IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1215 OF 2014

M/s.Morarjee Textiles Limited ...Petitioner
vs.
Assistant Commissioner of Income Tax 6(3),
Mumbai and Others ...Respondents

Mr. Madhur Agrawal i/b. Atul Jasani, for the Petitioner
Mr. Suresh Kumar, for the Respondents

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.

DATE : FEBRUARY 10, 2022

P.C.:

. Petitioner is impugning notice dated 18th March, 2013 issued under section 148 of the Income Tax Act, 1961 by which Respondent No. 1 has informed Petitioner that he has reason to believe that Petitioner's income chargeable to tax for assessment year 2008-2009 has escaped assessment within the meaning of section 147 of the Act. We have considered the reasons recorded for reopening, which read as under:

> "The assessment in this case was completed u/s 143(3) of the Income Tax ACt, 1961 on 27/12/2010 at an income of Rs.23,09,82,469/-. Perusal of assessment records reveal that:
>
> 1] As per section 72 of the Income Tax Act, 1961, no business loss can be carried forward and set off against any other heads of income except income under the head of business or profession for more than eight assessment years immediately succeeding the assessment year for

which the loss was first computed. Further as per section 32 of the Income Tax Act, 1961, unabsorbed depreciation can be carried forward for the indefinite period and it can be set off against any heads of income except income under teh head salaries. However, no unabsorbed depreciation relevant to assessment year 1997-98 to 2001-02 can be carried forward and set off against any other heads of income except income under the head business or profession for more than eight first computed. Similarly, brought forward unabsorbed depreciation allowance for and upto A.Y. 1996-97, which could not be set off upto A.Y.1996-97, shall be carried forward for set off against income under any head for a maximum period of eight A.Y.'s starting from A.Y. 1997-98 i.e. upto A.Y. 2004-05.

2] The above cited legal position was also confirmed by the special bench of ITAT, Mumbai on 30.06.2010 in the case of DCIT vs. Times Guarantee Ltd.

3] In the instant case the income was assessed at a loss of Rs. 23.09 crore after scrutiny assessment completed in December, 2010. Verification of records revealed that the assessee had carried forward of unabsorbed depreciation of Rs. 304818624/- pertaining to A.Y.s 1998-99 to 2000-01, though the same was lapsed with current assessment year i.e. A.Y.2008-09. (Year wise claim is detailed in the table below). This resulted in incorrect carried forward of losses of Rs. 304818624/- for future set off.

A.Y.	**Unabsorbed**
1998-1999	4,36,55,712
1999-2000	13,74,80,406
2000-2001	12,36,82,506
Total	**30,48,18,624**

In view of the above, I have reason to believe that income chargeable to tax as enumerated herein above, has escaped assessment within the meaning of section 147 read with proviso thereto by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."

3. Petition was admitted on 14th July, 2014. First of all we have to note that the Assessing Officer has relied upon the order of the special Bench of the ITAT in the case of **DCIT vs. Times Guaranty**

Limited to form an opinion that Petitioner's income has escaped assessment and therefore it would be a fit case to reopen. This order of ITAT is dated 30th June, 2010 but the assessment of the Petitioner under section 143(3) of the Act was completed on 27th December, 2010. Therefore, the original Assessing Officer had the legal position with him but still proceeded to pass the assessment order. Therefore, this is a clear case of change of opinion which is not permissible.

4. Moreover, the order of ITAT has not been accepted by the Hon'ble Gujrat High Court in **General Motors India (P) Ltd. vs. Deputy Commissioner of Income Tax**[1]**.** This has been followed by this Court in various matters, one of which is **Pr. Commissioner of Income Tax, Central-2 vs. Supreme Petrochem Ltd.**[2] in the order 7th June, 2019. When we are pointed this out to Mr. Suresh Kumar, Mr. Suresh Kumar in fairness agreed and also says that many Appeals of revenue had been withdrawn because of the settled legal position.

5. In the circumstances, Petition is allowed in terms of prayer clause (a) which read as under:

> (a) That this Court be pleased to issue a writ of certiorari or any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case

1 [2012] 25 taxmann.com 364 (Guj.)
2 ITA.No. 661 of 2017 Dt.07-06-2019

leading to the issue of the impugned notice and passing of the impugned order and after going through the same and examining the question of legality thereof quash, cancel and set aside the impugned notice (Exhibit E) and impugned order (Exhibit G)."

(N. J. JAMADAR, J.) **(K. R. SHRIRAM, J.)**