

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 7699 OF 2018

HSBC Software Development (India) Pvt. Ltd., .. Petitioner.
v/s.
The Deputy Commissioner of Income Tax
Circle-11, Pune & Others .. Respondents.

Mr. Nitesh Joshi i/b. Mr. A. K. Jasani, for the Petitioner.
Mr. Charanjeet Chandernal with Ms. Pragya Chandra, for the
Respondents.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
DATE : 14th FEBRUARY, 2019.**

P.C:-

Petition taken up for final disposal at this stage.

2 Petitioner has challenged a notice dated 16th March, 2018 of
re-opening of an assessment issued by Respondent No.1-Assessing Officer.

3 Brief facts are as under:-

- (i) Petitioner is a company, registered under the Companies Act, 1956
and is engaged in the business of providing Software Development
Services. Petitioner is a part of HSBC group of Companies
Worldwide.

- (ii) For the Assessment Year 2011-12, Petitioner had filed return of income, which was taken in scrutiny by the Assessing Officer. He passed an order of assessment under Section 143(3) of the Income Tax Act, 1961 (in short "the Act") on 30th March, 2013.
- (iii) To re-open such assessment, the Assessing Officer issued the impugned notice, which can be seen, was done beyond a period of four years from the end of relevant Assessment Year. In order to do so, the Assessing Officer had recorded the following reasons:-

Reasons for re-opening of the Assessment in the case of M/s. HSBC Software Development (Indai) Pvt. Ltd.:-

During the period relevant to A.Y. 2011-12, the assessee company was engaged in the business of Software Development as required for Banking Operation of the HSBC Group. The assessee company also undertook value added Information Technological services, acted as an in-house software development centre and developed solutions and software implementation services for group companies of HSBC spread across the globe. Return of income for A.Y. 2011-12 was filed electronically by the assessee company on 25/11/2011 declaring total income of Rs.31,99,35,403/-. Order u/s. 143(3) of the Act was passed on 30/03/2015 determining total income at Rs.146,32,01,943/-. In the scrutiny assessment, additions of Rs.113,15,18,134/- and Rs.1,20,60,460/- were made to the returned income by making disallowance u/s. 10B(7) r.w.s. 80IA and u/s. 14A r.w. Rule 8D respectively.

2. On examination of the case records, it is gathered that the assessee company had been paying huge amount to its partner company i.e. HSBC Holdings Plc., United Kingdom every year for usage of common platform created for development of IT Domains under an IT Domains under an IT Domains Cost Sharing Agreement (CCA). Expenses had been claimed for such payments but tax had not been deducted at source thereon u/s. 195 of the Income Tax Act, 1961. While completing the assessment

proceedings in the case of assessee company for A.Y. 2013-14, it was concluded that tax should have been deducted at source against the payments of IT Domain cost u/s. 195 r.w.s. 90 of the Act and Article 13 of the DTAA as the same was either in the nature of Fees for Technical Services or Royalty. After examination of the facts in the case and after duly considering the contentions/ submissions of the assessee company, expenses claimed on account of IT Domain cost paid to the parent company was disallowed u/s. 40(a)(i) of the Act by the undersigned after making elaborate discussions in the assessment order passed in the case of assessee company for A.Y. 2013-14. It is further noted that the above action of the Assessing Officer has duly ratified by the Ld. Commissioner of Appeals while deciding the appeal filed before him by the assessee company on said issue.

3. It is gathered that during assessment year 2011-12, the assessee company had made payments under the nomenclature at IT Domain Cost to HSBC Holdings Plc., UK to the tune of Rs.65,67,13,183/- on which tax was not deducted at source. Therefore, in view of the facts stated above, expenses claimed on account of IT Domain Cost amounting to Rs.65,67,13,183/- was not an allowable expenses. The assessee company had not disallowed on its own while filing return of income for A.Y. 2011-12. Also, the same was not disallowed u/s. 40(a)(i) of the Act in the assessment order dated 30/03/2015 passed u/s. 143(3) of the Act for A.Y. 2011-12. I, therefore, have reasons to believe that income to the tune of Rs.65,67,13,183/- has escaped assessment on account of failure on the part of the assessee company within the meaning of Explanation 1 to Section 147 of the Act as it had not disclosed fully and truly all material facts necessary for the assessment for A.Y. 2011-12 which have been gathered during subsequent assessment proceedings.

