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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09-08-2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

WP No.29023 of 2018
And
WMP No.33925 of 2018

M/s.Cognizant Technology Solutions India
Private Limited,
Represented by Authorised Signatory Mr.Gopakumar R.,
No.165, Menon Eternity Building,
6th Floor, St. Mary's Road,
Chennai-600 018. ...Petitioner

VS.

1.Assistant Commissioner of Income Tax,
Large Taxpayer Unit-1,
7th Floor, Room No.712,
121, Nungambakkam High Road,
Chennai-600 034.

2.Joint Commissioner of Income Tax,
Large Taxpayer Unit,
7th Floor, Room No.711,
121, Nungambakkam High Road,
Chennai-600 034. ...Respondents

Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records on the file of the first respondent and quash the impugned notice PAN:AAACD3312M dated 29.03.2018 issued under Section 148 of the Income Tax Act for the Assessment Year 2013-2014 in Notice No.ITBA/AST/148/2017-18/1009530834 (1) along with the impugned order in LTU1/AAACD3312M/2018-19 dated 16.10.2018.



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For Petitioner : Mr.N.V.Balaji
For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel for
Income Tax.

O R D E R

The lis on hand is filed challenging the notice issued under Section 148 of the Income Tax Act, 1961 for the assessment year 2013-2014 and the order passed by the Assessing Authority, disposing of the objections filed by the petitioner.

2. The petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the business of software development. The petitioner is regularly assessed to income tax. The petitioner had filed its return of income for the assessment year 2013-2014 under Section 139(1) of the Income Tax Act, 1961 on 30.11.2013.

3. The case of the petitioner was taken up for scrutiny and the first respondent sought for various details from time to time during the assessment proceedings. All the details were provided by the petitioner during the course of assessment proceedings. Accordingly, the first respondent passed the assessment order on 31.12.2016 under Section 143(3) read with Section 92CA of the Income Tax Act, 1961.

4. Although the first respondent in the assessment order had discussed on certain additions to be made in determining the book profits under Section 115JB, he did not give effect to the same in the computations attached to that order. A rectification petition was filed in this regard. Under these circumstances, a notice under Section 148 of the Income Tax Act, 1961 was issued for reopening of assessment for the assessment year 2013-2014 stating that the income chargeable to tax has escaped assessment.

5. The petitioner responded to the notice and requested for reasons. The reasons were provided and the petitioner submitted its objections elaborately. The said objections were also disposed of by the Assessing Authority and challenging the said disposal order, the present writ petition is filed by the petitioner.



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6. The learned counsel appearing on behalf of the petitioner mainly raised a contention that the reasons stated for reopening of assessment amounts to change of opinion. Secondly, the reasons for reopening has not been provided within a reasonable time and therefore, the proceedings are bad in law.

7. To substantiate the said grounds raised for assailing the order impugned, the learned counsel for the petitioner drawn the attention of this Court with reference to the reasons furnished to the petitioner-Assessee by the first respondent in proceedings dated 30.08.2018. The reasons are attacked by the petitioner and the objections submitted by the petitioner are relied upon. The reasons for reopening are met with complete particulars in comparison with the discussions and the adjudication made by the Assessing Authority, while passing the original assessment order under Section 143(3) of the Income Tax Act, 1961.

8. The learned counsel for the petitioner reiterated that all the issues were adjudicated elaborately and the very same subject matter and the very same particulars are taken into consideration for the purpose of reopening of assessment in a different language and therefore, it is a case of change of opinion and cannot be fit in with the provisions of Section 147 of the Income Tax Act, 1961.

9. It is contended that the petitioner-Company have categorically explained the reasons for assessment and the details submitted during the assessment proceedings under Section 143(3) of the Income Tax Act, 1961 and references were also cited. Therefore, there is no reason whatsoever for reopening of assessment.

10. The learned counsel for the petitioner further contended that, while disposing of the objections, the Competent Authority has not considered any of these objections raised with complete details and blanketly stated that the reopening of assessment is in accordance with the provisions of Law and therefore, the said order is not only establishes that the authorities have not applied their mind, but the objections in detail submitted by the petitioner had not been considered at all.



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11. It is contended that the impugned order disposing of the objections are passed in a mechanical manner without furnishing any findings with reference to the objections filed. Therefore, the order impugned is liable to be set aside.

