IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.08.2021

CORAM

THE HON'BLE Mr. JUSTICE S.M.SUBRAMANIAM

W.P.No.34700 of 2016
and
W.M.P.No.29888 of 2016

M/s.Roca Bathroom Products Private Limited,
Rep.by its Chief Financial Officer
Mr.K.Nirmal Kumar,
KGN Towers, 4th Floor,
Ethiraj Salai, Egmore,
Chennai 600 105. ...Petitioner

Vs

1. Deputy Commissioner of Income Tax,
   Large Tax Payers Unit 1,
   1775 Jawaharlal Nehru Inner Ring Road,
   Anna Nagar Western Extension,
   Chennai - 600 101.

2. Commissioner of Income Tax (LTU),
   Large Tax Payers Unit 1,
   1775 Jawaharlal Nehru Inner Ring Road,
   Anna Nagar Western Extension,
   Chennai - 600 101. ...Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records on the file of the first respondent and quash the impugned proceedings in PAN : AAACE9982E dated 15.09.2016 along with notice issued by the first respondent under Section 148 of the Act dated 28.03.2016.

For Petitioner : Mr.N.V.Balaji

For Respondents : Mr.D.Prabhumukunth ArunKumar
Junior Standing Counsel for IT

ORDER

The writ on hand is filed to quash the reopening proceedings initiated under Section 148 of the Income Tax Act and the consequential order of disposal passed by the respondents, rejecting the objections filed by the writ petitioner.

2. The petitioner is a Private Limited Company incorporated under the Companies Act, 1956. The petitioner is assessed to income tax under the first respondent. The petitioner is in the business of manufacture and trading of sanitary ware, bathroom fittings, taps etc. During the financial year 2008 - 09, the petitioner had acquired the 81% of the equity shares of M/s.Glamouroom Taps Pvt.Ltd ('GTPL') a company which was registered under the Companies Act having its registered office at Rajasthan, from M/s.Parry Enterprises Ltd. Prior to the acquisition of shares, the petitioner owned the balance 19% of the shares of GTPL. The entire consideration for acquiring the 81% was paid by the petitioner to M/s.Parry Enterprises Ltd on 16.07.2008. On completion of the acquisition of shares, GTPL became a subsidiary wholly owned by the petitioner on its own and through its nominee shareholder.

3. After the acquisition of the shares, the petitioner and GTPL approached Hon'ble Madras High Court and Hon'ble Rajasthan High Court praying for the proposal of GTPL merging into the petitioner. The Hon'ble Madras High Court and Hon'ble Rajasthan High Court vide orders in C.P.No.16 of 2008 dated 20.02.2009 respectively, approved the scheme of amalgamation with effect from 01.04.2008.

4. The petitioner states that for the assessment year 2009 -10, the petitioner filed its return of income under Section 139 (1) of Act electronically on 26.09.2009. In the said return of income, the petitioner had claimed set off of the brought forward losses of Rs.11,06,85,208/- and unabsorbed depreciation of Rs.4,95,78,646/-. These brought forward losses and unabsorbed depreciation pertain to the petitioner's amalgamating company GTPL. The set off was claimed pursuant to the provisions of section 72A of the Act.

5. The return of income filed by the petitioner was scrutinized and the Assessment Order was passed by the Assessing Officer on 16.01.2014. All these informations and materials submitted were considered elaborately by following the procedures as contemplated under the Income Tax Act and the final assessment order was passed. While so, beyond the period of four years but within six years, the impugned notice under Section 148 of the Act, was issued on 28.03.2016 stating that the Assessing Officer has reason to believe that the income chargeable for the Assessment Year 2009 - 10 has escaped assessment within the meaning of Section 147 of Income Tax Act. The petitioner in response filed a separate return of income on 25.04.2016, elaborating the transactions and reiterated that there cannot be any reason for the purpose of reopening of assessment. The petitioner requested the Authority to furnish the reasons for reopening by letter dated 26.04.2016 and the

reasons were furnished by the respondents in proceedings dated 13.07.2016. Thereafter, the petitioner submitted its detailed objections on 11.08.2016 and the said objections were rejected by the impugned order dated 15.09.2016. Thus, the petitioner is constrained to move the present writ petition.