4. In this case, a return of income was filed for A.Y. 2011-12 and regular assessment u/s. 143(3) of the Act was made on 30/03/2015. Since, four years from the end of the relevant year has expired in this case, the requirements to initiate proceedings 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 company to disclose fully and truly all

material facts necessary for the 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 at paragraph 3. I have carefully considered the assessment records containing the submissions made by the assessee company in response to various notices issued during the assessment proceedings and have noted that the assessee company has not fully and truly disclosed the material facts necessary for the assessment for the year under consideration. Thus, it is evident from the above facts that the assessee company had not truly and fully disclosed all material facts necessary for the assessment for the year under consideration thereby necessitating reopening u/s. 147 of the Act.

5. It is true that the assessee company 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 company has produced books of accounts, annual report and 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 that material evidence could not be discovered by the Assessing Officer and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of Section 147 of the Act.

6. It is evident from the above discussions that in this case, the issue under consideration was never examined by the Assessing Officer during the course of regular assessment. This fact is corroborated from the contents of notices issued by the Assessing Officer u/s. 143(2)/142(1) of the Act on various dates during the course of regular assessment proceedings for A.Y. 2011-12. It is important to highlight here that material facts relevant for the assessment on the issue under consideration were not filed during the course of regular assessment proceedings and the same may be embedded in annual report, audited P & L A/c. balance sheet and books of account in such a manner that it would require due diligence by the Assessing Officer to extract these information. For

aforestated reasons, it is not a case of change of opinion by the Assessing Officer.

7. In this case, more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/s. 148 has been obtained from Principal Commissioner of Income Tax-1, Pune as per the provisions of section 151 of the Act which has been communicated vide his office letter No.PN/Pr. CIT-1/u/s. 148/HSBC/2017-18/3624 dated 09/03/2018.”

- (iv) Upon being supplied the reasons, the assessee raised objections to the notice of re-opening under letter dated 4th May, 2018. Such objections were disposed of by the Assessing Officer by an order dated 31st May, 2018. Hence, the Petition.

4 Taking us through the reasons recorded by the Assessing Officer and other documents on record, Counsel for the Petitioner raised following contentions:-

- (i) that the impugned notice was issued beyond a period of four years from the end of the relevant Assessment Year. There was no failure on the part of the assessee to disclose truly and fully all material facts. The notice of re-opening of assessment was, therefore, invalid;
- (ii) In the present case, there was no income chargeable to tax which had escaped assessment. Counsel pointed out that, the Assessing Officer had computed the assessee's tax liability as per the normal provisions but by virtue of the reliefs granted by the Commissioner (Appeals), such computation was made under Section 115JB of the Act. Even if, the proposed additions as per reasons recorded, were to be made, the Company would still continue to be governed by

the MAT provisions;

- (iii) Counsel submitted that the expenditure in question, referred to in the reasons recorded, was subjected to transfer pricing scrutiny. Thus, the re-opening of assessment was, based on change of opinion; and
- (iv) Counsel lastly contended that sanction was granted by the Principal Commissioner on 9th March, 2018 whereas the reasons appeared to have been recorded on 16th March, 2018. Thus, nullifying the sanction granted by the Principal Commissioner.

