

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.7432 of 2016
and WMP.No.6637 of 2016

M/s Aricent Technologies (Holding) Limited,
(Successor in interest of erstwhile Future Software Limited)
represented by its
Authorised Representative Jitendra Grover
ASV Chandliya Towers
No.263/3, B1A1, Door No.5/397,
OMR Oggiyam, Thoraipakkam,
Chennai - 600 069. Petitioner

Vs.

- 1.Assistant Commissioner of Income Tax,
Corporate Circle-2(1),
Chennai - 600 034.
- 2.Principal Commissioner of Income Tax-2,
Chennai - 600 034.
- 3.Deputy Commissioner of Income Tax,
Company Circle II(1),
Chennai - 600 034. Respondents

Prayer: Writ Petition is filed under article 226 of the Constitution of India, writ of Certiorari, call for the records of the 1st Respondent pertaining to the reopening notice dated 29.03.2014 for assessment year 2007-08, and the consequential communication dated 19.02.2016 passed by the 1st Respondent and quash the same.

For Petitioner : Mr.Ajay Vohra
Senior Counsel
for Mr.Srinath Sridevan

For Respondents : Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

The petitioner is aggrieved by the impugned order / communication dated 19.02.2016 passed by the 1st respondent rejecting the objection filed by the petitioner for reopening the assessment under Section 148 read with Section 147 of the Income Tax Act, 1961.

2. The brief facts of the case are that M/s.Future Software Limited (transferor-assessee company) holding PAN No.AAACF0482E had merged with the petitioner M/s. Aricent Technologies (Holding) Limited which was then named as M/s.Kappa Investments Limited holding PAN No.AACCK8280B pursuant to an order dated 16.05.2007 of the Delhi High Court. The merger of the said M/s. Future Software Limited was with effect from 01.04.2007.

3. Though the merger took place on 01.04.2007, the income tax return for the Assessment Year 2007-08 was filed on 26.10.2007 under Section 139(1) of the Income Tax Act, 1961 in the name of transferor-assessee company i.e. M/s. Future Software Limited and taxable income of Rs.6,55,13,287/- was declared.

4. The 3rd respondent Deputy Commissioner of Income Tax issued notices dated 19.10.2010 issued under Section 142(1) & 143(2) of the Income Tax Act, 1961 and called upon the transferor assessee for the documents for scrutiny before assessment.

5. Thereafter, required information was furnished as requested. These informations were also furnished in the name of M/s. Future Software Limited by the Chartered Accountant on 28.10.2010 before the 3rd respondent. Since there were transfer pricing issues, the case was referred to the Transfer Pricing Officer(TPO). The Transfer Pricing Officer - IV (TPO) passed an order dated 28.10.2010 under Section 92CA(3) of the Income Tax Act, 1961 and proposed an upward adjustment of Rs.4,06,03,412/- towards arm's length price of Associated Enterprises (AE).

6. Thereafter, a draft order was passed by the 3rd respondent on 31.12.2010 under Section 143(3) read with Section 144C(1) of the Income Tax Act, 1961, wherein, the income of the transferor assessee was assessed to Rs.10,93,76,140/-. Following additions/ disallowances made in

i. Transfer pricing adjustment amounting to Rs.4,06,03,412 on account of international transactions;

ii. Disallowance of depreciation to the extent of Rs.3,25,175/- (The disallowance was made in respect of the 80HHE Unit and 10A on the basis of the depreciation claimed by those units);

iii. Deduction under Section 10A was restricted to Rs.12,75,32,500/- as against Rs.13,04,66,769/-.

7. Aggrieved by the above order passed under Section 143 (3) read with Section 144C(1) of the Income Tax Act, 1961 by the 3rd respondent, the transferor-assessee Company took up the issue before the Dispute Resolution Panel (DRP), Chennai for direction under Section 144C(5) of the Income Tax Act, 1961.

8. By an order dated 19.08.2011, the Dispute Resolution Panel (DRP) rejected the objection raised by the transferor assessee company. Thereafter, an Assessment order dated 20.09.2011 passed by the 3rd respondent was confirmed.

9. Long after passing the assessment order dated 20.09.2011, a notice was issued under Section 148 of the Income Tax Act 1961 on 29.03.2014 in the name of M/s. Future Software Limited (transferor-assessee) to re-open the assessment for the Assessment Year 2007-08. The last date for issuing the aforesaid notice within a period of 4 years had already expired on 31.03.2012 and the last date for issuing notice for passing order under the proviso to Section 147 of the Income Tax Act, 1961 would have expired on 31.03.2014. The impugned notice was issued just two days before expiry of limitation on 31.03.2014.

