R.M. AMBERKAR
(Private Secretary)

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

WRIT PETITION NO. 3580 OF 2018

Forbes & Co Ltd, Mumbai .. Petitioner

Versus

The Assistant Commissioner of Income Tax 1(1)(2), Mumbai & Ors. .. Respondents

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- Mr. Madhur Agrawal i/by Mr. Atul Jasani for the Petitioner
- Mr. Suresh Kumar for Respondent Nos. 1 and 2

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : JANUARY 25, 2019.

P.C.:

1. At the request of the learned counsel for the parties, the petition is heard finally.

2. This petition under Article 226 of the Constitution of India challenges a notice dated 26.2.2018 issued under Section 148 of the Income Tax Act, 1961 ("the Act" for short). The impugned notice is seeking to reopen the assessment for the assessment year 2011-12.

3. For the subject assessment year, the petitioner filed its revised return of income on 30.3.2012 declaring loss of Rs. 10.76 crore. During the course of scrutiny proceedings, the petitioner had filed a letter dated 6.3.2014 wherein it had disclosed that the income earned by the petitioner on surrender of the shares under buy back-schemes of the subsidiary company is not chargeable to tax under Section 47(iv) and 47(v) of the Act as the said transactions are between the parent and the wholly owned subsidiary company. The Assessing Officer did not dispute the claim made by the petitioner in its letter dated 6.3.2014. The Assessing Officer thereafter passed an order on 21.3.2014 under Section 143(3) of the Act reducing the loss claimed by the petitioner from Rs. 10.76 crore to 2.71 crore.

4. On 26.2.2018, the impugned notice was issued seeking to reopen the assessment for assessment year 2011-12. The reasons recorded by the Assessing Officer reads as under:-

> " In this case, the assessee filed the return of income on 30.3.2012 for AY 2011-12 disclosing total income at Rs. (-) 10,76,84,249/-. The assessment was completed u/S. 143(3) on 21.3.2014 determining total income at Rs. (-) 2,71,86,775/-.

Thereafter, the total income was determined at Rs. (-) 10,76,84,249/- vide order dated 8.5.2017 giving effect to CIT(A) order dated 20.3.2017.

From the schedule"6" Investments (unquoted) to the balance sheet dated 31.3.2011, it is seen that the assessee surrendered 9615 equity shares of Volkart Fleming Shipping & Services Limited for Buy Back and 2,27,000 equity shares of Eureka Forbes Limited for buy back. On surrendering the shares for Buy Back, the assessee earned a profit of Rs. 16,23,84,125/- [Rs. 73,69,573 (VFSSL) + Rs. 15,50,14552 (Eureka Forbes Limited)]. This profit of Rs. 16,23,84,125/- from sale of investment is credited to the profit and loss account. This amount was claimed exempt as per Section 47(iv) and (v) of the Act in the computation of income.

The provisions of Section 46A of the I.T. Act 1961 deal with capital gains arising on purchase by company of its own shares or other specified securities and provide for taxation of the difference between the cost of acquisition and the value of consideration received by the shareholder or the holder of other specified securities shall be deemed to be capital gains arising to such shareholder.

The assessee has claimed exemption by virtue of provisions of section 47(iv) and 47(v) of the Act. However, the provisions of Section 47 are applicable to capital gains taxable under Section 45 of the Act. The provisions of Section 46A are special provisions which are attracted in the case of buy back. The provisions of Section 47 do not exclude the provisions of Section 46A in the circumstances mentioned in the various clauses of Section 47. Hence, the claim of exemption of Rs. 16,23,84,125/- arising on account of surrendering of shares for buy back is incorrect.

The issue of claim of exemption on capital gains arising on surrendering of shares for buy back, was not examined by the assessing officer nor any submissions were made by the assessee in this regard. Hence, this is not a case of change of opinion. Further, the assessee has failed to make disclose fully and truly all material facts necessary for his assessment."

5. The petitioner objected to the reasons recorded in support of notice for reopening by its letter dated 22.11.2018. The Assessing Officer rejected the objections by order dated 29.11.2018 leading to filing of this petition on the ground that the impugned notice is without jurisdiction.

6. We have heard learned counsel for the parties and on perusal of the reasons recorded in support of impugned notice, the following facts emerge:-

i. The notice has been issued beyond the period of four years from the end of relevant assessment year i.e Assessment Year 2011-12 in a case where assessment was completed under Section 143(3) of the Act.

ii. The reasons as recorded do not indicate any failure on the part of the petitioner to disclose fully and truly all material facts necessary for reassessment. In fact, the basis of the notice is not on the basis of any fresh material obtained by the Assessing Officer but on the material which was before the Assessing Officer at the time of regular assessment proceedings leading the order under Section 143(3) of the Act.

Thus, the impugned notice would be hit by first proviso to Section 147 of the Act.

7. Mr. Suresh Kumar, the learned counsel in support of the Revenue submits that there has been a failure on the part of the petitioner to fully and truly disclose all material facts in as much as they did not bring the attention of the Assessing Officer, to the provisions of Section 46A of the Act which would apply in the facts of this case. It is only now that the Assessing Officer has realized that Section 46A of the Act would apply. Thus, there was a failure on the part of the petitioner to disclose fully and truly all material facts which were necessary for assessment.

8. We note that long back in the case of **Calcutta Discount Co. Ltd Vs. I.T.O.[1],** it has been held that the obligation on the part of the assessee is to disclose fully and truly all primary material facts which are necessary for assessment. Undisputedly, the fact that the the petitioner had received income on surrender of shares under buy back scheme of the subsidiary company was the material primary facts which was disclosed before the Assessing Officer during the course of regular assessment proceedings. Thus, there

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was complete disclosure of all primary material facts during the regular assessment proceedings, reopening is not justified.

9. In the above view, it cannot be said that there was any failure on the part of the petitioner to disclose fully and truly all material facts necessary for reassessment. Thus, the impugned notice is hit by first proviso of Section 147of th Act and is without jurisdiction. Accordingly, impugned notice is quashed and set aside. Petition disposed of.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**