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

WRIT PETITION NO.1367 OF 2022

DCB Bank Ltd.
(Formerly Development Credit Bank Ltd.)
6th Floor, Tower A, Peninsula,
Business Park, Senapati Bapat Marg,
Lower Parel, Mumbai-400013.
PAN:AAACD1461F

...Petitioner

V/s.

1. Deputy Commissioner of Income Tax
Circle-2(3)(1) Mumbai
Room No.552, 5th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400 020.
2. Principal Commissioner of Income Tax-2
Aayakar Bhavan, M.K. Road.
Mumbai-400 020.
3. Union of India, through the
Secretary, Ministry of Finance
North Block, New Delhi-110001

...Respondents

Mr. Satish Mody a/w. Ms. Aasifa Khan for Petitioner.
Mr. Suresh Kumar for Respondents.

**CORAM : K. R. SHRIRAM &
FIRDOSH P POONIWALLA, JJ.**
DATE : 1st AUGUST 2023.

ORAL JUDGMENT (Per Firdosh P. Pooniwalla J.):

1. The present Writ Petition challenges a Notice dated 24th March 2021 issued under Section 148 of the Income Tax Act, 1961 (“the Act”) and an Order dated 13th January 2022, rejecting the Petitioner’s objections against the reopening of the Assessment for Assessment Year 2014-15 under the provisions of Section 148 of the Act.

2. The Petitioner is a company engaged in the banking business. The Petitioner e-filed its original Return of Income for the Assessment Year 2014-15 on 27th November 2014, declaring NIL Income after setting off brought forward losses. The Petitioner subsequently filed the Computation of Income, a copy of the Audited Balance Sheet, the Profit and Loss Account and Tax Audit Report under Section 44AB in Form No.3 CD of the Act. The Report dated 25th November 2014, under Section 115JB of the Act, in Form No.29B, was uploaded on the Income Tax website.

3. The Assistant Commissioner of Income Tax-2(3)(1), who was then the Assessing Officer of the Petitioner, initiated scrutiny assessment and issued various notices/questionnaires to the Petitioner. The Assessing Officer

issued a Notice dated 28th August 2015, under Section 143(2) of the Act, to the Petitioner.

4. The Petitioner e-filed its revised Return of Income for the Assessment Year 2014-15 on 29th March 2016, once again declaring NIL Income.

5. Further notices and questionnaires were also issued to the Petitioner. A Notice dated 4th July 2016 under Section 142(1) of the Act, along with a questionnaire, was issued to the Petitioner. In the questionnaire, details regarding computation of MAT liability, Bad Debts Written Off and the provisions made in the account and deduction claimed under Section 14A of the Act, with detailed computation, were called for by the Assessing Officer.

6. By its letter dated 27th July 2016, the Petitioner submitted (i) the computation of MAT liability, (ii) explanation regarding the deduction claimed under Section 14A of the Act and (iii) the details of the Bad Debts. By its letter dated 11th August 2016, the Petitioner once again furnished the computation of MAT liability and details of Bad Debts. By a letter dated 16th September 2016, the Petitioner again submitted the working of the MAT

liability. Further, by a letter dated 18th November 2016, the Petitioner specifically gave complete explanation and details regarding the disallowance under Section 14A of the Act, read with Rule 8D of the Income Tax Rules, 1962 (“the Rules”). Hence, during the course of the assessment proceedings, the Petitioner specifically provided details of Bad Debts Written Off, working of the MAT liability and the disallowance under Section 14A of the Act. The details regarding the above three points were specifically enquired into in the course of original scrutiny assessment and all the facts regarding the same were disclosed to the Assessing Officer.

7. Thereafter, the Assessment was completed and an Assessment Order dated 20th December 2016 was passed under Section 143(3) of the Act. The Assessment Order determined the Income of the Petitioner at NIL under the normal provisions and income of Rs.3,82,53,206/- under Section 115JB of the Act.

8. After a period of over four years from the end of the relevant Assessment Year, i.e, Assessment Year 2014-15, the Assessing Officer issued to the Petitioner a Notice dated 24th March 2021 under Section 148 of the Act.

9. In response to the said Notice, the Petitioner e-filed its Return of Income on 29th May 2021, which was the same as the revised Return of Income filed on 29th March 2016.

