IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.08.2021

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THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.31258 of 2018
and
W.M.P.No.36442 of 2018

M/s.BASF Catalysts India Private Limited,
Represented by its authorized
Signatory Shri Anil Kumar Choudhary
Plot No.8/1, Veerapuram Village,
Chengelpet Taluk,
Kancheepuram District – 603 002 ... Petitioner

Vs

1. Deputy Commissioner of Income Tax,
   Corporate Circle 1(2),
   121, Mahatma Gandhi Road,
   Chennai.

2. Principal Commissioner of Income Tax 1
   121, Mahatma Gandhi Road,
   Chennai. ... Respondents

Prayer : Writ Petition filed Under Article 226 of the Constitution of India to issue of Writ of Certiorari, to call for the records on the file of the First Respondent and quash the impugned order in PAN:AAACE2545B/AY 2011-12 dated 13.11.2018 along with notice in PAN:AAACE2545B in Notice No.ITBA/AST/148/2017-18/1009528429(1) dated 29.03.2018 issued under section 148 of the Income Tax Act for the assessment year 2011-12.

For Petitioner : Mr.N.V.Balaji

For Respondents : Mr.D.Prabhu MukunthArunkumar
Junior Standing counsel
For Income Tax

ORDER

The writ on hand is filed, questioning the legal validity of the notice issued under Section 148 of the Income Tax Act [hereinafter referred to as the 'Act'] and the consequential order passed, disposing of the objections filed by the petitioners.

2. The petitioner is engaged in the manufacture of sale of catalysts coverers to automobile manufactures in India. The petitioner had filed a return of income for the Assessment Year 2011-12 and filed revised return also. The first respondent, after perusal of the details of payments, made to BASF USA and forex loss in respect of forward contracts and completed the assessment by making a disallowance in respect of payments made to BASF USA and no addition in respect of the Forex Loss.

3. The learned counsel for the petitioner made a submission that the petitioner has submitted all the relevant books of accounts pertaining to the Assessment Year and provided all informations sought for. Accordingly, the assessment order has been passed. While so, the first respondent issued a notice under Section 148 of the Act on 29.03.2018 with an allegation that the income of the petitioner has escaped assessment. The petitioner filed a return of income in response to the notice and requested for furnishing of reasons for reopening of assessment. The reasons were furnished and objections were filed and thereafter, the objection was disposed of by the first respondent and challenging the said disposal order, the present writ petition is filed.

4. The learned counsel appearing on behalf of the writ petitioner mainly contended that reopening of assessment is perverse in the present case as there is no new tangible materials available for the Assessing Officer to invoke the powers conferred under Section 147 of the Act. It is a case of change of opinion, in view of the fact that the issues raised in the reason for reopening were already adjudicated elaborately by the Assessing Officer and an assessment order was passed. Thus, in the absence of fresh materials on record, the first respondent has no jurisdiction to reopen the assessment.

5. The learned counsel for the petitioner referred the Appellate order passed by the Commissioner of Income Tax (Appeals) [in short 'CIT(A)'] dated 31.01.2018 and drawn the attention of this Court that regarding disallowances with reference to the Assessment Year 2011-12, adjudications were made. The Appellate authority considered those facts and details and made a finding. Against which, the Revenue filed an appeal before the Income Tax Appellate Tribunal [in short 'ITAT'] and the said appeal is pending. This being the factum, the issues adjudicated and pending in appeal cannot be a ground for reopening of assessment under third proviso to Section 147 of the Act. Any matter, which are the subject matter of any appeal, cannot be subjected to reassessment. Thus, the initiation of

proceedings under Section 147 is in violation of third proviso to Section 147 of the Act.

6. The learned counsel for the petitioner, reading the reasons, furnishing for reopening of assessment, contended that the said reasons were adjudicated before the Assessing Officer and further, subject matter of appeal, which is pending before the ITAT. For all these reasons, the very reason for reopening is untenable and in violation of third proviso to Section 147 of the Act and thus, the impugned orders are liable to be set aside.

7. The learned counsel for the petitioner further contended that all the merits relatable to the reasons furnished for the purpose of reopening of assessment for the Assessment Year 2011-12 were completely adjudicated and the respondents could not able to establish that any new fresh materials, which available on record to invoke Section 147 of the Act and thus, the actions initiated are untenable.

