R.M. AMBERKAR
(Private Secretary)

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

WRIT PETITION NO. 3642 OF 2018

MSEB Holding Company Ltd .. Petitioner

Versus

Dy. C.I.T., Circle 1(2)(2) & Ors. .. Respondents

....

- Mr. Jehangir Mistry, Senior Counsel a/w Mr. Niraj Sheth and Mr. Jitendra Singh for the Petitioner
- Mr. Suresh Kumar for Respondent Nos. 1 and 2

....

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 being heard finally at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges a notice dated 26.3.2018 issued by respondent No. 1 - Assessing Officer under Section 148 of the Income Tax Act, 1961 ("the Act" for short). The impugned notice seeks to reopen the assessment for the assessment year 2011-12.

3. The facts giving rise to this petition are as under:-

(a) On 30.9.2011, the petitioner filed its return of income declaring a loss of Rs. 256.39 crore for the subject assessment year 2011.12. In the return of income, the petitioner had interalia claimed as income an amount of Rs. 1.84 crore earned on fixed deposits. The above amount of Rs. 1.84 crore was credited to the profit and loss account and treated by the petitioner as a part of its business income.

(b) The Assessing Officer took up the above return of income for scrutiny assessment. After detailed examination, the Assessing Officer disallowed the the claim of loss on account of business, this on the ground that it did not carry out any business. This resulted in disallowing its claim for business expenditure. Thus, passing an order dated 30.3.2014 under Section 143(3) of the Act, resulting in assessing only the petitioner's rental income under the head, 'Income from House Property'. Thus assessing the petitioner to taxable income of Rs. 25.86 crore.

(c) Thereafter, the impugned notice was issued on 26.3.2018 seeking to reopen the assessment for the assessment year 2011-12. The reasons recorded by the Assessing Officer in support of the impugned notice read as under:-

"1. **Brief details of the assessee** : The assessee company filed its Return of income on 30.9.2011 declaring loss at Rs. 2,56,39,72,850/-. The case was selected for scrutiny for AY 2011-12. The assessment was completed on 30.3.2014 determining total income at Rs. 25,89,04,729/-.
The assessee company is one of the successor companies to the erstwhile Maharashtra State Electricity Board (MSEB) wholly owned Government company and is incorporated on 31.05.2005 on the demerger / unbundling of the said MSEB.

2. **Brief details of information collected / received by the AO :** Information collected was as a result of examination of records. Assessee company credited rental income of Rs. 38,43,52,860/- and interest on fixed deposit of Rs. 1,84,86,795/- along with Rs. 10,52,198/- as other misc. Receipts.

3. **Analysis of information collected / received** : Assessee Company credited rental income of Rs. 38,43,52,860/- and interest on fixed deposit of Rs. 1,84,86,795/- along with Rs. 10,52,198/- as other misc. Receipts. Assessee also claimed expenditure of Rs. 2,64,27,57,147/- against the above said incomes. At the time of scrutiny, department disallowed all claimed expenditure of Rs. 2,64,27,57,147/- with a view that assessee has not earned any business income during the year. Department also disallowed all brought forward losses as

considering the view that the assets & liabilities reflected in the books as on 31.3.2011 (include balance as on 6.6.2015) have been accounted in the financial statement pursuant to Provisional Transfer Scheme which has not attained its finality for the claim of brought forward losses. Therefore, department considered only rental income as taxable under the income from House Property by disallowing all expenditures and brought forward losses due to the said reason.

Further, it was also noticed that assessee earned income from fixed deposit amounting to Rs. 1,84,86,795/- (credited to P & L A/c), however, the same has not been accounted by department for taxability purposes. From the assessee's balance sheet, it is observed that assessee has maintained bank balance of Rs. 47,43,69,419/- out of that an amount of Rs. 18,83,45,563/- as deposit accounts under the head cash and bank balance (Schedule F). Thus, interests on FD of Rs. 1,84,86,795/- from the deposited amounts were required to be taxed as income from other sources. This omission resulted in under assessment of income of Rs. 1,84,86,795/- leading to short levy of tax of Rs. 61,40,851/-.

4. **Finding of the AO:** Assessee Company credited rental income of Rs. 38,43,52,860/- and interest on fixed deposit of Rs. 1,84,86,795/- along with Rs. 10,52,198/- as other misc. receipts.

