

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on 07.12.2011

+ **W.P.(C) 8475/2010**

HCL CORPORATION LIMITED ... Petitioner
versus

ASSISTANT COMMISSIONER OF INCOME-TAX & ANR .. Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Ajay Vohra, Adv. with Ms Kavita Jha, Mr Amit Sachdeva and
Mr Somnath Shukla, Advocates

For the Respondent : Ms Suruchi Aggarwal

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MS. JUSTICE VEENA BIRBAL

BADAR DURREZ AHMED (ORAL)

1. The present writ petition is in respect of the assessment year 2004-05. The petitioner is aggrieved by the fact that the assessment in respect of the said assessment year is sought to be re-opened by the Assessing Officer by invoking the provisions of section 147 of the Income Tax Act, 1961 (hereinafter referred to as the 'said Act').

2. By virtue of the present writ petition, the petitioner is seeking the quashing of the notice dated 30.03.2010 issued under section 148 of the said Act and also the quashing of all proceedings initiated pursuant thereto including the order dated 13.12.2010 passed by the Assessing Officer whereby he rejected the objections to the re-opening of the assessment filed on behalf of the petitioner/assessee.

3. The original assessment under section 143 (3) was completed on 17.07.2006. The notice under section 148 of the said Act was issued by the Assessing officer on

30.03.2010 and the reasons thereof are also dated 30.03.2010. The reasons were communicated to the petitioner/assessee on 07.12.2010. The petitioner filed his objection on 10.12.2010 and the impugned order rejecting the objection was passed on 13.12.2010. We may also point out that by virtue of the order dated 20.01.2010 passed in the present proceedings this court had stayed further proceedings and therefore the Assessing Officer was prevented from passing an assessment order pursuant to the re-opening of the assessment.

4. Mr Vohra, appearing on behalf of the petitioner essentially made two submissions. His first submission was that the notice under section 148 was beyond the period of four years and was therefore time barred. His second submission was that even if we ignore the fact that the re-opening was itself barred by time it cannot be sustained because it was occasioned by a mere change of opinion. He submitted that the Assessing Officer in the first round had examined all the details which had been filed by the assessee and it was only after examining all other information which the assessee was required to furnish that the assessment order was passed. Mr Vohra further submitted that the sole issue for consideration was the extent of the expenses which was incurred in relation to earning exempt income in the backdrop of section 14-A of the said Act. He submitted that the assessee had disclosed that it has incurred a sum of Rs. 54,31,565/- towards the portfolio management scheme and a further sum of Rs. 8,10,000/- towards depository charges which were the sum total of expenses incurred towards earning the exempt dividend income of Rs. 195,19,82,701/-. And, the assessee itself had excluded these expenses from the claimed expenditure.

5. Consequently, it was submitted by Mr Vohra that first of all there was a full

and true disclosure of the expenses incurred towards earning dividend income which was exempted in the year in question and that there was no other expenditure incurred in respect of earning that income. He submitted that this being the position, the bar of four years clearly applied and since the notice under section 148 of the said Act was admittedly issued on 30.03.2010 i.e., beyond the four years from the end of the assessment year in question, there would be no occasion for re-opening the assessment as the same was barred by law. In any event, he submitted that a mere change of opinion could not be a ground for re-opening an assessment as has been held by the Supreme Court in the case of **CIT v. Kelvinator of India Ltd: 320 ITR 561 (SC)**, which affirmed a full Bench decision of this court in the case of **CIT v. Kelvinator of India Ltd: 256 ITR 1 FB (Del)**.

6. Mr Vohra further submitted that it appears that the only reason as to why the re-opening has been attempted on the part of the revenue was the fact that subsequent to the filing of the return the provisions of section 14-A were amended by introduction of sub-sections (2) and (3) therein by virtue of the Finance Act 2006, with effect from 01.04.2007, and the subsequent introduction of Rule 8-D in the Income Tax Rules, 1962 (hereinafter referred to as the 'said Rules') which provided the methodology for computing the expenses incurred towards earning income which did not form part of the total income. The said Rule 8-D was notified in the gazette on 24.03.2008. He submitted that the revenue was of the view that the provisions of sub-sections (2) and (3) of section 14-A as also Rule 8-D would be retrospective in operation. That view has been dispelled by virtue of the decision of this court in the case of **Maxopp Investment Ltd v. CIT: ITA 687/2009 decided on 18.11.2011**, and other connected matters. He further submitted that even if the said provisions were taken to be retrospective they could

not be the ground for re-opening of the assessment in view of this court's decision in the case of **CIT v. SIL Investments Ltd:** ITA 700-701/2010, decided on **07.05.2010 (2010-TIOL-327-C-DEL-15)**.

7. Consequently, Mr Vohra submitted that the writ petition ought to be allowed and the impugned notice as also the impugned order ought to be quashed.

