

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

WRIT PETITION NO.3491 OF 2018

Hamilton Housewares Pvt. Ltd.

... Petitioner

V/s.

Deputy Commissioner of Income-tax and ors. ... Respondents

Mr.S.Sriram with Mr.B.V.Jhaveri with Mr. Mayank Thosar for the
Petitioner.

Mr.Sham Walve for Respondent Nos.1 and 2.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : MARCH 01, 2019.**

P.C.:-

1. Petitioner has challenged a notice of re-opening of assessment dated 28th March, 2018 issued by the respondent No.1-Assessing Officer to reopen the petitioner's assessment for the assessment year 2013-14.

2. Brief facts are as under:-

Petitioner is a private limited company. For the assessment year 2013-14, the petitioner had filed return of income on 26th September, 2013 declaring total income of Rs.12.88 crores (rounded off). Such return was taken in scrutiny by the Assessing Officer. He passed order under section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 30th March, 2016. To reopen such assessment, the Assessing Officer issued the impugned notice. In order to do so, he had recorded reasons, relevant portion of which reads 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 & trading of steel/plastic household goods and glassware/opal ware goods. The return of income, for the A.Y. 2013-14, was filed on 30/11/2013, declaring a total income of Rs.12,88,15,390/-. 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 30/03/2016, assessing the total income at Rs.13,28,67,218/-.

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

During the period relevant to the A.Y. 2013-14, the assessee M/s Hamilton Houseware Pvt. Ltd. accepted a loan of Rs.1,02,00,000/- from M/s Rupani Spinning Mills Private Limited, in which the shareholder of the assessee company, Shri Ajay D.

Vaghani, was having 16% voting rights and was also having substantial interest of more than 20% in the share capital of assessee company (20.02%). Hence, all the condition mentioned in section 2(22)(e) were applicable in this case and deemed dividend to the extent of accumulated profits or loan received whichever is less was required to be taxed.

3. Analysis of information collected/received:-

Perusal of the details available on records revealed that the assessee received Rs.1,02,00,000/- as loan from M/s Rupani Spinning Mills Private Limited in which the shareholder of the assessee company, Shri Ajay D.Vaghani, was having 16% voting rights. Shri Ajay Rupani was also having substantial interest of more than 20% in the share capital of the assessee company (20.02%). Hence, the deemed dividend of Rs.1,02,00,000/- 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.1,02,00,000/- as loan from Rupani Spinning Mills Private Limited in which the shareholder (Shri Ajay D. Vaghani) was having 16% voting rights and was also having substantial interest of more than 20% in the share capital of assessee company (20.02%) . 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 assessee's business was not lending of loans but business centre income.

6. Basis of forming reason to believe and

details of escapement of income:-

The assessee was required to be taxed on the deemed dividend of Rs.1,02,00,000/- to the extent of accumulated profits or loan received whichever is less, as per section 2(22)(e) of the I.T. Act. The assessee therefore should have added back the amount of Rs.1,02,00,000/- to its total income of the A.Y. 2013-14, in the Computation of Total income. As the assessee failed to do so, I have reason to believe that the assessee has failed to disclose fully and truly all material facts necessary for its assessment within the meaning of section 147 of the Act and assessee's income to the extent of Rs.1,02,00,000/- has escaped assessment.”

3. Upon being supplied such reasons, the assessee raised objections to the notice of reopening of assessment under a communication dated 15th October, 2018. Such objections were rejected by an order dated 19th November, 2018. Hence, this petition.

4. Appearing for the petitioner learned counsel Shri Sriram raised following contentions:-

(i) The ground on which the impugned notice has been issued was examined by the Assessing Officer during the original scrutiny assessment.

(ii) The Assessing Officer relies on an order of the Supreme Court making reference to the Larger Bench. As on today the law laid down by the Supreme Court in case of **Commissioner of Income Tax Vs. Madhur Housing and Development Company**¹ continues to hold the field.

(iii) The Assessing Officer has acted under the insistence of the audit party and issued the impugned notice which is clearly bad in law.

5. On the other hand, the learned counsel Shri Walve opposed the petition contending that during the scrutiny assessment the question of applicability of Section 2(22)(e) of the Act was not examined in relation to the loan transaction in question on the basis of which the impugned notice is issued. He further submitted that the notice has been issued within the period of four years from the end of the relevant assessment year by the Assessing Officer after recording proper reasons. The petition may therefore be dismissed.

1 (2018) 401 ITR 152

6. Having heard learned counsel for the parties, perusal of the reasons would show that the Assessing Officer wishes to invoke the provisions of Section 2(22)(e) of the Act, in relation to a loan of Rs.1.02 crores (rounded off) received by the assessee during the relevant accounting period from one M/s Rupani Spinning Mills Private Limited. The Assessing Officer has referred to the shareholding patterns of the two companies in this context.

7. With this background, we may refer to the exchange between the Assessing Officer and the Petitioner during the scrutiny assessment. In response to the queries raised by the Assessing Officer, the petitioner had in a communication dated 24th November, 2015, besides others supplied following details:-

Sr. No.	Para No. of your Notice	Particulars
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5	13	Details of Unsecured Loans Outstanding as on 31st March 2013 alongwith Name Address and Pan No. In this regard, we request your goodself to kindly refer Annexure # 5 to this Submission, wherein the Name, Address and PAN No. of the parties from whom Unsecured Loan has been taken by the Assessee Company has been given. Confirmation from the parties has also been attached herewith. With respect to the details of the new loans taken during the year, we request your goodself to kindly allow us some further time to submit the same.
7	16	Details of Secured Loans taken by the Company. In this regard, we request your goodself to kindly refer Annexure #7 to this Submission wherein details of Secured Loans taken during the year alongwith details of securities offered against such loans. We have also enclosed to the aforesaid annexure, the Sanction Letters of certain credit facilities taken by the Assessee Company.”