8. The learned Junior Standing counsel disputed the said contentions by stating that the reasons furnished for reopening of assessment is no way connected with the subject, which was raised in the appeal and the reasons are independent. In order to substantiate the said contention, the learned Junior Standing counsel drawn the attention of this Court with reference to the explanations submitted by the writ petitioner on 05.02.2015, wherein, in Point No.8, the petitioner has stated that "Forex loss details and declaration to the effect that no capital exp is included - Annexure VIII". Referring Annexure VIII, the learned Junior Standing counsel reiterated that the materials available on record are unconnected with the earlier adjudication made and further, the Assessing Officer, while considering the return of income, has not adjudicated these aspects.

9. Pertinently, the learned Junior Standing counsel referred the Appellate authority's order dated 31.01.2018, wherein the facts of the case are stated as under:

> "2. Brief facts of the case: The appellant is engaged in the business of manufacture and sale of catalysts and catalytic convertors for automobile manufactures in India. Assessment u/s.143(3) has been completed for A.Y.2011-12 after disallowing payments made to BASF Malaysia to the extent of Rs.1,08,78,548/- towards shared legal / administrative services u/s.40 (a)(i) for failure to deduct tax at source u/s.195. Further, a sum of Rs.4,28,18,719/- paid by the appellant to BASF SE, Germany under a Cost Sharing Agreement has also been disallowed for failure to deduct tax at source."

10. The above brief facts in the Appellate order dated 31.01.2018 is compared with the reasons furnished for reopening of assessment in proceedings dated 12.10.2018. The first reason furnished are as under:

> "1.The assessee has made payments to Associated Enterprise for shared service/cost sharing expenses. As per Attachment 6B to Form 3CEB, there is an entry for payment of Rs.3,72,07,000/- to BASF Corporation, USA, but TDS was not made u/s.195. Income escaped Rs.3,72,07,000/-".

11. Relying on these two facts, the learned Junior Standing counsel contended that the BASF Corporation mentioned in the Appellate order is at Malaysia and the reasons furnished for reopening indicates that there is an entry for payment of Rs.3,72,07,000/- to BASF Corporation USA, but TDS was not made under Section 195. Income escaped Rs.3,72,07,000/-. Therefore, those facts before the Appellate authority are no way connected with the reasons furnished for reopening of assessment in proceedings dated 12.10.2018. Both are different and distinct and therefore, the petitioner has to participate in the reassessment proceedings. The learned Junior Standing counsel said that the petitioner has not clarified his objections. Thus, the reopening is made, based on the new materials identified, which would not disclosed fully and truly by the petitioner at the time of assessment and therefore, the reassessment is within the ambit of Section 147 of the Act. This apart, the petitioner submitted his detailed objections on 01.11.2018 and the Appellate order was passed by the CIT(A) on 31.01.2018. Therefore, the petitioner had an opportunity to explain these aspects, but he has not said all these aspects in the objections.

12. The learned counsel for the petitioner, in reply, states that the Income Tax Department was party to the appeals filed before the CIT(A), this Court is of an opinion that the Income Tax Department is working in a large scale manner. Various officials are dealing with files. Therefore, the Departmental representative cannot be expected to bring these facts at the time of reopening of assessment and it is for the assessee to inform all these aspects to the Assessing Officer at the time of filing its objections merely on the ground that the Income Tax Department is a party to the appeal, the petitioner cannot take a ground by stating that he is not mentioned because the Income Tax Department is a party. Such an objection deserves no consideration.

13. The order impugned, disposing the objections filed by the petitioner would reveal that the respondent has considered all the objections raised by the petitioner on issue basis. The specific contention raised by the assessee is that the issue was

pending before ITAT and therefore, under third proviso to Section 147 of the Act, reopening cannot be made. However, Revenue raised a point that the deduction of tax was not made for payments made to BASF Corporation at USA. What was adjudicated before the Appellate authority was about the payments made to BASF Corporation, Malaysia.

14. The learned Junior Standing counsel relied on the findings made in the order impugned and contended that the issues raised are dealt with on merits and rejected by the competent authority. The authority cannot exceed with reference to the other aspects raised and it is for the assessee to submit the materials available with the petitioner by participating in the process of reassessment. Whatever available on record and the basis for reopening of assessment as well as the objections raised were taken into consideration for the purpose of disposal of the objections and reasons were also recorded. Thus, there is no infirmity.

