caprihans India Ltd. v. Prakash Chandra (2003) 30 DTC 499 (Bom-HC) : (2002) 256 ITR 721 (Bom). Based on these two judgments he submitted that the facts of the present case are identical to those involved in the aforesaid cases. Hence the challenge set up in this petition is squarely covered by the judgment of this court. 14. Learned counsel for the petitioners also contends that excise duty and customs duty have been paid before due date of furnishing return of income. He submits that proviso to section 147 will clearly apply to the facts of this case and it cannot be said that the income has escaped assessment on account of failure on the part of the petitioner to disclose all material facts. Learned counsel also relied upon the case of Hindustan Lever Ltd. v. V.K. Pandey, Joint CIT (2002) 25 DTC 904 (Bom-HC) : (2001) 251 ITR 209 (Bom) and Caprihans India Ltd. v. Prakash Chandra (2003) 30 DTC 499 (Bom-HC) : (2002) 256 ITR 721 (Bom). Based on these two judgments he submitted that the facts of the present case are identical to those involved in the aforesaid cases. Hence the challenge set up in this petition is squarely covered by the judgment of this court. 15. Mr. Desai, learned counsel for the revenue tried to contend that so far as merits of the case are concerned the same can be dealt with by the assessing officer and the petitioners should be directed to appear before the assessing officer with liberty to raise all the contentions. 15. Mr. Desai, learned counsel for the revenue tried to contend that so far as merits of the case are concerned the same can be dealt with by the assessing officer and the petitioners should be directed to appear before the assessing officer with liberty to raise all the contentions. 16. Mr. Desai, with respect to the contention that the notice under section 148 is barred by limitation and that the assessing officer has no jurisdiction to issue such notice, contends that even if the words “failure to disclose fully and truly all material facts relevant for assessment for assessment year” are absent in the reasons recorded, still such reasons can be inferred on the text of the reasons recorded. He, therefore, submits that the notice under

challenge is well within the scope of section 147 as such this petition is liable to be dismissed being without any substance. 16. Mr. Desai, with respect to the contention that the notice under section 148 is barred by limitation and that the assessing officer has no jurisdiction to issue such notice, contends that even if the words "failure to disclose fully and truly all material facts relevant for assessment for assessment year" are absent in the reasons recorded, still such reasons can be inferred on the text of the reasons recorded. He, therefore, submits that the notice under challenge is well within the scope of section 147 as such this petition is liable to be dismissed being without any substance. Consideration 17. Having heard the parties at length, we are of the opinion that the petitioner can be disposed of on the first contention raised by the petitioner, wherein the petitioner has contended that the notice issued under section 148 is without jurisdiction being hit by the proviso to section 147 of the Act as such not within the prescribed period provided under proviso to section 147 of the Act. In the circumstances, it would be necessary to turn to section 147 of the Act, which reads as under : 17. Having heard the parties at length, we are of the opinion that the petitioner can be disposed of on the first contention raised by the petitioner, wherein the petitioner has contended that the notice issued under section 148 is without jurisdiction being hit by the proviso to section 147 of the Act as such not within the prescribed period provided under proviso to section 147 of the Act. In the circumstances, it would be necessary to turn to section 147 of the Act, which reads as under : "147. Income escaping assessment.If the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereinafter in this section and in sections 148 to 153 referred to as the relevant assessment year) : Provided that where an assessment under sub-section (3) of section 143 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." 18. Reading of proviso to section 147 makes it clear that if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceeding under section 147, or recompute the loss or the depreciation allowance or any other allowance, as the case may be for the concerned assessment year. However, where an assessment under sub-section (3) of section 143 has been

made for relevant assessment year, no action can be taken under section 147 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 reasons of the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year. (Emphasis here italicised in print supplied) 18. Reading of proviso to section 147 makes it clear that if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceeding under section 147, or recompute the loss or the depreciation allowance or any other allowance, as the case may be for the concerned assessment year. However, where an assessment under sub-section (3) of section 143 has been made for relevant assessment year, no action can be taken under section 147 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 reasons of the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year. (Emphasis here italicised in print supplied) 19. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31-3-1997 and from that date if four years are counted, the period of four years expired on 1-3-2001. The notice issued is dated 5-11-2002 and received by the assessee on 7-11-2002. Under these circumstances, the notice is clearly beyond the period of four years. 19. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31-3-1997 and from that date if four years are counted, the period of four years expired on 1-3-2001. The notice issued is dated 5-11-2002 and received by the assessee on 7-11-2002. Under these circumstances, the notice is clearly beyond the period of four years. 20. The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the assessing officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the assessing officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the assessing officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded

must be based on evidence. The assessing officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced. 20. The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the assessing officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the assessing officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the assessing officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The assessing officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced. 21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the assessing officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside. 21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the assessing officer had no

jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside. 22. Since we are setting aside the impugned notice only on the first ground of challenge, in our opinion it is not necessary to go to the other question and record our findings in that behalf. 22. Since we are setting aside the impugned notice only on the first ground of challenge, in our opinion it is not necessary to go to the other question and record our findings in that behalf. 23. In the result, the impugned notice is quashed and set aside. Rule is made absolute in terms of prayer clause (a) with no order as to costs. 23. In the result, the impugned notice is quashed and set aside. Rule is made absolute in terms of prayer clause (a) with no order as to costs.