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

WRIT PETITION NO. 163 OF 2020

Maharashtra State Power Generation Company Ltd., … Petitioner.
Vs.
Deputy Commissioner of Income-Tax, Circle -14 (2)(1), Mumbai & 2 Ors. … Respondents.

Mr. J. D. Mistri, Senior Advocate a/w. Mr. Niraj Sheth i/by Mr. Atul K. Jasani for the Petitioner.
Mr. Suresh Kumar, Advocate for the Respondents.

CORAM : K.R. SHRIRAM & R.N. LADDHA, JJ.
DATED : JANUARY 20, 2022
(Through Video Conferencing)

P.C. :-

1. Prayer (a) of the Petition reads as under :-

> "(a) to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof, quash and set aside the impugned notice dated 30th March, 2019 (Exhibit "G") issued by Respondent No.1 section section 148 of the Act to reopen the assessment for the assessment year 2012-13 as well as the impugned order dated 19th November, 2019 (Exhibit "K") rejecting the Petitioner's objections for the assessment year 2012-13."

2. Petitioner had filed its return of income for AY 2012-13 on 28 September, 2012, declaring loss of Rs. 1,34,38,07,555/-. Thereafter,

Petitioner filed revised return of income on 19 March, 2014, declaring a loss of Rs. 1,33,61,85,017/-. Assessment was completed by passing order on 31 March, 2015 under section 143 (3), determining total income loss of Rs. 82,54,63,907/- under normal provisions and Rs. 2,02,97,77,002/- under section 115 (J)(b).

3. More than four years from the end of the relevant Assessment Year, a notice dated 30.03.2019 under section 148 of the Income Tax Act, 1961 (the said “Act”) came to be issued. At the request of Petitioner, reasons recorded for reopening assessment was also provided by communication dated 2 September, 2019. As the notice has been issued after expiry of four years from the end of relevant Assessment Year and Assessment has been completed under section 143(3) of the Act, proviso to section 147 shall apply. The case is that Respondent has to show that there was failure on the part of Petitioner to disclose truly and fully material facts required for the assessment. Shri Suresh Kumar submitted that the reasons do mention that there has been failure to disclose. Having considered the reasons, in our view, a statement, in the reasons for reopening, that there has been failure to disclose material fact is clearly made as an attempt to take the case out of the restrictions imposed by the proviso to section 147 of the Act. In our view, it is a clear case of change of opinion which, as held repeatedly by various Courts including this Court and the Apex Court, was not permissible. On consideration of material on record, Assessing Officer in Assessment Order dated 31 March, 2015 has taken conclusively one view. It will not be open to the Assessing Officer now to reopen the assessment based on the very same material with a view to take another view.

4. Even the reasons clearly indicate that it is change of opinion and the person, who has provided the reasons and the Assessing Officer, who proposed to reopen is only attempting to review the matter. We say this, as

it is quite evident from paragraphs 4, 5 and 6 of the reasons, which read as under :

"4. <u>Enquiries made by the AO as sequel to information collected / received</u> :

Based on the above, the Computation of income, the annual financial statements and records have been perused. It is seen that a claim of additional depreciation has been made amounting to Rs. 24,59,58,375/- and claim of depreciation on licenses has been made at the rate of 60%.

5. <u>Finding of the AO</u> :

On verification of the records and in view of the details as aforesaid, for the above mentioned A.Y.2012-13, the excess claim of depreciation made at the rate of 60% in respect of software licences and the said claim of additional depreciation during the present AY are not in order.

6. <u>Basis of forming reason to believe and details of escapement of income :</u>

During the year under consideration, as per the detailed facts and discussion hereinabove, it is seen that claim of depreciation on software licences is allowable at the rate of 25% rather than 60%. Therefore, the correct depreciation allowable is Rs. 70,95,954/- in place of claimed depreciation of Rs. 1,69,43,891/- (difference amounting to Rs. 98,83,937). Further, the claim of additional depreciation on plant and machinery amounting to Rs. 24,59,58,375/- is not allowable. Therefore, based on the above facts, the undersigned has reason to believe that the income chargeable to tax to the extent of Rs. 25,58,42,312/- has escaped assessment for A.Y.2012-13."

5. As stated in the Petition and also in the objections filed by Petitioner through their Chartered Accounts' letter dated 23 September, 2019,

reopening is made on the basis of the objections received from the revenue audit cell, usually referred as audit objections. Identical objection, as raised in the reasons for reopening, was raised and communicated to Petitioner on 14.03.2019. Petitioner, in response to the audit queries, had provided clarifications to the Assessing Officer. It is a well laid down principle that the re-assessment proceedings initiated merely on the basis of the audit objections are illegal and not valid in law and as such re-assessment proceedings have been repeatedly again quashed and set aside by the Courts. As held in :

(i) **Indian and Eastern Newspaper Society v/s. CIT (1979) 119 ITR 996 (SC)** :

"AO having allowed assessee's claim for depreciation in the regular assessment and reopened the assessment pursuant to audit objection, it cannot be said that he had formed his own opinion that the income had escaped assessment, and the reopening being based on mere change of opinion, same was not valid."

(ii) ***ICICI Home Finance Co. Ltd., v.s. ACIT (2012) 25 taxmann. Com 241 (Bom.)****:*

"The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the Assessing Officer before he issued the impugned notice. On this ground alone, the assumption of jurisdiction by the Assessing Officer can be faulted."

(iii) IL & FS Investment Managers Ltd., v/s. ITO and Ors (2008) 298 ITR 32 (Bom.) :

"Reopening of assessment pursuant to audit objection that depreciation was not admissible on intangible assets was not valid. Thus, reopening of the assessment without any basis and merely on change of opinion, was not permissible."

vi. ***Jagat Jayantilal Parikh vs. DCIT (2013) 32 taxmann.com 161 (Guj.)*** *:*

"The reasons for reopening of the assessment are almost identically worded as that of audit report. No material worth the name emerges to indicate any independent application of mind. Facts are quite glaring and they clearly establish absence of subjective satisfaction of Assessing Officer. Thus the ground raised by the assessee that such notice of reopening is invalid for the Assessing Officer having not formed his independent belief requires to be sustained."

6. Even in the case at hand, the reasons for reopening of the assessment are almost identically worded as that of audit report. In view of the foregoing, since, in the case at hand also the reopening of the assessment being at the behest of the audit party, the reopening of the assessment is misconceived, incorrect and bad in law.

7. In the circumstances, Petition is allowed in terms of prayer clause (a), as reproduced earlier.

8. Petition disposed accordingly with no order as to costs.

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

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