10. The petitioner therefore called upon the 3rd respondent to furnish the reasons for reopening of the assessment order dated 20.09.2011 in terms of the decision of the Hon'ble Supreme Court in G.K.N.Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, (2003) 1 SCC 72.

11. Pursuant to the aforesaid request, by a communication dated 20.08.2015, the 1st respondent furnished the reasons for reopening the assessment, which reads as under:

i) It is seen that the M/s Flextronics Technology (Mauritius) Ltd (FTML) is holding 4,75,28,058 shares of the assessee

Company, out of which FTML has bought back 34,70,868 shares at a premium of Rs.56.48. The holding company FTML has divested its entire shareholding of 4,40,57,190 shares in the assessee company. However section 2 (14) has been amended with retrospective effect from 1.4.62, providing that management or control of any other rights will be treated as Capital assets. Therefore this transaction attracts Capital Gain.

ii) The shares brought back from the holding company FTML utilizing the reserves & surplus in the profit & loss a/c, amounts to deemed dividend u/s 2(22) (a).

iii) The Company was previously claiming deduction u/s 80HHE. If the approval has been granted under FTZ / EPZ after expiry of deduction u/s 80HHE, then the Company could claim deduction u/s 10A only for the remaining period from the actual commencement of production. Therefore, the deduction claimed u/s 10A of Rs.12,75,32,500 is required to be disallowed.

12. Under these circumstances, the petitioner filed its reply / objection dated 14.09.2015 against the re-opening of the completed assessment stating that the issue sought to be re-opened in the Assessment Order was already considered by the Assessment Officer while passing an order dated 20.09.2011.

13. By the impugned communication dated 19.02.2016, the 1st respondent has conveyed his decision and rejected the objection filed by the petitioner against the reopening assessment under Section 148 of the Income Tax Act, 1961.

14. Aggrieved by the same, the petitioner has filed the present Writ Petition challenging the impugned notice dated 29.03.2014 and consequential rejected objection of the petitioner is communicated vide impugned order dated 19.02.2016.

15. The petitioner has challenged invocation of machinery prescribed under section 148 reopening of the assessment on the ground that the reason given by the respondent that

section 2 (14) of the Income Tax Act, 1961 has been amended with effect from 1.4.1962 retrospectively cannot justify a conclusion that the petitioner had either truly and fully failed to disclose the required information for the purpose of assessment within the meaning of proviso to section 147 of the Income Tax act 1961.

16. It is submitted that the amendment has been made to the above definition of "capital asset" to get over the decision of the Honourable Supreme Court in Vodafone case 341 ITR 1. It is further submitted that the shares brought back from the holding company namely Flextronics Technologies (Mauritius) Ltd would at best attract payment of TDS liability and since there was Double Taxation Treaty same cannot be the basis for reopening the completed assessment.

17. On behalf of the petitioner reliance was also placed on the decision of the Supreme Court in Principal Commissioner of Income Tax versus Maruti Suzuki India Ltd 416 ITR 613 to state that the impugned order was liable to be quashed as it has been issued in the name of the transferor company which no longer exist as it has been merged with the petitioner and therefore the order was liable to be quashed.

18. The transaction regarding the buyback of shares and direction of share capital was subject matter of deliberation before the assessment order dated 20.09.2011 was passed. It is submitted that a notice dated 19.10.2010 was specifically issued to the petitioner and a question regarding the payment of Rs.1,73,54,340/-was specifically deliberated in the form of a question into which the petitioner also replied by its reply dated 28.10.2010 along with the annexures.

19. It is further submitted that it is only thereafter the 3rd respondent Deputy Commissioner of Income tax proceeded to pass the assessment order on 20.9.2011. It is therefore submitted that invocation of section 148 for the purpose of proviso to section 147 of the Income Tax Act, 1961 was without jurisdiction. It is further submitted that the aforesaid payment of Rs.1,73,54,340/-on account of buyback of the share by the petitioner was taxable in the hands of the recipient namely Flextronics Technology (Mauritius) Ltd., and therefore the impugned order seeking to reopen the assessment order was without jurisdiction.

Further, the issue was also enumerated not only by the Transfer Pricing Officer but also by the Dispute Resolution Panel.

20. The learned senior counsel for the petitioner place reliance on the decision of the Honourable Supreme Court in Commissioner of Income Tax Versus Kelvinator of India Ltd 320 ITR 561 wherein the decision of the Delhi High Court was upheld stating that reassessment cannot be reopened merely on the ground of change of opinion. Reference was also made to the decision of this court rendered in CIT Versus Arvind Remedies Ltd 378 ITR 547 (Mad) and CIT versus Schwing Stetter India Private Limited 378 ITR 380 (Mad).