5. **Basis of forming reason to believe and details of escapement of income** : Assessee Company credited rental income of Rs. 38,43,52,860/- and interest on fixed deposit of Rs. 1,84,86,795/- along with Rs. 10,52,198/- as other misc. Receipts. Assessee also claimed expenditure of Rs. 2,64,27,57,147/- against the above said income. At the time of scrutiny, department disallowed all claimed expenditure of Rs.

2,64,27,57,147 with a view that assessee has not earned any business income during the year. Department also disallowed all brought forward losses as considering the view that the assets and liabilities reflected in the books as on 31.3.2011.

Interest on FD of Rs. 1,84,86,795/- from the deposited amounts were required to be taxed as income from other sources. This omission resulted in under assessment of income of Rs. 1,84,86,795/- leading to short levy of tax of Rs. 61,40,851/-.

6. **Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India**: <u>**Not Applicable**</u>

7. **Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to Section 147:** Findings on examination of records and verification thereof revealed that the assessee had not disclosed full and truly all material facts necessary for his assessment or that the facts of the case are covered by the explanation 1 to section 147 of the Act.

8. **Applicability of the provisions of Section 147/151 to the facts of the case:**

   In this case, a return of income was filed for the year under consideration and regular assessment u/S. 143(3) was made on 30.3.2014. Since, 4 years from the end of the relevant year has expired in this case, the requirement to initiate proceedings u/S. 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer paragraphs 2, 3 & 5). I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment / reassessment proceedings and have noted that the assessee has not fully and truly disclosed the following material facts necessary for his assessment for the year under consideration:

Assessee Company credited rental income of Rs. 38,43,52,860/- and interest on fixed deposit of Rs. 1,84,86,795/- along with Rs. 10,52,198/- as other misc. Receipts. Interest on Fixed Deposit of Rs. 1,84,86,795/- were required to be taxed on income from other sources.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/S. 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P & L A/c. and balance sheet along with return of income where various information / material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P & L a/c. and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly, attracting provisions of Explanation 1 of Section 147 of the Act.

It is evidence from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment / reassessment. This fact is corroborated from the contents of notices issued by the

AO u/s. 143(2)/142(1) and order sheet entries dated 23.5.2013 to 3.1.2014 recorded during the 143(3) proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceedings and the same may be embedded in annual report, audited P & L A/c, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For afore stated reasons, it is not a case of change of opinion by the AO.

In view of the above facts, I am satisfied that the assessee's income of Rs. 1,84,86,795/- or above has escaped assessment for the A.Y. 2011-12 within the meaning of Section 147 of the Act.

In this case, more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/S. 148 has been obtained separately from Principal Commissioner of Income Tax as per the provisions of Section 151 of the Act.

4. We have heard the learned counsel for the parties. Undisputedly, the impugned notice dated 26.3.2018 has been issued beyond the period of four years from the end of relevant assessment year i.e 2011-12. The regular assessment was completed under Section 143(3) of the Act. Thus, in view of the clear mandate of the first proviso to Section 147 of the Act, reopening notice on the above facts can only be sustained if there has been a failure on the part of the assessee to truly and fully disclose all material facts necessary for assessment.

5. Bare reading of the reasons in support of the impugned notice would make it evident that there has been a complete disclosure of all material facts on the part of the petitioner in the regular assessment proceedings under Section 143(3) of the Act. This is so as the basis of the notice as indicted in the reasons is information collected from the examination of the records. Undisputedly, there is no new tangible material received by the Assessing Officer that has triggered the impugned notice. Moreover, these reasons, further, record that the interest on fixed deposit amounting to Rs. 1.84 crore have been credited to profit and loss account and have been offered to tax by the petitioner as part of its business income, however, the same was not accepted by the Assessing Officer on the ground that the petitioner did not carry out any business. Be that as it may, the impugned notice is clearly hit by the first proviso to Section 147 of the Act as there has been no failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment in the proceedings leading to an order under

Section 143(3) of the Act.

6. In the above view, the impugned notice is without jurisdiction. Therefore, the same is quashed and set aside.

7. In the result, the petition is allowed in the above terms.

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