15. This Court has to consider the scope of third proviso to Section 147 of the Income Tax Act. The third proviso enumerates that "Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

16. The said Proviso indicates that the Assessing Officer "may" assess or reassess such income, other than the income involving matters, which are the subject matters of any appeal. Therefore, the Court has to consider the language employed in the third proviso to Section 147 of the Act. The language employed is "may". Thus, a discretion is conferred on the authority to scrutinize the records at the time of reopening of any assessment. However, the proviso in other circumstances, the word "shall" is employed, in view of the fact that third proviso stipulates that the Assessing Officer may assess or reassess, the Act provides discretion to the Assessing Officer to consider various aspects and take a decision, whether the income other than the income involving the matters are the subject matters of the any appeal or not. The word such income would reveal that in a same subject, or issue, if a portion of income is identified has escaped assessment, then also, the Assessing Officer is empowered to reopen the assessment proceedings. More specifically, in a singular issue, where portion of transaction or otherwise is the subject matter of appeal and in respect of the same issue, some other informations are identified or traced out and the said issue was not the subject matter of the appeal nor discussed by the Appellate authority, then also the Assessing Officer is empowered to invoke Section 147 and reopen

the assessment. In such circumstances, the assessee cannot complain that the issue was pending before the Appellate Authority. At the outset, mere pendency or adjudication of a particular issue on a subject by the Appellate authority solely cannot be a ground and the reasons furnished, if directly connected to the issue adjudicated before the Appellate authority is the point to be considered by the Court for forming an opinion, whether the reopening of assessment is in valid and sustainable under the third proviso to Section 147 of the Act.

17. Adopting the principles of purposive interpretation, the proviso clauses are provided with specific purpose, enabling the Assessing Officer to cull out new materials, informations, from and out of the issue, which all are pending before the Appellate authority with reference to an assessment order already passed. The legislative intention is not to deprive the Revenue from reopening the assessment if any new materials are identified from and out of the issue, which were not the subject matter of the appeal. Issue may be one and the same, but the materials collected may be different and distinct and was not the subject matter of the appeal. Thus, the distinctions are very important for the purpose of reopening of assessment by the authority competent.

18. In the present case, the reasons furnished for reopening of assessment would reveal that the assessee has made payments to Associated Enterprise for shared service/cost sharing expenses. As per Attachment 6B to Form 3CEB, there is an entry for payment of Rs.3,72,07,000/- to BASF Corporation, USA, but TDS was not made u/s.195.

19. The facts of the case as narrated in the Appellate order dated 31.01.2018 would reveal that Assessment u/s.143(3) has been completed for A.Y.2011-12 after disallowing payments made to BASF Malaysia to the extent of Rs.1,08,78,548/- towards shared legal / administrative services u/s.40(a)(i) for failure to deduct tax at source u/s.195.

20. The difference is that the disallowance of payments related to BASF Malaysia is stated in the appeal and the extent of disallowance is mentioned as Rs.1,08,78,548/-. However, in the reasons furnished for reopening in proceedings dated 12.10.2018 would state that the income escaped is Rs.3,72,07,000/-. Therefore, there is a mismatching between the subject dealt with by the Appellate authority as well as the reasons furnished for reopening of assessment.

21. The learned counsel for the petitioner made an attempt to clarify certain transactions for the purpose of establishing

that the subject matter is one and the same and the issue was relatable to the transactions from various countries. If the facts also, it is for the petitioner / assessee to place all such records before the Assessing Officer. Mere reopening of cannot be construed as conclusive. Still, the petitioner would get an opportunity to clarify these aspects and establish that there was no suppression or failure on the part of the assessee to furnish true and full disclosures. However, High Court cannot adjudicate these disputed aspects. Once there is a prima facie reason for reopening of assessment, which is essential under the provisions of Section 147 of the Act, rest of the adjudications are to be completed in all respects by affording opportunity to the assessee concerned. The initiation of proceedings cannot be crippled merely based on certain clarifications. Such clarifications as well as the documents relied upon are to be adjudicated in detail by the Assessing Officer for the purpose of arriving a decision during the course of 147/148 proceedings.

22. This being the factum established, this Court is of the considered opinion that the petitioner has to co-operate for the completion of the assessment / reassessment proceedings by availing the opportunities to be provided and the respondents are bound to complete the proceedings as expeditiously as possible.

23. With these observations, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1. The Deputy Commissioner of Income Tax,
   Corporate Circle 1(2),
   121, Mahatma Gandhi Road,
   Chennai.

2. The Principal Commissioner of Income Tax 1
   121, Mahatma Gandhi Road,
   Chennai.

+1cc to Mr.N.V.Balaji, Advocate, S.R.No.38123
+1cc to M/s.Hema Muralikrishnan,
Senior standing Counsel, S.R.No.38103

W.P.No.31258 of 2018

GPL(CO)
HS(26/08/2021)