R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3364 OF 2018

Underwater Services Company Ltd .. Petitioner

Versus

Deputy Commissioner of Income Tax,
Central Circle - 5(3) & Ors. .. Respondents

....

- V. Sridharan, Sr. Counsel a/w Mr. S. Sriram, Mr. Mayank Thosar i/by B.V. Jhavaeri for the Petitioner
- Mr. Charanjeet Chanderpal a/w Ms. Namita Shirke and Ms. Pragya Chandra for the Respondents

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CORAM : AKIL KURESHI &
B.P. COLABAWALLA, JJ.

DATE : FEBRUARY 1, 2019.

P.C.:

1. Heard learned counsel for the parties for final disposal of the petition.

2. Petitioner has challenged a notice dated 28.3.2018 issued by respondent No. 1 - Assessing Officer under Section 148 of the Income Tax Act, 1961 ("the Act" for short).

3. Brief facts are as under:-

(a). The petitioner is a company registered under the

Companies Act and is engaged in the business of rendering services relating to operations and maintenance of Single Point Mooring installations on the high seas. For the assessment year 2011-12, the petitioner had filed return of income on 30.9.2011 declaring total income of Rs. 4.32 crore (rounded off). The return was taken in scrutiny by the Assessing Officer. He passed the order of assessment under Section 143(3) of the Act on 31.12.2013. In such order, he determined the petitioner's total income after making disallowance of a sum of Rs. 4.42 crore (rounded off) which included the expenditure incurred under the head 'sales promotion' and 'gift expenses'.

(b). To reopen such assessment, the Assessing Officer has issued the impugned notice. In order to do so, he had recorded the following reasons:-

> "1. M/s. Samson Maritime Limited (SML) is a ship owning company and the assessee i.e M/s. Underwater Services Co. Ltd. (USCL) is a service enterprise. O & M contract as well as Single Point Mooring SPM are been undertaken by USCL. For providing these services, USCL hires charter vessels from SML, its 100% holding company on day rate charter basis as the assessee does not own such vessels.

2. The assessee has filed return of income declaring the total income of Rs. 43279942/- on 30.9.2011 and the same was processed u/S. 143(1) of the Act on 13.1.2012.

3. In this case, information has been received from DDIT(Inv.), Mumbai vide letter No. DDIT(Inv.) Unit 3(3)/Information-USCL/2017-18 dated 20.3.2017 stating that search action u/S. 132 of the IT Act was conducted on the assessee wherein it was seen that the assessee had not bench marked its transaction with **Associate Enterprises (AE) or Closing Connected Person.** In accordance with the transfer pricing provision or section 115VI(8) of the I.T. Act and therefore, unreasonable high payments were made with regards to the Fair Market Value of hire charges by the assessee to its holding company M/s. Samson Maritime Ltd (SML).

4. From the information received, it is seen that the assessee has paid hire charges during FY 2010-11 pertaining to AY 2011-12 to its AE Samson Maritime Ltd of Rs. 18,71,03,093/-. It is further observed from the Transfer Pricing Study report that SML is treated as a tested party and the OP / OC earned by SML on charter hire of vessel to USCL is bench marked to the OP / OC earned on the charter hire of vessel to Reliance Industries Ltd (RIL) being a not AE. However, it is further observed that the revenue business from RIL to SML is a small percentage of the total revenue generated by SML, therefore, the comparable and its margin is very small and inconsequential to consider for bench marking and is therefore not reliable comparable for the entire transaction.

In addition to is, it is also seen that Samon Maritime Ltd. indulged in shifting of profit from hands of USCL to SML as effective rate of tax is much lower in hands of SML as compared to USCL as per the provisions of section 115VI(8) of the I.T. Act.

5. Further in this case information was also received that the assessee had booked expenditure under the head Gift & sales promotion and victualling expenses amounting to Rs. 1413462/-. During the post search proceedings, the assessee had failed to provide the list of persons to whom the gift were presented and for the said reason, I have reason to believe that the said expenses as per the provisions of section 37(1) of the I.T. Act are not allowable in the hands of the assessee and the same has escaped assessment. Further, the victualling expenses are stated to be incurred in cash.

6. As there is failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, the undersigned had reason to believe that the income chargeable to tax amounting to Rs. 18,85,16,555/- has escaped assessment for A.Y. 2011-12, within the meaning of section 147 of the I.T. Act, 1961.
Provisions for issuance of notice u/s. 148 as per the provisions of Sec. 151(2) of the I.T. Act, 1961 is solicited."

(c). Upon being supplied such reasons, the petitioner raised objections to the notice of reopening of assessment on 25.10.2018. Such objections were rejected by the Assessing Officer by order dated 19.11.2018. Hence, the petition.

4. Taking us to the reasons recorded by the Assessing Officer, learned counsel for the petitioner pointed out that the reasons cite two grounds for reopening the assessment. First is with respect to the Arm's Length Price of the transaction entered into by the petitioner with its Associated Enterprise ("AE" for short) namely one Samson Maritime Limited (hereinafter referred to as 'Samson') alleging that in the process, the assessee had indulged in shifting of its profits to said Samson as effective rate of tax is much lower in the hands of Samson. The second ground sought to be pressed in service by the Assessing Officer is of gift and sales promotion expenses amounting to Rs. 14.13 lacs (rounded off).