12. At the outset, it is contended that the assessment order was initially passed under Section 143(3) of the Income Tax Act, elaborately considering all the issues and in respect of the issues queries were raised and the petitioner had also submitted detailed answers for the queries and accordingly, final assessment order was passed.

13. Shockingly, the very same particulars and details adjudicated were taken into consideration for the purpose of reopening of assessment and therefore, it is the change of opinion and the initiation itself is in violation of Section 147 of the Income Tax Act.

14. The learned Senior Standing Counsel, appearing on behalf of the respondents, disputed the contentions of the learned counsel for the petitioner, by stating that under Section 147 of the Income Tax Act, if the Assessing Officer has reason to believe, the same would be sufficient for reopening of assessment. The materials already considered by the Assessing Authority may also be a ground to cull out certain new informations and from and out of such new informations, reassessment proceedings shall be initiated by the Competent Authority.

15. In the present case, merely comparing the subjects which were discussed by the Assessing Authority in the assessment order, the petitioner cannot make out a ground by stating that the very same subject has been taken into consideration for the purpose of reopening of assessment and therefore, the reopening amounts to change of opinion. Such a ground deserves no merit consideration as Section 147 of the Income Tax Act, provide ample powers to the authority to reopen the assessment on numerous circumstances.

16. The learned Senior Standing Counsel for the respondents drawn the attention of this Court with reference to the original assessment order passed for the assessment year 2013-2014 on 31.12.2016. Undoubtedly, the issues are



considered, however, the reasons furnished for reopening of assessment order would show that from and out of the materials, the Assessing Authority has reason to believe that dis-allowance of provision for lease equalisation and charges under Section 115JB was made. That was not taken into consideration while arriving a taxable income under Section 115JB.

17. Further, relying on the reasons furnished for reopening of assessment contended that on those particulars, the Assessing Officer has reason to believe that the income chargeable to tax on escaped assessment. When the Assessing Officer could able to trace out certain new materials from and out of the materials submitted by the Assessee during the original assessment proceedings, such informations are also sufficient enough for the purpose of reopening of assessment. It is for the Assessee to participate in the reopening proceedings and place the records, enabling the authority to complete the reopening proceedings by following the procedures.

18. Considering the arguments as advanced by the respective learned counsel appearing on behalf of the parties to the lis on hand, this Court has to consider the fact that reopening of assessment in the present case is made within four years. Admittedly, when it is made within a period of four years, then the First Proviso to Section 147 of the Income Tax Act, is not applicable.

19. Section 147 enumerates that "if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this Section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned".

20. Let us now consider the spirit of the language employed in the said provision. The term "has reason to believe" is considered by the Constitutional Courts on many occasions. The reasons must have live link for the purpose of reopening of assessment. Therefore, it is not mere reasons to believe and such reasons must have some nexus for the purpose for which the reopening proceedings are initiated.



21. This apart, the reasons should not be change of opinion. The change of opinion is also elaborately discussed by the Courts. If any adjudication is made with reference to a particular issue and an interpretation is given in a particular manner or a finding is given and in respect of the same finding, if another opinion is formulated, the same amounts to change of opinion. However, the Courts are expected to be cautious, while forming an opinion whether it is 'change of opinion' or 'reason to believe'.

22. In many occasions, materials are one and the same, issues are also one and the same. However, from and out of the same materials and issues, if the Competent Authority could able to trace out a new information, material or dimension in consonance with the provisions of the Act, which was omitted by the original Assessing Authority and such failure of the original Assessing Authority resulted in income chargeable to tax escaped assessment, then it is a ground for reopening of the assessment. In certain circumstances, undoubtedly, the Courts are expected to be cautious in view of the fact that the subjects may be one and the same.

23. The issues discussed by the Assessing Authority as well as the Original Authority may be one and the same, but the factual inference and the application of provisions of Income Tax Act and the interpretation required to be given in such circumstances, creates a reason to believe for the authority that the income escaped assessment and reopening of assessment is initiated.

