

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

WRIT PETITION NO.3447 OF 2018

Hamilton Housewares Pvt.Ltd .. Petitioner
vs

1. Deputy Commissioner of Income Tax-Dadra }
Nagar Haveli.
2. Principal Commissioner of Income Tax-]
Valsad.
3. Union of India, New Delhi } .. Respondents

Mr.S.Sriram with Mr.B.V.Jhaveri, Mr.Mayank Thosar
for Petitioner
Mr.Sham Walve for Respondent nos.1 and 2.

CORAM : AKIL KURESHI &
M.S.SANKLECHA, JJ
DATE : 1st MARCH, 2019

Per Akil Kureshi, J

1. Heard learned counsel for the parties for final disposal of the petition.
2. The petitioner has challenged the petition of re-opening of assessment dated 26.3.2018 issued by the respondent no.1-Assessing Officer.

Brief facts are as under:

3. The petitioner is a private limited company. The petitioner had filed a return of income for Assessment year 2012-13 which was taken in scrutiny, by the Assessing Officer who passed an order of assessment under section 143 (3) of the Income Tax Act, 1961 (*for short,' the Act'*) on 27.10.2014. In order to re-open such assessment, he issued the impugned notice which as can be seen, was done beyond the period of four years from the end of the relevant Assessment year. In order to do so, he had recorded the following reasons: Relevant portion of which read thus:

“ Your case has been re-opened for Scrutiny 147 of the Act for A.Y.2012-13 vide this office notice u/s 148 of the Act dated 26.03.2018. The reasons on which your case has been re-opened for Scrutiny u/s 147 of the I.T.Act 2013 are as under :

1. Brief Details of the assessee:-

The assessee Company i.e M/s Hamilton Houseware Pvt.Ltd is engaged in the business of manufacturing 86 trading of steel/plastic household goods and glassware/apalware goods. The return of income for the A.Y.2012-13 was filed on 28/09/2012, declaring a total income of Rs.20,50,58,020/-.The said return of income was processed under section 143 (1) of the Act. The case was selected for scrutiny and assessment u/s 143 (3) of the I.T.Act was completed on 27.10.2014 assessing the total income at Rs.20,92,54,758/-. Thereafter, on 31/03/2017 the Pr.CIT Valsad passed an order u/s 263 setting aside the Asst.Order passed on 24/10/2014. Accordingly, on 28/12/2017 an order us/ 143 r.w.s.263 of the I.T.Act was passed assessing the total income of the assessee of Rs.21,67,76,922/- making a total addition of Rs.,1,62,00,438/- to assessee's total income.

2. Brief details of information collected/received by the AO:-

The assessee received Rs.3,09,40,000/- as loan from Rupani Spinning Mills Private Limited in which the share holder (Shri Ajay D.Vaghani) was having

16% voting rights and also was having substantial interest of more than 20% in the share capital of assessee company (20.02%). Further, Rupani Spinning Mills Pvt.Ltd was having accumulated profit of Rs.1,94,09,682/- (including profit). Hence, all the condition mentioned in section 2(22) w.e.f. current year applicable in this case and deemed dividend to the extent of accumulated loan received whichever is less was required to be taxed.

3. Analysis of information collected/received:

The perusal of the details available on records revealed that the asset received Rs.3,09,40,000/- as loan from Rupani Spinning Mills Ltd in which the share holder of assess company Shri Ajay D.Vadhani having 16 % voting rights, Shri Ajay Rupani was also having substantial interest of more than 20% in the share capital of the assessee compare (20.02%). Further, Spinning Mills Pvt.Ltd was having accumulated (profit of Rs.1,94,09,682/ (including current year profit). However, the assessee had stated that Rupani Spinning Mills Pvt.Ltd was having lending of money as a substantial part of business of the company. The same was not tenable as on verification of the Profit and loss account of Rupani Spinning Mills Pvt.Ltd for the year ended on 31st March 2012 it was noticed that the main source of income of Rupani Spinning Mills Pvt Ltd was from Business Centre income of Rs.1,50,37,500/-/. As against this, interest income was of Rs.13,64,720/- only. (Interest was paid by the assessee company only, as seen from statement D of CD report). Hence, the substantial part of business was not lending of loan but business centre income. Hence, assessee's case is not covered by the exception clause (ii) to SA.2 (22) of the Act. Hence, the deemed dividend of Rs.1,94,682/- was required to be taxed.

4. Enquiries made by the AO as sequel to information collected/received:-

5. Findings of the AO:-

It is seen from the above that the assessee received Rs.3,09,40,000/- as loan from Rupani Spinning Mills Pvt.Ltd in which the shareholder (Shri Ajay D. Vaghani) was having 16% voting rights and also was having substantial interest of more than 20% in the share capital of assessee company (20.02%). Further Rupani Spinning Mills Pvt.Ltd was having accumulated profit of Rs.1,94,09,682/- (including current year profit). Hence, all the condition mentioned in Section 2(22) (e) were applicable in this case and the assessee was liable to be taxed on the deemed dividend to the extent of accumulated profits or loan received whichever is less. Also, assessee's case is not covered by the exception clause (ii) to S.2(22) of the Act, as the substantial part of the assessee's business was not lending of loans but business centre income.”