8. Ms Suruchi Aggarwal, appearing on behalf of the revenue contended that the notice under section 148 of the said Act was not barred by limitation because, according to her, the petitioner had not fully and truly disclosed all the material facts necessary for the assessment. As such, according to her, in view of the 1st proviso to section 147 the bar of four years would not be applicable. She further submitted that even though this court in the case of **Maxopp Investment Ltd (supra)** held that the provisions of sub-sections (2) and (3) of section 14-A and rule 8-D would operate prospectively, it did not mean that the assessing officer was not to satisfy himself as to the correctness of the claim of the assessee with regard to the expenditure referred to in section 14-A. She submitted that in paragraph 42 of the judgment itself it has been indicated that if the assessing officer is satisfied, on an objective analysis and for cogent reasons that the amount of expenditure claimed by the assessee for the purposes of section 14-A is not correct, the assessing officer would be required to determine the amount of such expenditure on the basis of a reasonable and acceptable method of apportionment. Thus according to her, even though the provisions of sub-sections (2) and (3) of section 14-A and Rule 8-D have been held to be prospective in operation, it does not mean that the assessing officer is not to embark upon an enquiry and investigate into the correctness of the claim of the assessee with regard to the quantum of expenditure

of the nature indicated in section 14-A of the said Act.

9. Ms Aggarwal, also drew our attention to Explanation 3 to section 147 and submitted that for the purposes of assessment or re-assessment, the assessing officer may assess or re-assess the income in respect of any issue which has escaped assessment even if such issue comes to his notice subsequently in the course of the proceedings under section 147, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148. She also submitted, with regard to the Explanation 1 to section 147 of the said Act, that mere production before the assessing officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the assessing officer would not necessarily amount to disclosure within the meaning of the 1st proviso to section 147. She finally submitted that although the reasons recorded by the assessing officer primarily appears to be based on the retrospective applicability of sub-sections (2) and (3) of section 14-A and rule 8-D of the said Rules, while embarking upon the re-assessment proceedings, if the assessing officer comes across something new he is within the law to pursue that in view of Explanation 3 of section 147.

10. Having heard learned counsel for the parties and having examined the matter in some detail, we feel that this writ petition ought to succeed. The reason is that we agree with Mr Vohra that the notice under section 148 is beyond time. The 1st proviso to section 147 reads as under:-

“ 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:

11. It is absolutely clear that the end of the assessment year in question was on 31.03.2005. Four years from that would take us to 31.03.2009. The notice under section 148 in the present case was issued on 30.03.2010. Therefore, the notice was issued beyond the period of four years from the end of the relevant assessment year.

12. The only ground on which the revenue is seeking to escape from the bar of limitation is that the assessee/ petitioner had failed to disclose fully and truly all material facts necessary for the assessment. We do not see how this can be said. The petitioner had in its return and other information supplied to the assessing officer clearly indicated that it had received dividend income to the extent of ₹ 195,19,82,701/- and that it had incurred expenses to the tune of ₹ 54,31,565/- towards the portfolio management scheme and ₹ 8,10,000/- towards depository charges which were said to be the only expenses incurred for the purposes of earning the said dividend income which was admittedly exempt in the year in question.

13. In the purported reasons for re-opening the assessment, there is no specific averment or allegation that any particular expense has not been mentioned by the assessee/ petitioner at the time of original assessment proceedings. On the other hand, according to Mr Vohra certain information was sought by the assessing

officer and the same was supplied by virtue of the letter dated 12.07.2006 which is at page 124 of the paper book. We also notice the following remarks in the assessment order which is at page 62 and which is to the following effect:-

“In response to notice u/s 143(2) of the Income Tax Act, 1961, issued on 03.07.2006 Sh. Ajay Bhagwani, C.A. and Sh. Neelesh Aggarwal, DGM (Finance), authorized representative of the assessee attended. Necessary details filed. The assessee has also filed details of allocation of expenses, not related to business i.e. provisions written back during the year, gain on account of revaluation of investment, details of long term and short term capital gain etc. After examining the details filed by the authorized representatives of the assessee, the return income is accepted.

Assessed u/s 143 (3) of the Income Tax Act at ₹. 16,84,90,040/-
Issue necessary forms.”

(underlining added)

14. From the above it is apparent that necessary details were sought and they were filed and that the assessee had specifically filed details with regard to allocation of expenses. The same was examined by the assessing officer and it is only then that the assessment was finalized under section 143 (3) of the said Act. It would be apposite to note the observations of the Full Bench of this court in the case of ***Kelvinator of India Ltd (supra)*** which are as under:-

“We also cannot accept the submission of Mr Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on

application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.”

15. We are therefore of the view that the petitioner had fully and truly disclosed all the material facts necessary for the purposes of assessment. That being the case, there is no escape from the fact that the bar of four years would be clearly applicable. Since the notice under section 148 was issued beyond the period of four years the notice and all proceedings pursuant thereto would be contrary to law. As such the impugned order as also the notice under section 148 are set aside and any proceeding pursuant thereto are also set aside.

16. In view of the conclusion that we have arrived at on the plea of limitation, we do not find it necessary to examine the other issues which have been urged before us.

17. The writ petition is allowed to the aforesaid extent. No orders as to costs.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

DECEMBER 07,2011
kb