8. Further information was supplied under letter dated 10th December, 2015, which included the following:-

Sr. No.	Para No. of your Notice	Particulars

4	8	Details of Debtors/Creditors having outstanding balance more than Rs.1 Lakhs, in the Format Specified by your goodself. A statement showing details of Debtors and Creditors of which an amount of Rs.1 Lakh or more is outstanding as on 31.03.2013 is attached herewith and enclosed as Asnnexure #3 to this submission as per the format specified by your goodself.
5	9	Please furnish the details of capital subsidy/MODVAT received during the year under consideration in acquisition of fixed asset. Also explain whether the amount received has been reduced from the cost of acquisition fixed assets for claiming depreciation. A statement showing details of capital subsidy/MODVAT received during the year under consideration on acquisition of fixed assets is attached herewith as Annexure #4 to this Submission. Further, MODVAT availed on capital goods have been reduced from the cost of acquisition of fixed assets.

9. Yet again on 29th February, 2016 the petitioner wrote to the Assessing Officer supplying following further details:-

“1. Q#13- Details of unsecured loan alongwith the ledger copies of all parties from whom unsecured loan outstanding on the first day of the previous year.

We request your goodself to kindly refer Annexure # 5 to submission # 2 dated 24th November, 2015, for the details of unsecured loan outstanding as on 31 March 2013. As required by your goodself the ledger copies of parties from whom unsecured loan was taken and outstanding as on the first day

of previous year relating to current assessment year are enclosed as Annexure # 1 to this submission for your kind perusal.

3. Q #30- Please furnish the share holdings pattern as on 01.04.2012 to 31.03.2013 name and address of shareholders and furnish the name and address of the directors copies of ledger accounts of all the directors and shareholders alongwith narration of each transactions and copies of I.T. return alongwith annexure and bank account details for the considering year.

We request your goodself to refer Annexure #10(for the names, address of shareholders and shareholding pattern) and Annexure #11 (for names and address of directors) to Submission #2 dated 24th November, 2015, along with it your goodself has asked for the copies of ledger accounts and bank details. We request your goodself to also refer annexure #5 to Submission #4 dated 25th February, 2016, in the cases of directors and /or shareholders where the assessee company has entered into any transaction viz. loan, interest, remuneration and other expenses, and a statement showing bank details.

Further as required by your goodself the ledger copies of the shareholders along with the acknowledgement of Return of Income and a statement showing bank details is attached and marked as Annexure #3 to this Submission.”

10. Perusal of such information would clearly establish that the loan transaction in question was specifically brought to the notice of the Assessing Officer during the various communications made

by the petitioner. Ordinarily, it may be possible for the Assessing Officer to argue that despite such disclosures the Assessing Officer had no occasion to examine the applicability of Section 2(22)(e) of the Act. However, for two reasons such stand would not be valid in the present case. Firstly, in addition to supplying necessary details of the loan transactions of the assessee, in the letter dated 29th February, 2016 the assessee was responding to the demand of the Assessing Officer for furnishing shareholding pattern as on 1st April, 2012 to 31st March, 2013, name and address of the shareholders and name and address of the Directors with copies of ledger accounts of all Directors and shareholders alongwith narration of each transaction and copies of income tax return and the bank account details. Thus, the only angle or element in raising such a question could be to test whether any of the loans taken by the assessee during the year under consideration would be covered by the provisions of Section 2(22)(e) of the Act. This is more so since the very Assessing Officer in the immediately preceding assessment year, had examined the loan transaction between the petitioner and the said M/s Rupani Spinning Mills Private Limited with special focus

of Section 2(22)(e) of the Act. By separate order passed today in Writ Petition No.3447 of 2018, we had occasion to examine these documents in the context of the petitioner's challenge to the notice of reopening of assessment of the said assessment year. In the scrutiny assessment, the Assessing Officer in the said assessment year had at length collected materials in the context of the possible applicability of Section 2(22)(e) of the Act. Under the circumstances, in facts of the present case, we have no hesitation to come to the conclusion that this issue was duly scrutinized by the Assessing Officer in the original scrutiny assessment.

11. There is one more ground on which the impugned notice must be quashed. We may recall, the counsel for the petitioner had argued that the Assessing Officer was acting at the behest of the audit party. Such a ground was not taken in the petition. However, we had permitted the petitioner to raise the same in the rejoinder and provided sufficient time to the revenue to respond. This being a pure question of examination of contemporaneous documents, we had requested the counsel

for the revenue to make available for our perusal the original file of the department, which he had so done. The perusal of the file would clearly show that the audit party had brought to the notice of the Assessing Officer the possibility of invoking Section 2(22)(e) of the Act in relation to the loan transaction in question. The Assessing Officer under a detailed reply dated 9th June, 2015 had opposed any such invocation of Section 2(22)(e) of the Act. He had given reasons why in his opinion Section 2(22) (e) of the Act was inapplicable. Despite this, upon further insistence by the audit party, impugned notice came to be issued. It is well settled through series of judgments that the decision to reopen the assessment must be on the basis of the belief found by the Assessing Officer. It may be open for the audit party to bring the relevant aspect to the notice of the Assessing Officer. However, thereafter it must be the independent decision of the Assessing Officer to reopen the assessment upon formation of his belief that income chargeable to tax had escaped assessment. Reference in this respect can be made to a decision of this Court in case of **Commissioner of Income-Tax Vs. Ranjan N. Aswani**¹.

1 (2018) 403 ITR 30(Bom)

12. Under the circumstances, we do not go into other contentions raised by the counsel for the petitioner. Impugned notice is quashed. Petition allowed and disposed of accordingly.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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