4. Upon being supplied such reasons, the petitioner raised objections to the notice of re-opening of assessment under a communication dated 13.11.2018. Such objections were disposed of by the Assessing Officer by an order dated 19.11.2018 upon which, this Petition is filed.

5. Learned counsel for the petitioner took us through the reasons, recorded by the Assessing Officer and raised the following objections:

(i) The impugned notice has been issued beyond the period of four years from the end of the relevant Assessment year; There was no failure on the part of the assessee, to disclose a true and fair material facts;

(iii) The ground on which the Assessing Officer wishes to re-open the assessment was minutely examined by him, during original assessment and any attempt on his part to re-open the assessment, would be based on mere change of opinion;

6. On the other hand, learned counsel for the revenue, opposed the petition contending that the Assessing Officer has recorded elaborate reasons for issuing the impugned notice. These reasons make out a *prima facie* case of income chargeable to tax having escaped assessment.

7. Having thus, heard learned counsel for the parties, we find

that the Assessing Officer's reasons for re-opening the assessment are based entirely on one ground, namely that the assessee had received a sum of Rs.3.09 crores (rounded off) of a loan from one Rupani Spinning Mills Pvt.Ltd and looking to the share structure of the two companies, such transaction would fall within the fold of section 2 (22) (e) of the Act, and had to be treated as deemed dividend in hands of the assessee.

8. First and foremost, the Assessing Officer in the reasons recorded, has proceeded entirely on the material already brought on record, during original assessment. There was thus, no additional material available with the Assessing Officer, on the basis of which, he could have formed a belief that income chargeable to tax has escaped assessment. In clear terms, there was no failure on the part of the assessee to disclose true and full material facts. Even the Assessing Officer in the reasons recorded, has not demonstrated in any manner, how this important requirement of section 147 of the Act, was satisfied. In the reasons, he agrees that the assessee had produced Books of Accounts, Annual Reports and Audited Profit and Loss Accounts and Balance Sheets and other documents.

9. One more ground on which the impugned notice cannot sustain is that, during scrutiny assessment, the Assessing Officer had raised various queries which, were duly answered by the assessee. In a communication dated 8.10.2014, replying to the queries of the Assessing Officer, the petitioner besides other information, had provided shareholding pattern of the companies from and to whom, loans and advances were obtained or given ? The relevant observations in this behalf reads thus:

“2. Shareholding pattern of the companies from/to whom Loans & Advances have been obtained & given.

In this regard, we request your goodself to kindly refer Annexure # 1 for details of Unsecured Loans taken during the year. Please also find enclosed, details of the Shareholders of the Company from whom Unsecured Loans have been taken by the Company enclosed and marked as Annexure # 1A.

Further, with respect to the applicability of the provisions of Section 2 (22) (e) we would like to humbly submit before your good-self a justification, enclosed and marked as Annexure # 1B on as to why the provision of deemed dividend u/s 2 (22)(e) are not applicable.”

10. Along with his communication, the petitioner had annexed Annexures, one of them contained details of secured and unsecured loans, taken from various lenders, and one of which was Rupani Spinning Mills Pvt.Ltd from whom during the period, relevant to the Assessment year, in-question, a loan of Rs.3.09 crores was shown to have been received. Further, the petitioner had given detailed reasons why such loan cannot

be treated as deemed dividend under section 2 (22) (e) of the Act ?. The petitioner's contentions in this respect, were as under :

f) Justification with regards to Non-applicability of Deemed Dividend to Loans taken from Rupani Spinning Mills Private Limited (RSMPL)

In respect of the loans taken from RSMPL, we would like to submit before your good-self that there are Common Shareholders in the two Companies and such shareholders have substantial interest of more than 20% in the share capital of the Assessee Copmpany and also hold more than 10% of the voting power in HCPL.

However, the provisions of Deemed Dividend u/s 2 (22) (e) of the Act shall not be applicable under S. 2(22) (ii) of the Act it has been stated that “Dividend” does not includes any advance or loan made to a shareholder (or the said concern) by a company in the ordinary course of its business,where the lending of money is a substantial part of the business of the company. In this context, please find attached a copy of the Balance Sheet and Profit & Loss Account of RSMPL enclosed and marked as Annexure # 1F, where it can be noted that the Company had invested almost 84% of its Assets,as reflected below, into the business of lending which was a significant part of its business.”

Particulars	Amount (Rs.)
LOANS & ADVANCES GIVEN	3,16,32,948
Share Capital	25,00,000
Profit & Loss Account	1,94,09,682
Long Term Borrowings	1,56,32,520
TOTAL CAPITAL EMPLOYED	3,75,42,202

11. It was after such detailed scrutiny of the issues at hand, that the Assessing Officer in the order of assessment made no addition. Under the above circumstances, it was not open for the Assessing Officer to rely upon this ground to re-open assessment by issuing the impugned notice.

12. In the circumstances, the impugned notice is quashed and set aside.

Petition is allowed and disposed of.

(M.S.SANKLECHA, J)

(AKIL KURESHI, J)