IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.12.2017

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THE HONOURABLE MR.JUSTICE **T.S.SIVAGNANAM**

W.P.No.19375 of 2017 and
W.M.P.Nos.20883 to 20335 of 2017 & 35397 of 2017

Cholamandalam Investment and Finance
Company Ltd., through its Executive Vice
President and Chief Financial Officer,
Mr.D.Arul Selvam,
I Floor, Dare House, NSC Bose Road,
Parrys, Chennai-600 001. ... Petitioner

Vs.

Assistant Commissioner of Income-tax,
Corporate Circle-1(2),
121, Mahatma Gandhi Road,
Aaykar Bhavan, Wanaparthy Block,
6th Floor, Chennai-600 034. ... Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records comprised in the notice bearing Lr.No.ITBA/AST/S/148/2016-17/1001916886(1) dated 27.02.2017 issued by the respondent and all proceedings in furtherance thereof, including but not limited to order in PAN : AAACC1226H/AY 2015-16 dated 13.07.2017 passed by the respondent, and quash the same being arbitrary, unjust and illegal and to consequently restrain the respondent from proceeding with reassessment against the petitioner for the assessment year 2010-11.

For Petitioner : Mr.Kamal Sawhney
for Mr.Arun Karthik Mohan

For Respondent : Mrs.Hema Muralikrishnan,
Senior Panel Counsel

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ORDER

Heard Mr.Kamal Sawhney, representing Mr.Arun Karthik Mohan, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Senior Panel Counsel for the respondent

2.This writ petition has been filed praying for issuance of writ of Certiorarified Mandamus to quash the notice issued by the respondent dated 27.02.2017 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and the order dated 13.07.2017, rejecting the petitioner's objection to the re-opening proceedings.

3.It may not be necessary for this Court to do a through factual exercise to ascertain as to whether the impugned re-opening is sustainable or not, as the re-opening is being challenged on a technical ground. The petitioner's company during the assessment year 2009-10 credited provisions amounting to Rs.223.53 crore. These provisions represented unascertained liabilities, which were disallowed by the assessee in the assessment year 2009-10. During the assessment year 2010-11, the petitioner's company decided to withdraw a portion of these provisions, as a result of which a sum of Rs.193.53 crore towards provisions was reversed. As the original provisions amounting to Rs.223.53 crore, which had been disallowed in the assessment year 2009-10, the reversed provisions were considered as part of taxable income for the assessment year 2010-11. It is this amount of Rs.193.53 crore, which the respondent now seeks to tax by way of present re-assessment proceedings on the ground that the amount has escaped assessment to tax.

4.The impugned re-opening proceedings is on the basis of an audit objection, which was communicated to the Department. On receipt of the audit objection, the Central Board of Direct Taxes vide letter dated 10.06.2015, addressed the Director (RA), office of the C&AG of India, New Delhi, stating that the audit objection made by their Department has not been accepted by the Ministry (Ministry of Finance) for the reasons given in Annexure-A to the said letter dated 10.06.2015. The Annexure-A is a note submitted by the assessing officer of the petitioner. In the said Annexure, the assessing officer has clearly stated as to how the claim of the Revenue audit that Rs.323.53 crore was to be treated as a revenue receipt is not correct and unacceptable. Thus, the matter should have been allowed to rest at that stage, but however, the assessing officer thought fit to issue the impugned notice under Section 148 of the Act. The petitioner sought for reasons for re-opening vide letter dated 03.03.2017. On such request, the assessing officer furnished the reasons for re-opening vide communication dated 10.03.2017.

5.What is interesting to note is that the reasons for re-opening is verbatim repetition of the audit objections filed by the audit party. This position was clearly demonstrated by the learned counsel for the petitioner by comparing the audit objection and the reasons for re-opening. Thus, it is clear that the assessing officer did not have any independent material to re-open the assessment, but merely proceeded to re-open the assessment on the ground that there was an audit objection. Thus, two issues arise for consideration. Firstly, whether the re-opening proceedings have been made solely based upon the audit objection. Secondly, when CBDT had taken a stand that they do not accept the audit objection whether the respondent could proceed to initiate re-opening proceedings.

6.On the first issue, Courts have held that the assessing officer cannot blindly follow the opinion of an audit authority. In this regard, it is beneficial to refer to the decision of the Hon'ble Supreme Court in the matter of ***Indian & Eastern Newspaper Society v. CIT*** reported in ***[1979] 119 ITR 996.*** This decision was followed in the decision of the High Court of Bombay in the case of ***ICICI Home Finance Co. Ltd., vs. Assistant Commissioner of Income-tax*** reported in ***[2012] 25 taxmann.com 241 (Bom.).*** The operative portion of the order reads as follows:

> *"6.The power to reopen a completed assessment under Section 147 of the Act has been bestowed on the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. In fact, the Supreme Court in the matter of* Indian & Eastern Newspaper Society vs. CIT [1979] 119 ITR 996/2 Taxman 197 *has held that whether an assessment has escaped assessment or not must be determined by the Assessing Officer himself. The Assessing Officer cannot blindly follow the opinion of an audit*

authority for the purpose of arriving at a belief that income has escaped assessment. In the present facts, it would be noticed that the reasons for which the assessment for the assessment year 2006-2007 is sought to be reopened by communication dated 12.10.2011 are identical to the objection of the audit authority dated 29.12.2009. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the Assessing Officer before he issued the impugned notice. On this ground alone, the assumption of jurisdiction by the Assessing Officer can be faulted."