24. Thus it is not as if the Assessee can simply compare the issues discussed by the Assessing Authority and the reasons furnished for reopening of assessment. Within the issue, if materials are culled out, which is not discussed or adjudicated by the original assessing authority, then reopening of assessment is allowable and therefore, mere comparison would undoubtedly result in denial of an opportunity for the revenue to bring the tax escaped assessment within the net work. All these intricacies required to be considered in such cases, where the materials shown are one and the same both in the original assessment order as well as in the reasons furnished for reopening of assessment.



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25. The other ground raised by the petitioner is that the Assessing Authority, while disposing of the objections, has not considered the objections. Though the petitioner has elaborately submitted the objections with reference to the reasons furnished for reopening of assessment, the said objections are not considered and no findings are given in this regard. It is necessary for this Court to examine this issue. A distinction is to be drawn in respect of the disposal of an objection by the Competent Authority and a final order passed in the reassessment proceedings.

26. Section 147 of the Income Tax Act, contemplates that "the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, then he is empowered to assess or reassess such income". Even during the course of reassessment proceedings, if the authority would be able to find out some new informations or materials and such authority is empowered to assess or reassess the said income also. Two circumstances are contemplated. The first circumstance is that after passing the assessment order if the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment for reopening assessment proceedings by issue of notice under Section 148 of the Income Tax Act. The second circumstance would be that any other income chargeable to tax has escaped assessment and which comes to his notice subsequently in the course of the proceedings under Section 147, then also the Assessing Officer is empowered to go for reassessment of such income, which was traced out during the course of proceedings.

27. The significance of the second circumstance is that even after furnishing of reasons or at the time of continuance of reopening proceedings, if the Assessing Authority could able to find out any other income chargeable to tax, which has escaped assessment and which comes to his notice, then he can provide an opportunity to the Assessee and proceed with the reassessment against such income escaped assessment also.

28. In this context, let us consider the spirit of the judgment of the Hon'ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd vs. Income Tax Officer and Others [(2003) 1 SCC 72], wherein in paragraph-5 of the judgment, the opportunity in compliance of the principles of natural justice



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has been considered by the Supreme Court and the following procedures are directed and the same reads as under:-

"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

29. Though the Income Tax Act provides opportunity to an Assessee, the Supreme Court thought fit that an opportunity to be provided under the Income Tax Act must be in compliance with the principles of natural justice. That prompted the Apex Court to issue a direction in GKN Driveshafts (India) Ltd case (cited supra). The directions are that when a notice under Section 148 of the Income Tax Act is issued, the Assessee may file a return if he so desires and to seek reasons for reopening. The Supreme Court says that the Assessing Officer is bound to furnish the reasons within the reasonable period of time. The Assessee is entitled to file objections to the issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order.

30. With reference to the directives of the Apex Court of India, the procedures are to be followed scrupulously as the judgement became the law of the land under Article 141 of the Constitution of India. However, the directives are to be read in consonance with the spirit of Section 147 of the Income Tax Act in order to understand that the directives issued for the purpose of compliance of the principles of natural justice.



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31. The directives of the Apex Court are in between procedures created by judgment, more specifically, from the initiation of Section 147 proceedings and the disposal of objections by the Assessing Officer.

32. The very purport of directions are to ensure that the Assessee must know the reasons for reopening and he must be provided with an opportunity to contest the reasons by way of submitting the objections and such objections must be disposed of by a Competent Authority by passing a speaking order.

33. The speaking order in the present context means only with reference to the reasons for reopening of assessment. Therefore, speaking order would not include the entire issues, which all are to be adjudicated. After disposing of the reasons and while passing the order of reassessment, the Assessee would get further opportunity to participate in the reassessment proceedings and he is entitled to submit any further documents available during the course of proceedings of reassessment. Therefore, the submission of objections for the reasons for reopening is not the end of the matter and there are further proceedings and during such proceedings, the Assessee is entitled to submit further materials if it is in his knowledge or the documents available and place it before the Competent Authority for consideration. Therefore, the disposal of objections by the authority, cannot be equated with the final order of reassessment or assessment.

34. What is required is whether the requisite condition contemplated under Section 147 of the Income Tax Act is complied with or not. Section 147 stipulates that the Assessing Officer must have reason to believe. If such reason to believe is satisfied and disposal of objections would indicate that the reasons furnished are having live link with the initiation of proceedings. The said nexus as well as the materials or informations considered for reopening would be sufficient.

