

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 3130 OF 2018

Rubix Trading Pvt. Ltd.

.. Petitioner

v/s.

The Income-Tax Officer-3(3)(1)
Mumbai & Ors.

.. Respondents

Mr. Madhur Agarwal I/b Mr. Atul Jasani for the petitioner
Mr. Sham Walve for respondent nos. 1 to 3

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 20th DECEMBER, 2018.

P.C.

1. By consent of the learned Counsel for the parties, the petition is taken up for hearing and final disposal.

2. The petitioner has challenged a notice of reopening of assessment dated 29.03.2018. Brief facts are as under :-

3. The petitioner is a company registered under the Companies Act and is engaged in the business of development of real estate projects. For the Assessment Year 2013-14, the petitioner had filed its return of income on 30.11.2013 declaring loss of Rs.3,87,662/-. The return was taken in scrutiny by the Assessing Officer. The Assessing Officer passed

an order of assessment under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 19.01.2016 accepting the petitioner's declared income.

4. In order to reopen such assessment, the Assessing Officer issued the impugned notice which, as can be seen was done within a period of 4 years from the end of the relevant assessment year. In order to issue the notice, the Assessing Officer had recorded following reasons :-

"In this case, the original return of income declaring total loss of Rs.387,662/- and claiming a refund of Rs.1,10,83,662/- was filed on 30.11.2013. The assessee filed a revised return of income declaring loss of Rs.387 662/- and refund at Rs.Nil on 31.3.2015. Scrutiny assessment was completed u/s 143(3) of the IT Act on 19.1.2016 accepting the returned income.

2. *The assessee company is engaged in the construction and development of infotech parks, cyber parks, business parks and other similar works.*

3. *It is observed from the details of interest paid and received in Exhibit-7 of letter dt.23.11.2015 that during the year under consideration, the assessee has incurred interest expenses to the tune of Rs.47,11,82,441/- on loans taken and has earned interest income of Rs.11,08,36,618/- on loans given. It has also been mentioned by the assessee that the company has netted off interest received of Rs.11.08 crores against interest paid of Rs.47.12 crores and the remaining amount has been transferred to the WIP account. This is not correct. Interest income earned by the assessee on loan advanced is in the nature of income from other sources and the same should have been offered for taxation accordingly. In this respect, it is pertinent to mention decision of Hon. Mumbai ITAT in the case of M/s Whistling Woods International Ltd. v/s ITO (2010) 48 DTR 371, wherein it has been held that interest earned by the assessee by investing its surplus funds in deposits with banks and other companies at the time when it was constructing the building of the institute for conducting its main business activity is taxable as income from other sources.*

4. Further the Hon. Supreme Court in the case of CIT V/s Autokast Ltd. (2001) 248 ITR 110 (SC) has held that interest earned from money borrowed for purchase of plant and machinery and kept in short term deposits is assessable to tax as income from other sources.

In this case, all the fund utilized or giving loans/advances was sourced from interest bearing debentures and loan taken.

5. It is also pertinent to mention here that decision of Hon. Rajasthan High Court in the case of CIT Vs Rajasthan Land Development Corporation 211 ITR 597, wherein the following principle have been set out for deciding the tax treatment for the interest earned.

(i) Interest on fixed deposits and other deposits before the commencement of the business is income from other sources.

(ii) Income from interest on deposits of surplus money during the construction period is also to be considered/treated as income from other sources.

(iii) Interest income in respect of surplus money, not required for business and deposited in bank or person as idle money, for safe keeping, would be assessable as income from other sources. If the income from interest is from a fund which has been brought as surplus capital, it would be assessable as income from other sources.

iv) In respect of investment of surplus funds there is divergence of opinion between different High Courts and this Court in the case of Murali Investments Co. held that if the surplus funds are invested instead of keeping them idle, the income by way of interest this should be treated as income from other sources.

(v) Only in the case where surplus funds emerge out of business carried on by the assessee which is regularly carried on by the assessee and then with the intention to carry on the business of lending of money or money lending the loan is advanced, the income therefrom would be income from business. The intention has to be gathered with reference to all the activities of advancing money which should be permitted by the objects of the company and also by the resolution of the board of directors to carry on the business of money lending or lending money.

6. The Hon. Supreme Court in Tuticorin Alkali Chemicals and

Fertilizers Ltd. v/s CIT 227 ITR 172 has held that where the interest debited by the assessee prior to commencement of its business, from the borrowed funds which were to be utilized for setting up the factory of the company were invested in short term deposits with bank would be chargeable to tax under the head income from other sources.

