IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1160 OF 2014

Mangalore Refinery and Petrochemicals Limited ...Petitioner

Versus

The Deputy Commissioner of Income Tax, Range 3(2) & ors. ...Respondents

Mr. J. D. Mistri, Senior Advocate, a/w Mr. Madhur Agrawal, and Mr. Rajesh Poojary, i/b Mulla & Mulla, CB & C, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

CORAM: K. R. SHRIRAM &
N. J. JAMADAR, JJ
DATED: 18th FEBRUARY, 2022

JUDGMENT: (PER : N. J. JAMADAR, J.)

1. Rule. Rule made returnable forthwith, and with the consent of the Counsels for the parties, heard finally.

2. The petitioner assails the legality and validity of a notice dated 25th February, 2013, issued by respondent no.1 under Section 148 of the Income Tax Act, 1961 ("the Act, 1961") and the order dated 17th February, 2014, whereby the objections raised by the petitioner to the said notice to reopen the assessment for Assessment Year 2006 – 2007, came to be rejected.

3. The background facts leading to this petition can be stated

in brief as under:

(a) The petitioner is a company engaged in the business of running a petroleum refinery. In respect of Assessment Year 2006 – 2007, the petitioner filed the return of income on 25th October, 2016. It came to be revised on 28th March, 2008. In the revised return of income the petitioner disclosed total income of Rs.Nil under the normal provisions of the Act, 1961 and "book profits" of Rs.406,11,46,046/- under Section 115JB of the Act, 1961. During the assessment proceedings, respondent no.1 had initially issued a notice under Section 142(1) of the Act, 1961 on 10th September, 2017. The petitioner furnished the requisite explanation and documents in support thereof to the aforesaid notice as well as the subsequent clarification sought by respondent no.1. Eventually, respondent no.1 passed an assessment order on 18th December, 2008 under Section 143(3) of the Act, 1961, whereby respondent no.1 determined total income of the petitioner at Rs. Nil under the normal provisions of the Act, 1961 and the book profit at Rs.806,91,33,098/- under Section 115JB of the Act, 1961.

(b) Post assessment, the petitioner was served with an audit query dated 30th July, 2009 in which objections were noted as regards the debit of Rs.1,26,33,095/- towards "leased assets

repurchase expenses" and Rs.1,78,05,149/- towards "assets written off – irregular spares". The petitioner clarified the audit notes.

(c) In the aforesaid backdrop, on 25th February, 2013, respondent no.1 issued the impugned notice under Section 148 of the Act, 1961 recording that he had reason to believe that petitioner's income chargeable to tax for the Assessment Year 2006 – 2007 has escaped assessment within the meaning of Section 147 of the Act, 1961. The said belief was sought to be formed on the premise that an amount of Rs.3,04,38,244/- was debited under the head of 'miscellaneous expenses' to the Profit and Loss Account, comprising of 'leased assets repurchase expenses' amounting to Rs.1,26,33,095/- and 'assets written off (irregular spares)' amounting to Rs.1,78,05,149/-, as revenue expenses, though they were capital in nature and, thus, required to be disallowed.

(d) Upon being served with the reasons recorded for the proposed reopening, the petitioner submitted objections on 8th April, 2013. By the impugned order dated 17th February, 2014, respondent no.1 rejected the objections and called upon the petitioner to submit reply for the purpose of reassessment.

4. Being aggrieved, the petitioner has invoked the writ

jurisdiction of this Court. The principal grounds of challenge are that there was no material to form the reason to believe that income chargeable to tax has escaped assessment. Secondly, the impugned notice suffers from clear non-application of mind as respondent no.1 lost sight of the fact that the amount of Rs.1,78,05,149/- was added back to the computation of income by the petitioner itself and no deduction was claimed on the said count. Thirdly, since the scrutiny assessment under Section 143(3) of the Act, 1961 was completed in respect of Assessment Year 2006 – 2007, respondent no.1 committed an error in assuming jurisdiction without satisfying himself that the income had escaped assessment on account of failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment. In the case at hand, the issues sought to be raised by respondent no.1 were specifically adverted to, and dealt with, in the original assessment. Fourthly, in any event, the exercise on the part of respondent no.1 was in the nature of taking a different view of the matter on the basis of a mere change of opinion with regard to the same material. Therefore, the impugned notice under Section 148 and the consequent action deserve to be quashed and set aside.