35. Thus, the disposal of objections must be read with reference to the requisite condition contemplated under Section 147 of the Income Tax Act, i.e., "the Assessing Officer has reason to believe". If the said requirement is complied with, it would be sufficient to proceed with the reassessment proceedings. It is not as if the entire adjudication of issues



must be done by the Assessing Officer while disposing of the objections filed by the petitioner with reference to reasons furnished within.

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36. The point to be considered is that even after disposal of the objections if the Assessing Officer under Section 147 of the Income Tax Act noticed that any other income chargeable to tax which has escaped assessment during the course of proceedings, then also he is empowered to reassess such income. Thus various circumstances made available for the Assessing Authority to reopen the assessment, cannot be interfered with in a routine manner. The authority must be permitted to complete the reassessment proceedings in all respects. The Assessee would be getting ample opportunity even after disposal of the objections and before passing the reassessment proceedings. Even after reassessment order is passed, the Assessee would be getting further opportunity of appeal etc.

37. Thus, mere comparison of subject or issues with reference to the original assessment order and disposal of objections, cannot be a ground for the purpose of setting aside the reopening proceedings. If the reasons furnished for reopening of assessment provide any new informations or materials or based on different dimension under the provisions of the Income Tax Act, which has not been considered by the original authority, then also reopening of assessment is permissible.

38. This exactly is the reason why Explanation 2 to sub clause (c) of Section 147 of the Income Tax Act, contemplates, where an assessment has been made, but income chargeable to tax has been underassessed, then also the reassessment is permissible. Such income has been assessed at too low a rate under various circumstances as provided under Explanation 2 also. Thus, the comparison alone cannot be a ground or mere adjudication of an issue cannot be construed as change of opinion. If such an adjudication is based on reasons to believe, then the authorities may be allowed to continue the reopening proceedings for all purposes by following the procedures as contemplated under law.

39. In respect of the case on hand, the reasons furnished



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would reveal the following informations/materials for reopening of assessment:-

(1) In this connection, on verification of the ITMR file and the assessment order, it is observed that in the assessment order an addition to Book profit amounting to Rs.35,91,44,949/- towards disallowance of provision for Lease Equalisation charges under Section 115JB was made. This was not taken into consideration while arriving a taxable income under Section 115JB. In addition to the above, the disallowance made under Section 14A disallowance amounting to Rs.1,92,10,640/- should also be considered for Book profit. The above omission has resulted in short levy of tax to the tune of Rs.7,34,95,572/-.

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(2) During the relevant previous year, the assessee company had entered into forward contracts in order to safeguard itself from unfavourable movement in the foreign exchange rates relating to its export earnings. In the return of income, the assessee has claimed an amount of INR 82,06,13,134/- being the mark to market loss on restatement of outstanding forward contracts as on 31.03.2013 as a deduction in computing the income under the head profits and gains from business or profession.

Since the above unrealised expenses being the mark to market loss is not an allowable expenditure and requires to be disallowed and brought to tax.

(3) It is seen from Notes forming part of the Financial Statements for the year ended 31.03.2013, vide Sl. No.25 under other expenses, an amount of Rs.1,86,03,66,315/- was shown as expenses towards software. However, software being an intangible asset requires to be claimed depreciation at 25%. The entire



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expenditure should not be claimed an expenditure. Hence, the excess allowance requires to be brought to tax. On verification of break up details of repairs and maintenance an amount of Rs.20,11,71,783/- was considered as computer software. The above expenditure should be restricted to 25% depreciation as against the 100%. This has resulted in excess allowance as under.

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(4) Long Term Capital Loss was computed for Rs.148,06,18,752/- and the same was considered in the computation of total income. However, the above loss was considered for carry forward for future set off. In this connection, it is observed from the computation of long term capital loss was computed by adopting the cost of acquisition at the US Dollar rate as against the Indian Rupee rate. This has resulted in excess long term capital loss to be carry forward as detailed below:-

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(5) It is seen from Annexure 3 in respect of the computation of short term capital gain it is observed that capital gain was arrive for Rs.40,62,04,596/-. However, as amount of Rs.1,86,37,918/- was deducted from the above short term gain stating that the amount relates to unrealised capital gains accounted in the financial statements as on 31.03.2012 and was added back in the assessment of earlier years. As per income tax act, short term capital gain in computed based on the difference between the cost of acquisition and the cost of sale. Hence the deduction of earlier year unrealised loss is not an acceptable deduction".