21. The Learned Senior Counsel for the Petitioner also relied on the decision of this Court in W.P.No.43435 of 2016 passed in the case of Daimler India Limited

22. Per contra, on behalf of the respondent submitted that the petitioner cannot scuttle the reassessment proceeding by filing the present writ petition in as much as petitioner has an alternate remedy. It is submitted that the invocation of jurisdiction under section 148 of the Income Tax Act, 1961 satisfied the requirement of section 149 to 153 of the said Act and therefore the present writ petition was liable to be dismissed.

23. I have considered the arguments advanced on behalf of the petitioner and the respondent.

24. This is a case where the transferor assessee Company namely Future Software Ltd., was a wholly owned subsidiary of Flextronics Technology (Mauritius) Ltd., had reduced its share capital to the extent of 34,70,868 shares valued at Rs.5 per share. As a result of above, the total number of shares of 4,75,28,058/- was reduced to 4,40,57,190/-. A sum of Rs.1,73,54,340/- was paid to the said Flextronics Technology (Mauritius) Ltd., out of reserves and surpluses of the transferor assessee.

25. Balance number of 4,40,57,190 equity shares in the transferor assessee company which were held by the said Flextronics Technology (Mauritius) Ltd., were later transferred on 29.05.2006 to an extent of number of 3,32,10,000 shares and 1,08,46,160 shares on 30.09.2006 to Flextronics Software Systems India Ltd., (FSSL). Thus, FSSL became the holding company of transferor-assessee company.

26. The reduction of share capital and the consequential adjustment/payments from reserves and surplus by the Transferor assessee to its then holding company namely Flextronics Technologies Mauritius Ltd was captured in the assessment order passed on 20.9.2011. Thus, there is no case for invoking Section 148 of Income Tax Act, 1961, for the purpose of proviso to Section 147 of the Income Tax Act. The passing of the aforesaid assessment order dated 20.9.2011 preceded an examination of the issue by the assessing officer namely the 3rd respondent.

27. Earlier certain other issues were also referred by the 3rd respondent assessing officer to be the Transfer Pricing Officer-IV and the consequential order was passed by the said officer on 28.10.2010. Thereafter, a draft assessment order dated 31/12/2010 was also passed and against which the transferor assessee by which time the transferor assessee had been fully merged into the petitioner who took up the issue before the Dispute Resolution Panel. The Dispute Resolution Panel also passed order/direction under section 144 C (5) of the Income Tax Act, 1961 on 19.8.2011.

28. It is pursuant to these developments the assessment order dated 20.9.2011 was passed by the 3rd respondent. Thus, it is evident that there is no

fear failure on the part of the petitioner to truly and fully disclose information required for the purpose of assessment. The 2nd reason given for reopening of the assessment regarding buyback of shares by the holding company namely Flextronics Technologies Mauritius Ltd amounts to deemed dividend within the meaning of section 2 (22) (a) also flows from the same issue as in issue No.1.

29. The reason for reopening the assessment appears to be an amendment to the definition of "capital asset" in section 2 (14) of the Income Tax Act, 1961 vide Finance Act, 2012 which inserts an explanation to the above definition retrospectively with effect from 1.4.1962. Though, the definition stands amended, nevertheless it cannot be construed that there was failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment for the assessment year 2007-08.

30. The issue relating to deemed dividend is also on account of a change of opinion and therefore reopening of the assessment cannot be upheld in the light of the decision of the Supreme Court in Kelvinator of India Ltd case referred to

supra. The first two reasons for reopening of the assessment are on the strength of the amendment to the definition of capital assets in section 2 (14) of the Income Tax Act, 1961. Therefore, the reopening of the assessment for the purpose of 147 of the Income Tax Act, 1961 is without jurisdiction.

31. As for as claim for section 10 A deductions are concerned, it is evident from the assessment order dated 20.9.2011, the issue was examined by the assessing officer before allowing the same and therefore it cannot be said that the petitioner had failed to truly and fully disclose necessary information for the purpose of assessment. In fact the petitioner had claimed deduction for Rs. 13,04,66,769/- whereas the deduction that was restricted to Rs.12,75,32,500/-.

32. In the light of the above discussion, I am inclined to interfere with the impugned order by quashing the said impugned order. The writ petition accordingly stands allowed. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

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To

1. Assistant Commissioner of Income Tax,
Corporate Circle-2(1),
Chennai - 600 034.

2. Principal Commissioner of Income Tax-2,
Chennai - 600 034.

3. Deputy Commissioner of Income Tax,
Company Circle II(1),
Chennai - 600 034

+1cc to M/s.Hema Muralikrishnan , Advocate SR.No. 105510

W.P.No.7432 of 2016

A.SK(09/03/2020)