7.The above referred decision of the Hon'ble Bombay High Court has been affirmed by the Supreme Court in the case of ***Assistant Commissioner of Income-tax vs. ICICI Securities Primary Dealership Ltd.,*** reported in ***[2012] 24 taxmann.com 310 (SC)*** on the ground that the re-opening proceeding was a clear case of change of opinion.

8.Further, it is relevant to take note of the decision of the High Court of Gujarat at Ahmedabad in the case of ***Cadila Healthcare Ltd., vs. Assistant Commissioner of Income-Tax*** in *Special Civil*

Application No.15566 of 2011 dated 14.12.2011, wherein identical issue was considered by the Gujarat High Court, similar proceedings were set aside on the ground that the assessing officer had acted at the behest of and on the insistence of the audit party. In the said decision, reliance was placed on the decision of the Apex Court in the case of ***C.I.T. vs. P.V.S.Beedies Pvt. Ltd.,*** reported in ***237 ITR 13*** and in the case of ***Indian & Easter Newspaper Society*** (supra). Therefore, by applying the law laid down by the Hon'ble Courts, as referred above, it has to be held that the impugned re-opening proceedings is clearly a change of opinion and liable to be set aside. That apart, in the assessee's own case for the assessment year 2009-10, the Commissioner of Income-tax (Appeals) by order dated 19.06.2017, taking note of the objections filed by the CBDT to the audit report has held in favour of the assessee and the appeal has been allowed. As on date, it appears that no further appeal has been preferred by the Department.

9.Learned Senior Panel Counsel appearing for the respondents would vehemently contend that the petitioner should be relegated to avail alternate remedy provided under the Act. It is further submitted that circular referred to by the petitioner viz., Circular No.8/16 dated 17.03.2016 has come into effect from 17.03.2016, and it shall be applicable only to the objections/LAR received from the said date so that the Principal Commissioner of Income Tax/Commissioner of Income Tax could inform the AG within two months from the date of receipt of the LAR. Further, it is submitted that remedial action has been initiated and as per the existing CBDT instruction, which will be binding on the field authorities. The stand taken by the revenue in the counter affidavit as well as the submission of the learned Senior Panel Counsel for the revenue could not in any manner improve the case, as it has been clearly demonstrated that the reasons for re-opening are verbatim repetition of the audit objection, which procedure has been struck down in the above mentioned decisions.

10.That apart, on merits of the matter, it is seen that the issue, which is subject matter of re-opening, was dealt with by the assessing officer while completing the assessment under Section 143(3) of the Act and during the course of hearing on 13.06.2012, additional details/clarifications were called for. In response to the same, the petitioner furnished the clarifications/details vide letter dated 10.07.2012, wherein with regard to the provision made for during the year, the petitioner pointed out in paragraph 2.9 therein, re-conciliation statement for the provision made during the year as per Schedule 16, which was appended as Annexure-4 to the said communication. In Annexure-4, the petitioner stated that Rs.1,700,000,000/- is not considered as income in the computation of total income. That apart, further clarification was called for by the assessing officer during the hearing on 10.07.2012 and the same was clarified by the petitioner vide letter dated 13.08.2012 and the clarification on the subject issue is as follows:

> *"1.6* ***Schedule 17 Notes on Accounts Para – 3:***
>
> *a) Loss on Sale of investment in Subsidiary Company – Details furnished as Annexure-VI*
>
> *b) Provision made for diminution in the value of investment company written back;*
>
> *Provision made for Diminution in the value of investment in DBS Cholamandalam Distribution Limited during the preceding ass. Year (AY 2009-10) Rs.2353.00 Lakhs. The same was also disallowed in the relevant asst. year in the Statement of Taxable income. During the current assessment year, in view of the*

improvement in the financials of the said subsidiary, it was decided to withdraw the provision. The withdrawal of provision amounting to Rs.2353.00 Lakhs credited to Profit and Loss Account, is not considered as part of income for income tax purposes, since the earlier provision in the preceding assessment year was disallowed."

11.Thus, after obtaining the above details and the clarification, the assessment was completed under Section 143(3) of the Act. Thus, all materials were available in the hands of the assessing officer and the impugned re-assessment proceedings is clearly a case of change of opinion and on the facts noted above and by applying the law laid down in the aforementioned decisions, the impugned proceedings are illegal and not sustainable.

12.Accordingly, this writ petition is allowed and the impugned proceedings are quashed. No costs. Consequently, connected miscellaneous petitions are closed.

12.12.2017

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Index:Yes

T.S.SIVAGNANAM, J.
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To

The Assistant Commissioner of Income-tax,
Corporate Circle-1(2),
121, Mahatma Gandhi Road,
Aaykar Bhavan, Wanaparthy Block,
6th Floor, Chennai-600 034.

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