5 On the other hand, Counsel for the Revenue opposed the Petition, contending that, the issue raised by the Assessing Officer in the reasons recorded, was never decided by him in the original assessment proceedings. This is, therefor, no case of change of opinion. What effect, the additions may have on the assessee's tax liability, cannot be foreseen at this stage. He pointed out that copy of reasons produced and annexed at Exh.N conveys the reasons recorded and it also records in para 7 thereof the factum of sanction obtained from competent authority. This would not mean that the reasons were recorded on 16th March, 2018 as contended. More importantly, Counsel contended that mere production before the Assessing Officer all books of accounts or other evidence from which material evidenced for due diligence, have been discarded by the Assessing Officer, will not amount to full and true disclosure within the meaning of first proviso to Section 147 of the Act. He, of course, relied on Explanation 1 to Section 147 of Act.

6 Having heard the learned Counsel for the parties and having

perused the facts and documents on record, we may analyze the reasons recorded by the Assessing Officer. Paragraphs 2 and 3 of the reasons recorded form foundation of the belief of the Assessing Officer that, income chargeable to tax, has escaped assessment. In these paragraphs, the Assessing Officer pointed out that, assessee during the period relevant to Assessment Year, had made payments to its partner-company HSBC Holdings Plc, United Kingdom for usage of common platform. However, on said expenses, tax was not deducted at source in terms of Section 195 of the Act. Therefore, the expenditure to the tune of Rs.65.67 Crores had to be disallowed as per Section 40(a)(i) of the Act. He further records that, that is how he has treated the expenditure by passing Assessment Order for the Assessment Year 2013-14. In paragraph 5, Assessing Officer recorded as under:-

“It is true that the assessee company 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, he goes on to record that, the assessee had not truly and fully disclosed all material facts necessary for assessment.

7 We fail to see how the Assessing Officer can sustain his contention of lack of true and full disclosure by assessee. Plain facts of the case are that, the assessee had, even as admitted by the Assessing Officer, filed full details, particulars, and audited accounts along with the return, in which, the payments in question, were duly reflected. The onus of the assessee to make disclosure would end upon such disclosure of primary facts. It is well settled, through series of judgments, starting from the Apex Court decision in *Calcutta Discount v/s. ITO 41 ITR 191*, the

responsibility of the assessee is to disclose primary facts. What further enquiring, inference and in law is to be drawn from said facts, is fully within the realm of the Assessing Officer's jurisdiction.

8 In paragraph 3 of the reasons, in order to support lack of true and full disclosure, the Assessing Officer referred to the fact that, the assessee had not on its own disallowed expenditure in terms of Section 40(a)(i) of the Act. Thus, Assessing Officer expects the assessee to make the disallowance involuntarily to be able to claim full and true disclosure.

9 To reiterate the entire reasons recorded by the Assessing Officer proceeded on material already on record. It is not the case of the Assessing Officer that after completion of the original scrutiny assessment, he came upon some additional or alien material which had an effect on taxability of the expenditure in question.

10 The Assessing Officer in his reply has admitted that the assessee had filed Form 3 CEB, in which, the expenditure in question was duly reflected. In fact, as pointed out by the Counsel for the Petitioner, such expenditure also came up for scrutiny during the enquiry in relation to the transfer pricing.

11 In absence of lack of full and true disclosure on the part of the assessee, the Assessing Officer could not have re-opened the assessment by issuing impugned notice, which was done after four years from the end of the relevant Assessment Year.

12 In view of this conclusion, it is not necessary to examine the Petitioner's second contention of no income chargeable to tax, having escaped assessment, which would require us to take into account various contentions such as - whether the order of Commissioner (Appeals) has achieved finality and whether after notionally adding the expenditure referred to in the reasons recorded, the Petitioner-Company would still continue to be governed by the MAT provisions.

13 However, we do not accept the third and forth contentions of the Counsel for the Petitioner. Firstly, admittedly, the present issue was not examined by the Assessing Officer during original scrutiny assessment and, therefore, he had not formed any opinion at this stage. Secondly, the communication of reasons contained in paragraph 7 refers to the sanction order of the Principal Commissioner which was granted on 9th March, 2018. This communication is dated 16th March, 2018 which does not mean that the reasons were recorded on 16th March, 2018 .

14 In the result, **Petition** is **allowed**. Impugned notice is set aside.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)