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

WRIT PETITION NO.7693 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 Chanderpal with Ms. Pragya Chandra, for the Respondents.

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

P.C:-

Heard learned Counsel for the parties for final disposal of this Petition.

2 Petitioner has challenged the notice of re-opening of an assessment dated 16th March, 2018, seeking to re-open the assessment for the Assessment Year 2012-13. This notice was issued beyond a period of four years from the end of the relevant Assessment Year. In order to do so, Assessing Officer had recorded the detailed reasons to which reference may be given at a later stage. Petitioner raised objections which came to be dismissed by the Assessing Officer by an order dated 31st May, 2018.

3 In Writ Petition No.7699 of 2018, we had considered various

issues which overlap in this Petition. Paragraphs 2 and 3 of the reasons recorded in the present case, were same as in the Writ Petition No.7699 of 2018. We had set aside the notice of re-opening of an assessment, making following observations:-

> *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.*
>
> *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.*
>
> *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.*
>
> *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.*

> *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.*
>
> *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.*

4 In the present Petition, in the reasons recorded, the Assessing Officer has raised additional element of income chargeable to tax having escaped assessment, which reads as under:-

> *“ Further, on examination of case records, it is gathered that in the instant case scrutiny assessment was completed on 10/03/2016 determining total income at Rs.37,97,95,46,60/- under normal provisions of the Act and book profit was computed at Rs.3,82,81,87,718/- u/s. 115JB of the Act. It is further noted that the assessee company had claimed MAT credit of Rs.46,55,35,703/- out of the total brought forward MAT credit of Rs.139,82,00,851/- and the balance MAT Credit of Rs.93,26,65,148/- had been carried forward in subsequent years as per return of income. In this regard, on examination of computation of income filed along with return filed for A.Y. 2012-13, it is seen that the assessee company had claimed deduction of Rs.103.71 lakh on account of state taxes paid in USA under both the provisions. Under the provisions of the Income Tax Act, 1961 and also in view of some judicial pronouncements, the state taxes paid in USA being in nature of income tax were not allowed to be reduced while computing*

total income either under normal provisions or u/s. 115JB of the Act. As per section 115JB of the I.T. Act, in case of a company, where the tax payable under the normal provisions of the Act is lower than the tax payable at the prescribed rate on book profit, such book shall be deemed to be the total income of the assessee company. Further, Explanation 1 below sub-section 2 of Section 115JB prescribed the certain adjustment to be carried out for computing book profit. The specified adjustment stipulates that income tax paid or payable shall be added to book profit. Further, Authority of Advance Rulings in the case of Bank of India (AAR No. 732 of 2006) has held that the term 'income tax' includes any taxes paid in foreign countries. Also, ITAT Mumbai in the case of Tata Sons Lt., v/s. DCIT 2(3) (in ITA No.4978/Mum/04) held that state income taxes paid in US are not allowable as deduction as they are in nature of taxes on income. However, as per the Tribunal, assessee can claim tax credit u/s. 91 of the Act restricted to actual income tax liability in India in respect of income on which taxes have been so paid abroad. The above view has been reaffirmed recently in the order of Hon'ble ITAT, Mumbai Bench in the case of Deputy Commissioner of Income Tax & Anr. V/s. Tata Consultancy Services Ltd. & Anr. (2016) 46 ITR (Trib.) 0394 (Mumbai) pronounced in November, 2015. Further, as per section 115JAA (5) of the I.T. Act, set off in respect of brought forward tax credit shall be allowed for any assessment year to the extent of the difference between the tax on the total income and the tax which would have been payable under the provisions of sub-section (1) of Section 115JA or section 115JB, as the case may be for that assessment year. Here, in the instant case, the assessee company while determining book profit u/s. 115JB of the Act had not added back the amount of Rs.103.71 lakhs debited by it in the profit and loss account towards states income taxes paid in USA and had also not disallowed the amount of state taxes paid in USA, being an disallowable expenditure in the computation of normal income on its own while filing return of income for A.Y. 2012-13. Further, in the regular assessment, above issues were not considered at all. I, therefore, have reasons to believe that income to the tune of Rs.103.71 lakhs 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 since it had not disclosed fully and truly all material facts necessary for the assessment for A.Y. 2012-13 as noted herein above."*

5 In this Petition, all we find that the assessee had made full and true disclosure. The Assessing Officer himself records that "*further, on examination of case records, it is gathered that ... ...*" Thus, in clear terms, the Assessing Officer is proceeding on the basis of materials already on record.

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

(M.S.SANKLECHA,J.) **(AKIL KURESHI,J.)**