40. The Assessee also submitted elaborate objections for all the reasons furnished. For disposing of the objections dated 16.10.2018, the Assessing Authority considered the objections as raised by the petitioner. The Assessing Authority considered the objections on issue basis and made findings in paragraphs 5.1, 5.3 and 6.2, extracted as under:-

"5.1 The Assessee's objection is carefully considered, however, it is not accepted for the reason that the relevant issue was not specifically considered by the Assessing Officer. The Assessing Officer nowhere left the traces for verification of the issue, therefore, it does not tantamount to change of opinion and to review of the assessment already completed. The Assessee has to truly and fully disclose the information whereas in this case Assessee failed to furnish the information required on the above issue. It is duty cast on the Assessee to disclose fully and truly all material facts necessary for the purpose of assessment, it is not relevant that had the Assessing Officer been diligent. He could have got all necessary information for the purpose of assessment. In this case Assessing Officer has not formed opinion on this issue. Therefore, reopening of assessment is in accordance with the provisions of Section 147 of the IT Act 1961.

5.3 From the above it is clear that the reassessment is permissible when Assessing Officer did not form opinion on any issue during first assessment and if any reason to believe is formed for escapement of income chargeable to tax that itself is sufficient enough to initiate reassessment proceedings. In view of the above discussion, your objection that reassessment proceedings were based on mere change of opinion and not based on any reason to believe and therefore the reassessment proceedings are invalid is rejected.



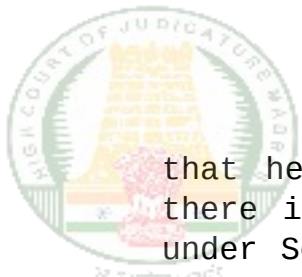
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6.1. The Assessee's objection is carefully considered, however, it is not accepted for the reason that in the said case (Sahkari Khand Udyog Mandal Limited vs. ACIT) certain direction was issued by the Hon'ble High Court of Gujarat to the concerned Chief Commissioner. With due respect it may be considered that the said decision is not binding in the assessment under consideration as the said decision is not of jurisdictional High Court. Hence Assessee's contention is not entertainable".

41. The learned counsel for the petitioner referred some of the judgments and so also the learned Senior Standing Counsel for the Income Tax Department also referred few judgments. Absolutely, there is no dispute regarding the proposition of law relied on by both the respective counsel regarding the judgments cited. The principles in this regard are settled and the judgments relied on by both the parties to the lis, are considered by this Court. Therefore recording of those judgments repeatedly by this Court may not be required for the purpose of considering the facts and circumstances established in the present case on hand. The reasons furnished and disposal of reasons would play a pivotal role in arriving a decision.

42. Considering the reasons furnished, the objections submitted by the petitioner and the disposal of the objections by the Competent Authority, this Court is of an opinion that the intricacies involved in the issues require an elaborate adjudication and admittedly, the petitioner is falling under the large tax payer unit and certain intricacies in deeper manner requires more adjudication with reference to the issues raised. Such an elaborate adjudication cannot be done with reference to the issues as the Assessee has to avail the opportunities to be provided, while proceeding with the reassessment proceedings and it is for the Assessee to participate in the reopening proceedings and avail the opportunities to be provided for the purpose of completion of reopening proceedings.

43. This being the factum and the principles to be followed, this Court has no hesitation in arriving a conclusion that the Assessing Officer in the present case has established



that he has reason to believe for reopening of assessment and there is no infirmity, as such, in reopening of the assessment under Section 147/148 of the Income Tax Act. The petitioner has to cooperate for the early completion of the reopening proceedings.

44. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-
Assistant Registrar (CS-VI)

// True Copy //

Sub Assistant Registrar

Svn

To

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2. Joint Commissioner of Income Tax,
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+1cc to Mr.N.V.Balaji, Advocate SR.No.39591
+1cc to Mr.A.P.Srinivas, Advocate SR.No.39516

WP.No.29023 of 2018

PCH(CO)
RVM(27/08/2021)