7. *In view of the facts and circumstances of the case and various judicial rulings mentioned supra, interest received by the assessee amounting to Rs.11,08,36,618/- from loans should have been charged to tax under the head income from other sources and the WIP should have been increased by the whole amount of Rs.47,11,82,441/-, without allowing the netting of interest income against interest expenditure incurred during the year.*

8. *Therefore, I am of the opinion that for AY 2013-14 as per sub clause (c) of Explanation 2 to section 147 are applicable to the facts of the case of the assessee and the assessment year 2013-14 under consideration is deemed to be a fit case where income chargeable to tax has escaped assessment, for issue of Notice u/s. 148 of the IT Act.*

9. *Since this case falls under the provisions of Section 151(2) of the Income Tax Act, 1961 necessary sanction to issue notice u/s 148 is obtained from the Addl. Commissioner of Income Tax. Range 3(3), Mumbai.*

10. *In view of the above facts of the case, I have reasons to believe that income to the minimum extent of Rs.11,08,36,618/-has escaped assessment within the meaning of section 147 and I am hence, satisfied that this is a fit case for issue of notice u/s 148 r.w.s section and section 151(2) of the Income Tax Act, 1961.”*

5. Upon being supplied with the reasons recorded by the Assessing Officer, the petitioner raised objections to the reopening of the assessment under a communication dated 12.07.2018. Such objections were however rejected by the Assessing Officer by order dated 30.08.2018. Hence, this petition.

6. Learned Counsel for the petitioner took us through the materials

on record and the reasons recorded by the Assessing Officer and raised following contentions :-

(i) That the entire issue was examined by the Assessing Officer during the original scrutiny assessment. In the absence of any new material, the reopening of the assessment would be based on mere change of opinion.

(ii) Counsel submitted that even otherwise there was no income chargeable to tax which had escaped assessment. Counsel submitted that the Assessing Officer's contention with respect to the assessee's claim of business expenditure was incorrect according to the legal position.

(iii) Counsel lastly submitted that in any case the benefit of the interest expenditure would be available to the assessee upon completion of the development project and, therefore, there was no question of revenue loss.

7. In support of his contentions, Counsel relied on several judgments, reference to which would be made at the appropriate stage.

8. On the other hand, learned Counsel for the Revenue opposed the petition contending that during the original assessment, the question of correctness of the petitioner's claim of interest expenditure was not

examined. The notice of reopening has been issued within a period of 4 years from the end of the relevant assessment year. The concept of true and full disclosure, therefore, would not apply.

9. A perusal of the reasons recorded by the Assessing Officer would show that what he wished to press in service was that the assessee had adjusted the interest income of Rs.11,08,36,618/- against the interest expenditure of Rs.47,11,82,441/- which according to the Assessing Officer was not permissible. The Assessing Officer referred to the case law and various judgments on the point to support his contention in this regard.

10. With this background, we may refer to certain material which was part of the original proceedings. Under a letter dated 28.09.2015, the Assessing Officer had called upon the petitioner to provide certain details. Relevant portion of which reads as under :-

“1. In the original return, you have shown interest income of Rs.11,08,36,618/- on which TDS of Rs.1,10,83,662/- deducted and the same has been claimed as refund due, whereas in the revised statement of computation, you have not shown the interest income nor claimed refund. Please explain.

2. In the original return of income, you have shown interest income of Rs.11,08,36,618/- whereas in the cash flow statement, you have shown interest income of Rs.9,16,57,313/- showing a difference of Rs.1,91,79,305/-. Please explain the difference of the same.

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9. *Please furnish the details of the rate of interests on which loan was taken and in the details of rate of interest on which loan was given.*
10. *Please furnish the details of project, date of starting of project and percentage of completion."*

11. In response to the said queries, the petitioner replied under a letter dated 23.11.2015. In connection with the above noted queries, the petitioner's response was as under :-

Sr. No.	Query	:	Our submission
1.	<i>In the original return, you have shown interest income of Rs.11,08,36,618/- on which TDS of Rs.1,10,83,662/- deducted and the same has been claimed as refund due, whereas in the revised statement of computation, you have not shown the interest income nor claimed refund. Please explain.</i>	:	<i>Exhibit - '1"</i>
2.	<i>In the original return of income, you have shown interest income of Rs.11,08,36,618/- whereas in the cash flow statement, you have shown interest income of Rs.9,16,57,313/- showing a difference of Rs.1,91,79,305/-. Please explain the difference of the same.</i>	:	<i>The Company has booked excess interest of Rs.1,91,79,305/- in the F.Y. 2011-12 which was reversed during the current financial year be debited to the interest received account. However the company has netted off interest received of Rs.11.08 crore against interest paid and remaining interest amount is transferred to work in progress account.</i>

3.	Please furnish the details of the rate of interests on which loan was taken and in the details of rate of interest on which loan was given.	: Exhibit '7'
4.	Please furnish the details of project, date of starting of project and percentage of completion	: The Company has undertaken slum redevelopment project at Wadala, Mumbai which is yet to commence.