5. An affidavit-in-reply is filed on behalf of respondent no.1. An endeavour is made to support the impugned action by relying

upon the very reasoning which permeates the reasons recorded by respondent no.1.

6. We, therefore, deem it appropriate to extract the reasons which weighed with the Assessing Officer to reopen the assessment. The relevant part of the reasons recorded by the Assessing Officer reads as under:

> "On perusal of the records for the Assessment Year 2006 – 2007, it is found that the assessee company has debited an amount of Rs.3,04,38,244/- under the head "miscellaneous expenses" to the P&L Account. Said amount is consist of leased assets purchase expenses amounting to Rs.1,26,33,095/- and assets written off (irregular spares) amounting to Rs.1,78,05,149/-. Said expenses have been claimed by the assessee company as revenue expenses, although they are capital in nature. As the cost incurred are capital in nature, the same requires to be disallowed.
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> In view of the said discussion, I have reason to belief that income amounting to Rs.3,04,38,244/- has escaped assessment in the hands of M/s. Mangalore Refinery & Petrochemical Limited for A.Y. 2006 – 2007 within the meaning of Section 147 of the I. T. Act."

7. A bare perusal of the aforesaid reasons indicates that, according to the Assessing Officer, income chargeable to tax escaped assessment on two counts. First, the assessee debited a sum of Rs.1,26,33,095/- towards 'leased assests repurchase expenses', which were capital in nature. Second, the assessee debited a sum of Rs.1,78,05,149/- towards 'assests written off (irregular spares)', again as a revenue expenses though it was capital in nature.

8. In the light of the aforesaid reasons recorded by the

Assessing Officer, Mr. Mistri, the learned Senior Counsel for the petitioner, submitted the jurisdictional conditions for invoking the provisions contained in Section 147 of the Act, 1961 are not at all satisfied. Since the scrutiny assessment was completed under Section 143(3) of the Act, 1961 and the assessment was sought to be reopened beyond a period of four years, the first Proviso to Section 147 of the Act, 1961 came into play, and, thus, it was incumbent upon the Assessing Officer to record that the escapement of income was on account of the failure on the part of the petitioner to disclose fully and truly all the material facts necessary for the assessment, urged Mr. Mistri.

9. The aforesaid submission appears impeccable. The reasons recorded by the Assessing Officer, which we have extracted above, on purpose, singularly lack the element of satisfaction recorded by the Assessing Officer that the escapement of income was on account of the failure on the part of the petitioner to make a true and full disclosure. Nay, there is no assertion that there was a failure to disclose on the part of the petitioner. As the first Proviso to Section 147 of the Act, 1961 operated, it was incumbent upon the Assessing Officer to satisfy himself about the twin conditions; that there was a reason to believe that there was an escapement of income and such escapement was the effect of failure to make a true and full disclosure of the material

facts by the petitioner, before the Assessing Officer assumed jurisdiction to issue notice for reopening the assessment. In other words, the causal connection between alleged escapement and failure to disclose is simply non-existent.

10. The next challenge to the reopening of the assessment on the count that, in fact, the petitioner had made a full and true disclosure of the material, which forms the basis of the alleged reasons to believe escapement of income, and there was also a conscious consideration of the said material by the Assessing Officer during the course of scrutiny assessment under Section 143(3) of the Act, 1961, also appears to be borne out by the material on record.

