

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

WRIT PETITION NO. 3619 OF 2018

Firstsource Solutions Ltd.

.. Petitioner

v/s.

Dy. Commissioner of Income Tax & Ors.

..Respondents

Mr. F.V. Irani a/w Mr. Niraj Sheth I/b Mr. Atul Jasani for the petitioner
Mr. Charanjeet Chandernal a/w Mr. Sigmund Gracias a/w Ms. Pallavi
Supekar for the respondent

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

DATED : 22nd DECEMBER, 2018.

P.C.

1. Leave to amend. Re-verification dispensed with. Amendment to be carried out forthwith.
2. Heard learned Counsel for the parties for disposal of the petition with consent.
3. The petitioner has challenged a notice of reopening of assessment dated 30th March, 2018 for the Assessment Year 2011-12. Brief facts are as under :-

4. The petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of export of software and providing IT enabled services. For Assessment Year 2011-12, the petitioner had filed its return of income on 28.11.2011.

5. 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 25.05.2015. In order to reopen such assessment, the Assessing Officer has issued the impugned notice. For issuing the notice, the Assessing Officer had recorded reasons, relevant portion of which reads as under :-

“The assessee is corporate entity, engaged in business of exporting computer software & IT enabled services. The assessee filed its ROI on 28/11/2011 declaring Returned Income Rs.0/- for AY 2011-12. The return was selected for scrutiny and notice u/s 143(2) was issued. The scrutiny was completed u/s 143(3) r.w.s. 92CA of I.T. Act 1961 on 26/03/2015 assessing total income at Rs.16,42,10,210/-.

2. It is seen from the Balance Sheet that during the year the assessee has bought back 9,05,161 shares of the company for a total consideration of Rs.11,94,81,252/-. The shares were bought back on a premium of Rs.122/- per share in addition to the face value of the share. The premium paid amounting to Rs.11,04,29,642/- towards buy back of shares was reduced from the General Reserve Account. However no dividend has been distributed by the assessee inspite of the fact that the accumulated profit at the assessee company as on 31.03.2011 stands up at Rs.47,01,89,864/-. The assessee company has purchased the shares from the holding company M/s. Firstsource

Solution Ltd. By way of buy back the share holding has not been diluted. The profit making subsidiary by way of not paying dividend has avoided distribution tax and thus buy back is tax avoidance. Normally the companies buy back its share with an intention to recognize their capital structure, for improving net profitability and earnings as per share for maintenance of the management control stable. etc However, in the instant case, the assessee company is 100% subsidiary company of First Source Solution Ltd and therefore even after buy back, the assessee Company will remain the subsidiary of M/s First Source Solution Ltd. It is noticed that the company is making regular profit and the total accumulated profit of the company as on 31.03.2011 after buy back of share stands at Rs.47 crores. The assessee has not declared the dividend for the reason that if dividend is declared, it is required to pay dividend tax @15% on the distributed amount. This implies that the proposal of buyback was a scheme devised for tax avoidance and was a colorable device for avoiding dividend tax under Section 115O of the Act. The assessee has resorted dubious method of buyback fo shares to avoid dividend tax. Thus the transaction is a colorable device to avoid tax and it clearly amounts to tax evasion. The assessee company has utilized the accumulated profit for buy back of the shares and this arrangement is a convenient ploy to get round the dividend distribution tax liability and the payment towards buyback was indeed divided. By not paying the dividend, the company has avoided DDT. Instead of paying dividend, the company has offered a buyback offer which is accepted by the holding company and therefore I have reason to believe that the income of Rs.11,04,29,642/- chargeable to tax has been under assessed.

3. On the basis of above findings in above para no.2, I have reason to believe that income of the assessee has escaped assessment. By not declaring Rs.11,04,29,642/- as Dividend as discussed above, the assessee had not disclosed fully and truly all material facts necessary for its assessment.

4. In this case a return of income was filed for the year under consideration and regular assessment u/s 143(3) rws 92CA was made on 26/03/2015, Since, 4 years from the end of the relevant year has expired in this case, the requirement of initiate

proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above para no.2. I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the following material facts necessary for its assessment for the year under consideration:-

- Dividend Distribution and,
- Tax paid on the same

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for its assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P & L A/c and Balance Sheet along with Return of Income where various information / material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P & L A/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner the material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation I of Section 147 of the Act.

It is evident from the above discussion that in this case, the issue under consideration was never examined by AO during the course of regular assessment. This fact is corroborated from the contents of notices issued by AO u/s 143(2)/142(1) and order sheet recorded during the 143(3) proceedings. It is important to highlight here that material facts relevant for the assessment proceedings and the same may be embedded in annual report, audited P & L, balance sheet and

books of account in such a manner that it would require due diligence by the AO to extract these information. For aforesaid reasons, it is not a case of change of opinion by the AO.

5. Therefore, I have reason to believe that the income to the extent of Rs.11,04,29,642/- chargeable to tax in A.Y. 2011-12 has escaped assessment within the meaning of provision of section 147 of the Income Tax Act. Hence, I am satisfied that this is a fit case to reopen the assessment u/s 147 of the IT Act.”

6. Upon being supplied the reasons recorded by the Assessing Officer, the petitioner raised objections to the notice of reopening under communication dated 14.12.2018. Such objections were dismissed by the Assessing Officer by an order dated 14.12.2018. Hence, this petition.

7. Having heard learned Counsel for the parties and having perused the documents on record, in our opinion, the impugned notice is required to be set aside. It may be noted that the impugned notice is issued beyond the period of 4 years from the end of the relevant assessment year. From the reasons recorded by the Assessing Officer, nothing can be gathered to suggest that there was any failure on the part of the assessee to disclose truly and fully all material facts. In order to bring any element of lack of true and full disclosure, the Assessing Officer has merely referred to certain dividend which

according to him the petitioner should have paid. When the petitioner's contention is that no such dividend was payable, obviously it was not the duty of the petitioner to have made any such reference in the return. Whatever the validity of the Assessing Officer's contention regarding such dividend, surely, he cannot reopen the assessment beyond the period of 4 years from the end of the relevant assessment year, without there being any element of lack of true and full disclosure on the part of the petitioner. Only on this ground, the impugned notice is set aside.

8. Petition is allowed and disposed of accordingly.

(M.S. SANKLECHA J.)

(AKIL KURESHI, J.)