6. The learned counsel for the petitioner mainly contended that the requirements contemplated under Section 147 has not been complied with, in respect of the reopening of assessment in the case of the writ petitioner. It is a case of change of opinion, as the respondent could not establish any tangible material for reopening nor the respondent has established that the petitioner has not disclosed fully and truly all material facts. When both the conditions stipulated under Section 147 of the Act, are not complied with then the reopening proceedings are to be declared as void.

7. To substantiate the said contentions, the learned counsel for the petitioner drawn the attention of this Court with reference to the letter dated 13.03.2013 issued by the Joint Commissioner of Income tax, wherein the petitioner was requested to furnish informations / explanations regarding "unabsorbed depreciation of the Amalgamating Company was excess adjusted by you by an amount of Rs. 0.40 Cr. (pertaining to A.Y.2005 - 06), which is hereby proposed to be added to the total income." Therefore, it is proposed to be added to the total income. The petitioner in letter dated 19.03.2013 furnished the details regarding unabsorbed depreciation of amalgamating a company which reads as under:

> "3.Unabsorbed depreciation of the Amalgamating Company:
>
> The claim of carry forward loss represents the loss of the amalgamating company viz, Glamouroom Taps Private Limited. The loss has been reckoned based on the claim made by the amalgamating company in their income Tax Return for Assessment Year 2005 - 06. It may be noted that the difference in the figure of loss as was allowed by the Assessing Officer was due to the fact that there were certain additions / disallowance made in the assessment of the amalgamating company and the same issue was allowed by the Tribunal by setting aside the order of the Assessing Officer. We therefore submit that the claim of loss of Rs.1,65,44,751/- relating to the Assessment year 2005 - 06 which is set off as per out Return of Income is in order and no adjustment is required to be made."

8. In another letter dated 28.03.2013 also the petitioner has elaborately stated that as per Section 2 (1B) of the Income Tax Act, 1961, “amalgamation”, in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that -

(i) all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than (three-fourths) in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company;

9. The learned counsel for the petitioner relied on the draft Assessment Order as well as the final Assessment Order which were passed on 16.01.2014. In the final Assessment Order, unabsorbed depreciation of amalgamating company was elaborately considered by the Assessing Officer and the computation of income would also reveal that the informations and materials furnished were taken into consideration for passing the final Assessment Order. The notice of demand under Section 156 of the Income Tax Act was issued on 16.01.2014, while so, the impugned notice under Section 148 was issued on 28.03.2016.

10. The learned counsel for the petitioner relied on the reasons furnished during the hearing held on 26.03.2013. The query was raised regarding Section 2 (1B) of the Income Tax Act

and debentures issued, the petitioner furnished certain reply. The said reply was also taken into consideration and based on the said reply a factual inference is drawn, which is relied on for the purpose of reopening of assessment.

11. The learned counsel for the petitioner made a submission that such an inference drawn is nothing but a change of opinion. As the issue regarding the amalgamation was elaborately considered by the Assessing Officer and there was no material afresh for the purpose of reopening of assessment that too beyond the period of four years. The impugned order dated 15.09.2016 is also not in consonance with the established principles, in view of the fact that the respondents no doubt elaborated the scope of Section 147 in the impugned order. However, in the present case, in the absence of any tangible material and as well as the failure on the part of the assessee, there cannot be any reason for reopening of assessment. Thus, the impugned orders are liable to be set aside.

12. The learned Standing Counsel appearing on behalf of the respondents disputed the contentions by stating that admittedly the reopening of assessment has been initiated beyond the period of four years but within six years. However, the reasons furnished for reopening of assessment are unambiguous that the respondents could able to trace certain new informations from and out of the materials already submitted by the petitioner's and therefore, as per proviso Clause (c) of explanation 2 to Section 147, the respondents are empowered to reopen the assessment.