11. As regards the escapement of income on the score that the expenses towards leased assets repurchase amounting to Rs.1,26,33,095/- were incorrectly debited as revenue expenses, from the perusal of the communication dated 5th November 2008 addressed by the Assessing Officer it becomes evident that the petitioner was called upon to submit, *inter alia,* the details of miscellaneous expenses of Rs.5,95,12,84,632/- (Para 3(f)) and the petitioner did furnish details of those expenses along with the communication dated 14th November, 2008, wherein the particulars of the leased assets repurchase expenses at

Rs.1,26,33,095/- were specifically shown. In addition to this, in reply to the audit query communicated vide letter dated 30th July, 2009 the petitioner had made further disclosure as regards the said expenses of Rs.1,26,33,095/- towards revenue expenditure and offered justification in support thereof.

12. The situation which is obvious is that during the course of the scrutiny assessment under Section 143(3) of the Act, 1961, the Assessing Officer had made specific query as regards leased assets repurchase expenses and solicited explanation and documents. In compliance thereto, the petitioner furnished the requisite information and documents. It is true that in the assessment order dated 18th December, 2008, the Assessing Officer did not specifically advert to the said aspect of the matter and in terms record that the explanation so furnished was accepted and allowance upheld. However, this factor is not of decisive significance.

13. It is trite law that once a query is raised and the assesee furnishes explanation thereto, the Assessing Officer is presumed to have applied his mind to the question so raised and the fact that the Assessing Officer had not specifically dealt with the said aspect in the assessment order does not justify an inference that the Assessing Officer did not consider the same. On the

contrary, it would be justifiable to assume that the Assessing Officer was satisfied with the explanation so furnished by the assessee.

14. This position in law was expounded by this Court in the case of ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax-2(1)***[1] wherein the following observations were made:-

> "**14**. ..... 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. ....."

15. Once it becomes evident that the Assessing Officer had raised the query and reply thereto was furnished by the assessee, the endeavour on the part of the revenue to reopen the assessment is fraught with two infirmities. One, it cannot be said that the income escaped assessment on account of failure

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1[2014] 44 taxmann.com 304 (Bombay).

to make a true and full disclosure of the material facts (in cases where the proviso operates). Two, the exercise would then fall in the realm of mere change of opinion on the basis of the very same material, which is legally impermissible. Further, it cannot be said that there is a "tangible material" which would justify recourse to the provisions contained in Section 147 of the Act, 1961.

16. The third count of challenge to the impugned action that, it suffers from the vice of non-application of mind is equally well-merited. The second leg of the alleged escapement of income to the tune of Rs.1,78,05,149/- towards 'assets written off (irregular spares)', is not at all borne out by the material on record. The claim of the petitioner that in the return submitted by the petitioner, the said amount of Rs.1,78,05,149/- came to be added back, finds support in the computation of income submitted along with the tax audit report. Evidently, the Assessing Officer had not at all adverted to the fact that the petitioner had not claimed the said amount of Rs.1,78,05,149/- as deduction towards the revenue expenses. Failure to take cognizance of the fact that the said amount of Rs.1,78,05,149/- came to be added back as income erodes not only the sanctity of the reasons recorded by the Assessing Officer but also the sanction accorded by the Principal Commissioner, under Section 151 of the

Act, 1961.

17. Lastly, it would be contextually relevant to note that the rejection of the objections to the reopening also suffers from a familiar error, which the notices for reopening usually manifest. The Assessing Officer in the impugned order recorded that though the details of the expenses were called for and brought on record, no further inquiry regarding the expenses was conducted and, thus, the Assessing Officer (during the course of the scrutiny assessment) cannot be said to have applied his mind and recorded a finding as to the allowability or otherwise of the said expenses. These reasons betray a clear change of opinion on the same material.

18. The conspectus of the aforesaid consideration is that the impugned notice under Section 148 and the consequent action are required to be quashed and set aside.

19. Hence, the following order:

: O R D E R :

(i) The petition stands allowed in terms of prayer Clauses (a) and (b).

(ii) Rule made absolute in the aforesaid terms.

(iii) No costs.

[N. J. JAMADAR, J.] [K. R. SHRIRAM, J.]