5. Learned counsel submitted that with respect to the first ground, the issue was minutely examined by the Assessing Officer during the original scrutiny assessment. The transfer pricing provisions were invoked and applied. The assessee had made representation why the transaction did not lead to any shifting of profit by the assessee to its AE. Only upon being satisfied by said explanation that the Assessing Officer passed the order of assessment making no disallowance or additions on this ground. Learned counsel submitted that there was no additional material found during the search which would in any manner show that the disclosures made by the assessee during the original scrutiny assessment were incorrect. He, therefore, submits that the issue which was scrutinized could not have been reopened that too by issuing notice beyond the period of four years from the end of relevant assessment year.

6. On the question of disallowance of expenditure towards gift items, the learned counsel for the petitioner submitted that the petitioner had voluntarily reduced the expenditure by 50% and the remaining 50% was disallowed in the scrutiny assessment. The petitioner had challenged said disallowance before the Commissioner (Appeals) and has in fact succeeded in such appeal. Learned counsel, therefore, submitted that on the ground of merger, such an issue could have been raised by the Assessing Officer in the notice of reopening of assessment.

7. Learned counsel for the petitioner pointed out that in the reasons recorded, the Assessing Officer has stated that the return filed by the petitioner was accepted without scrutiny under Section 143(1) of the Act. It was on the basis of such reasons that the sanction for reopening of assessment was granted. The Assessing Officer as the authority recording the reasons and the Sanctioning Authority completely misdirected themselves recording the incorrect factual position namely that this was a case in which no scrutiny assessment had been undertaken. According to the learned counsel, this would demonstrate total non application of mind on the part of the Assessing Officer and the Sanctioning Authority.

8. On the other hand, learned counsel Mr. Chanderpal opposed the petition contenting that it was during the search operation that the petitioner's modus operandi of transferring its profit to its AE came to light. Merely because the petitioner had supplied the entries and documents and which were also examined by the Assessing Officer, would not preclude him from relying upon the material collected by the investigation wing during the search to reopen the assessment. He submitted that mere disclosures in the return and during the assessment would not prevent the Assessing Officer from reopening the assessment if it is found that such disclosures were incorrect.

9. As noted, the reasons recorded by the Assessing Officer cites two grounds for reopening the assessment. With respect to the action of the assessee to transfer its profit to its AE, the reasons refer to the search operation carried out against the assessee. However, the reasons, nowhere either contain or cite any material found during such search which would show that the disclosures made by the assessee during the original assessment proceedings were incorrect. In other words, the Assessing Officer was merely proceeding on the basis of the documents already on record. This is, therefore, not a case where after completion of assessment, the Departmental Authorities came in possession of new or additional material prima facie establishing that the declarations were not true and full. It is undoubtedly true as canvassed by the learned counsel for the respondent that even in case where the assessment has been completed after scrutiny and the period of four years lapsed from the end of relevant assessment year, the Revenue could still open the assessment if it is shown that the Assessing Officer was in possession of new or additional material suggesting that the disclosures were not true or full and that this led to the assessee's income chargeable to tax escaping assessment. This is, however, not a case of that nature. In the reasons, there is a mere mention of search operation. There is no indication of any new material found during such search suggesting that disclosures of the assessee were false. In plain terms, the Assessing Officer could not have relied on this ground to reopen the assessment.

10. There is yet another reason why we cannot permit the Assessing Officer to rely on this ground. This closely overlaps with the earlier discussion. The Assessing Officer during the original assessment had examined the entire transaction of the petitioner with its AE. In response to the query raised, the petitioner had given detail replies. In one such reply dated 26.12.2013, the petitioner inter alia provided following information:-

> "3. Justification for Inter company transaction - Detailed submission is attached herewith.
> We hope that above will clarify the nature of expenses."

Along with this letter, the petitioner had annexed a set of submissions. On the issue this is what the petitioner had represented to the Assessing Officer:-

> "5. It bears mention that SML is covered under tonnage tax scheme under Chapter XXIG of the Income Tax Act. As per Section 115VZB, SML has to demonstrate that it has not entered into any transaction or arrangement which produces to the tonnage tax company more than ordinary profits which might be expected to arise from tonnage tax activities.
>
> This condition has been substantiated by SML in its assessment proceedings for A Y 2011-12 as manifested in the acceptance of its tonnage tax income in the assessment framed under Section 143(3) of the Act. A copy of the assessment order is enclosed together with the copy of the chart of submissions made in the course of proceedings of SML together with the copies of submissions made in the earlier years.
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> These facts should also validate the amounts of charter hire charges paid by the assessee to SML being the counter-reflection of the acceptance of the validity of the very same charter hire charges earned by SML from the assessee in the context of the tonnage tax scheme."

11. It was after such scrutiny that the Assessing Officer passed the order of assessment in which he made no additions on this ground. In absence of any new or additional material available with him, any attempt on the part of the Assessing Officer to disturb such assessment would be based on mere change of opinion and clearly impermissible in law.

12. The second ground sought to be raised by the Assessing Officer in the reasons is possible of summary disposal. The record would show that out of expenditure in question, the assessee had disallowed 50% voluntarily. The remaining 50% was disallowed by the Assessing Officer. This was subject matter of the appeal before the Commissioner. On the ground of merger, this issue could not have been raised by the Assessing Officer for reopening the assessment. Even otherwise, where the Assessing Officer himself had disallowed the expenditure in its entirety, we do not understand how he can seek to reassess the expenditure which in the original assessment he disallowed in its entirety.

13. For all these reasons, the impugned notice is quashed.

14. The petition is allowed and disposed of accordingly.

[B.P. COLABAWALLA, J.] **[AKIL KURESHI, J]**