13. The learned Standing Counsel has drawn the attention of this Court with reference to the reasons furnished as well as the disposal of objections, wherein the respondents have dealt with the scope of Section 2 (1B) of the Income Tax Act, with reference to the facts and circumstances of the case of the writ petitioner and has made a finding that the GTPL is not extinguished and it has been taken over as the going concern. In amalgamation there cannot be any separate identity for the transferor company after amalgamation. Hence, the whole transaction does not come under the purview of Section 2 (1B) and it is an ordinary takeover of business by acquiring shares. As it is only a normal business take over and not an amalgamation as per Section 2 (1B), the loss relating to GTPL adjusted of Rs.15.19 crores is to be withdrawn.

14. Relying on the said reasons, the learned Standing Counsel reiterated that the said reason would be sufficient for reopening of assessment and while disposing of the objections, the Authority has considered the objections specifically and formed an opinion that this issue was not considered by the

Assessing Officer during the original assessment proceedings as seen from the questionnaires issued, replies filed by the petitioner or the details of hearings conducted. Since the Assessing Officer did not form any opinion on the issue during the original assessment, there is no change of opinion in the subject case. Regarding failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, the respondents made a finding that the said condition would also be applicable in the case of the petitioner and therefore, the reopening of assessment is justified.

15. Considering the arguments as advanced by the respective learned counsel appearing on behalf of the petitioner and the learned standing counsel appearing on behalf of the respondent, this Court is of the considered opinion that the reopening of the assessment, in the case of the Writ Petitioner is falling beyond the period of four years. Thus the conditions stipulated under proviso Clause (c) of explanation 2 to Section 147 of the Act is to be complied. Mere reason to believe is insufficient for the purpose of assessment beyond the period of four years. Thus, if the Assessing Officer has reason to believe for reopening of assessment and such reopening is to be initiated beyond four years, then, the Assessing Officer must satisfy himself that the Assessee has failed in its duty to disclose fully and truly all the materials and in the absence of such conditions, it is to be construed that such reopening is violative of proviso Clause (c) of explanation 2 to Section 147 of the Act.

16. Regarding the change of opinion, the principles are considered by the Constitutional Courts in numerous judgments. However, if the materials are already taken into consideration while passing the Assessment Order, as per provision to Section 147 to Explanation (1): the mere production of books of accounts, materials are insufficient, but the deliberation made by the Assessing Officer at the time of Original Assessment would be relevant to form an opinion that, whether the reasons furnished are for change of opinion or otherwise, and two circumstances may be possible. Firstly, from and out of the materials furnished by the Assessee, if any inferences are drawn by the Assessing Officer and such inferences are new informations or materials and the reopening of assessment is initiated within four years, then there may not be any difficulty in invoking the powers of reopening of assessment.

17. In similar circumstances, such inferences are drawn by the Assessing Officer from and out of the materials submitted by the Assessee and deliberations were made, findings are given and inferences drawn would reveal that there is no failure on the part of the Assessee in furnishing truly and fully the

informations, then the proviso Clause will come into operation and in such circumstances, the reopening of assessment held as violative of Section 147 of the Income Tax Act. Therefore, it is not as if in every case of reopening of assessment, a similar view is to be taken by the Courts. Undoubtedly, it is to be decided based on facts to facts cases and further considering the reasons furnished for reopening of assessment and whether such reopening is falling within a period of four years or beyond the period of four years.