12. Exhibit 7 referred to in the answer no.9 noted above, reads as under :-

“Details of Interest Paid and Interest Recd

AY 2013-14

(A) Interest Paid

Sr. No.	Loan Particulars	Loan Amount	Interest Amount	ROI
1	Vinca Developers Pvt. Ltd.	2,68,00,00,000	44,29,49,457	14.75%
2	Deutsche Investment India Pvt. Ltd.	23,50,00,000	2,82,00,000	12%
3	Interest on Delayed payment of Tax	–	32,984	
		2,91,50,00,000	47,11,82,441	

(A) Interest Received

Sr. No.	Loan Particulars	Loan Amount	Interest Amount	ROI
1	Citygold Investments Pvt. Ltd.	56,10,27,968	11,08,36,618	9.50%

Reconciliation of interest income shown in profit and loss account

<i>Interest received as per above</i>	<i>11,08,36,618</i>
<i>Interest received as per PL</i>	<i>9,16,57,313</i>
<i>Difference</i>	<i>1,91,79,305</i>

Difference of Rs.1,91,79,305/- pertains to excess interest charged by the Company in the FY 2011-12 which was reversed during the year by debiting interest received ledger account.

However, the company has netted off interest received of Rs.11.08 crore against interest paid of Rs.47.12 crores and remaining amount transferred to work in progress account. There is no such interest debited to the profit & loss account.”

13. It can thus be seen that during the original scrutiny assessment, the Assessing Officer had asked the assessee to clarify the issue of the interest income of Rs.11,08,36,618/- which in the revised statement of computation the assessee had not shown his interest income nor claimed refund. He also called upon the assessee to furnish details of rate of interest on which the loan was taken and the details of rate of interest on which loan was given. In response to such queries of the Assessing Officer, as noted, the assessee in the reply explained why the amount of Rs.11,08,36,618/- was not shown as income. The assessee elaborated that *“the company has booked excess interest of Rs.1,91,79,305 in the FY 2011-12 which was reversed during the current financial year by debiting to the interest received account. However the company has netted off interest received of Rs.11.08 crore against interest paid and remaining interest amount is transferred to work in progress account”*.

14. It can thus be seen that with respect to the interest income of Rs.11,08,36,618/-, the assessee's stand was that the company had received such interest but had adjusted it against the interest paid and

the remaining amount was transferred to the work in progress account. Whatever may be the validity or assessee's stand in this respect, it cannot be denied that the Assessing Officer had asked the assessee to explain why the interest income of certain amount was not offered to tax and the assessee did offer the explanation in this respect. Further, as noted the assessee had also produced the full details of the interest earned and the interest paid on borrowed capital. The total of interest paid come to Rs.47,11,82,441/-. The interest amount received was Rs.11,08,36,618/-. In Exhibit 7, the assessee also clarified that the company has netted off the interest received of Rs. 11,08,36,618/- against the interest paid of Rs.47,11,82,441/- and the remaining amount was transferred to work in progress account. Indisputably, therefore, the entire question of taxing the assessee's interest of Rs.11,08,36,618/- was minutely scrutinized by the Assessing Officer during the original assessment proceedings. In the absence of any new material, the reopening of the assessment would be based on mere change of opinion.

15. The Supreme Court in case of *CIT Vs. Kelvinator India Ltd.* 320 *ITR 561* held that even after the amendment in Section 147 w.e.f. 01.04.1989, the concept of change of opinion would continue to apply. This Court in series of judgments applied the same principles.

Reference in this respect can be made to the decision of the Division Bench in the case of *N.J. Pharmaceuticals Ltd. Vs. Dy. CIT, (2008) 297 ITR 119*.

16. It is true that in the final order of assessment, the Assessing Officer had not elaborated this aspect but had not made any disallowance or addition in the hands of the assessee. Merely because the order of assessment was silent on a particular claim of the assessee, would not by itself mean that the same was not scrutinized or that the Assessing Officer had not formed an opinion with respect to the same. If after detailed scrutiny during the assessment, the Assessing Officer examines a claim but does not reject the claim of the assessee which had come up for scrutiny, would not enable the Revenue to argue that the Assessing Officer had not formed any opinion on such issue and, therefore, reopening of the assessment would be permissible without there being any new or additional material available to the Assessing Office. We may refer to decision of the Gujarat High Court in the case of *Gujarat Power Corporation Ltd. Vs. Asst. CIT, (2013) 350 ITR 266*, in which following observations were made :-

“41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits

but not liable to be reopened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving a large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interests of the Revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to the entire original assessment, of course at the hands of the Revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that the power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and, therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve a large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on

his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the Revenue that the Assessing Officer cannot be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition.”

17. In the result, the impugned notice is set aside.

18. Petition is allowed and disposed of accordingly.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)