18. As far as the present Writ Petition on hand is concerned, the reasons furnished would reveal that the Assessing Officer has reason to believe based on the materials already submitted during the course of original assessment. The Assessee in this case, admittedly had submitted all the documents relating to the amalgamation of GTPL with the petitioner company and the orders of the High Court and the other details relating to the accounting. Further, there was a specific query raised by the Assessing Officer, during hearing on 26.03.2013 and the petitioner has given reply elaborately based on the orders of this Court as well as the documents furnished. The Assessing Officer, from and out of the necessary materials submitted drawn certain factual inferences and formed an opinion that the whole transaction does not come under the purview of Section 2 (1B) of the Income Tax Act and it is an ordinary take over of business of shares. However, in the Original Assessment, Assessing Officer formed an opinion that it is an amalgamation. Thus, the factual inferences drawn is apparent from and out of the same materials and the respondents have formed an opinion that the transaction does not come under the purview of Section 2(1B), as it has an ordinary take over of business by acquiring shares. Therefore, question would arise, whether such an inference can be considered as a new information or tangible material. In this regard, such an opinion would have possibly taken by the Original Assessing Authority at the time of passing an Assessment Order. However, the Assessing Authority, while passing the original Assessment Order considering the very same materials as well as the informations provided and the Court Orders formed an opinion that it is a case of amalgamation. Thereafter, they are again forming an opinion that the transaction does not come under purview of Section 2(1B) of the Income Tax Act and it is an ordinary takeover of business by acquiring shares. Thus, where two opinions are possible in respect of a particular transaction and the Assessing Authority formed a particular opinion and passed an Assessment Order and the other opinion later on formed for the purpose of reopening of assessment beyond four years from and out of the same materials without any alteration or change, then such opinion formed at later point of time, undoubtedly to be construed as 'change of opinion'.

19. Regarding the failure on the part of the Assessee to disclose fully and truly all material facts, the findings in the impugned order states that the Assessing Officer in his Assessment Order dated 16.01.2014 had specifically considered that the quantum of accumulated unabsorbed losses of amalgamating company and restricted the same from INR 16.03 Crores to INR 15.23 Crores. Further, the TDS credit of INR 11.71 Lakhs pertaining to GTPL was allowed in the hands of Roca India. Therefore, the prerequisite condition as to 'existence of reason to believe that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment' has not been satisfied. In this regard, the learned counsel for the petitioner would able to establish that the said materials were made available even in the reply given to the queries to the respondents.

UNABSORBED DEPRECIATION OF AMALGAMATING COMPANY:

During the relevant previous year, one M/s GTPL amalgamated with the company by way of High Court orders dated 18.11.2018 and 20.02.2009 with effect from 01.04.2008. Consequent on such amalgamation, accumulated loss pertaining to M/s.GTPL has been set off by the assessee against its taxable business income to the extent of Rs.16.03 Crores. In this connection, details of assessments completed in the case of M/s.GTPL have been called for and perused. On perusal of the same, the loss determined in the case of M/s.GTPL was found to be as follows:

S.No.	Asst. year	Asst. order date	Amount
1.	2005-06	Order u/s 154 dt.31.3.2012	Rs.1.25 Cr.
2.	2006-07	Order u/s 143(3) dt.24.01.2008	Rs.5.28 Cr.
3.	2007-08	Order u/s 143(3) dt. 16.02.2009	Rs.5.24 Cr.
4.	2008-09	Loss as per return of income for A.Y.2008-09	Rs.3.42 Cr.
		Total	Rs.15.19 Cr.

20. In this regard, in the Original Assessment Order itself, the Assessment Authority made a finding regarding unabsorbed depreciation of amalgamating company. The details are furnished and the Assessing Authority has taken into consideration of all these facts. The rejection order which is impugned is passed only based on the factual inferences drawn from and out of the very same materials produced by the petitioner at the time of

original assessment and has elaborately considered in the aforementioned paragraphs. The inferences drawn at later point of time in the present case, is nothing but a change of opinion and therefore, the subsequent finding on the point that there was a failure on the part of Assessee cannot be relied upon.

21. In view of the fact that the case of the petitioner is not falling within the proviso Clause (c) of explanation 2 to Section 147 of the Income Tax Act and the respondents could not able to establish that there was a failure on the part of the Assessee to disclose fully and truly all material facts and further, this Court could able to arrive a conclusion that the factual inference drawn is also change of opinion, the petitioner is entitled to succeed in the present case.

22. Consequently, the impugned proceedings in PAN : AACE9982E dated 15.09.2016 along with notice issued by the first respondent under Section 148 of the Act dated 28.03.2016, are quashed and the writ petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

Pns/Kbs

To

1. Deputy Commissioner of Income Tax,
   Large Tax Payers Unit 1,
   1775 Jawaharlal Nehru Inner Ring Road,
   Anna Nagar Western Extension,
   Chennai - 600 101.

2. Commissioner of Income Tax (LTU),
   Large Tax Payers Unit 1,
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