10. By a letter dated 23rd July 2021, Respondent No.1 furnished to the Petitioner the reasons for re-opening the Assessment of the Petitioner. The reasons were essentially regarding three issues, i.e., (i) Bad Debts Written Off to the tune of Rs.1,24,96,27,594/- claimed as deduction; (ii) Computation of MAT liability under Section 115JB of the Act; and (iii) Disallowance under Section 14(A) of the Act.

11. The Petitioner objected to the said re-opening by a letter dated 18th August 2021 addressed to Respondent No.1. The Petitioner stated that during the assessment proceedings under Section 143(3) for Assessment Year 2014-15, as requested by the Assessing Officer, the Petitioner had submitted the details of Bad Debts Written Off by its letters dated 27th July 2016 and 11th August 2016. These details of Bad Debts Written Off were examined and allowed by the Assessing Officer. Further, during the assessment proceedings under Section 143(3) of the Act, the Petitioner has submitted the details of MAT computation along with various deductions claimed under the MAT

provisions. As requested by the Assessing Officer, the Petitioner had made specific submission regarding deduction of unabsorbed depreciation by its letter dated 11th August 2016. The details of the Petitioner's claim of unabsorbed depreciation, along with the working of the same, were examined and allowed by the Assessing Officer. Further, the Petitioner stated that, during the assessment proceedings under Section 143 (3), as requested by the Assessing Officer, the Petitioner had submitted a reply dated 27th July 2016 in response to the specific query raised by the Assessing Officer regarding justifying allowability of Section 14A of the Act in the case of the Petitioner. As requested by the Assessing Officer, the Petitioner had submitted details of Section 14A disallowance by its letter dated 18th November 2016. The Petitioner had disallowed expenses related to exempt income under Section 14A of the Act, read with Rule 8D of the Rules, amounting to Rs. 5,57,92,968/- in the original Income Tax Return filed on 27th November 2014. Thereafter, considering the judgment of this Court in the case of HDFC Bank (383 ITR 529), the Petitioner had filed revised Income Tax Returns on 27th July 2016 and disallowed expenses relating to exempt income amounting to Rs.7,24,194 (1% of exempt income of Rs.7,26,19,398/-), whereas in the original Income Tax Return Rs.5,57,92,968/- was disallowed. The above facts and submissions were examined by the Assessing Officer

during the assessment proceedings under Section 143(3) of the Act. The Assessing Officer had passed a speaking Assessment Order for Assessment Year 2014-2015, which specifically covered disallowance under Section 14A of the Act. The Petitioner further submitted that, considering the said facts, it had disclosed fully and truly all material facts before the Assessing Officer for Assessment Year 2014-15 within the meaning of Section 147 of the Act. The Assessing Officer had examined all the facts and allowed the deductions. Therefore, there was no reason to believe that income chargeable to tax has escaped assessment by reason of the failure on the part of the Petitioner to disclose fully and truly any material fact necessary for assessment. By the said letter, the Petitioner therefore submitted that, subsequent to the completion of the Assessment, no new evidence or data/information had been found or unearthed as would lead to the conclusion that there was lapse on the part of the Petitioner in the matter of disclosure of any material information to the Assessing Officer at the time of the assessment proceedings. The Petitioner further submitted that it was well settled that reopening of assessment due to change of opinion was not permissible and therefore the reopening of Assessment by the Assessing Officer was illegal and void ab-initio.

12. The Petitioner thereafter, by its letter dated 9th September 2021, once again filed its objections to the reopening of its assessment and reiterated what was stated in its letter dated 18th August 2021.

13. By an Order dated 13th January 2022, Respondent No.1 rejected the Petitioner's objections against reopening of the Assessment.

14. The present Writ Petition was lodged on 12th February 2022. By an Order dated 21st February 2022, this Court granted ad-interim relief staying the operation and implementation of the said Notice dated 24th March 2021 issued under Section 148 of the Act and the said Order dated 13th January 2022.

15. Mr. Mody, the learned Counsel for the Petitioner, reiterated the submissions made by the Petitioner in its aforesaid letters dated 18th August 2021 and 9th September 2021 and submitted that, for the reasons stated in the said letters, the Assessment of the Petitioner could not be reopened under the provisions of Section 148 of the Act. On the other hand, Mr. Suresh Kumar, the learned Counsel for the Respondents, supported the said Order dated 13th January 2022 and submitted that, for all the reasons given

in the said Order, the reopening of assessment had been initiated on valid grounds and the Assessment Officer had sufficient reasons to believe that the Petitioner had not disclosed fully and truly the material facts necessary for Assessment in its case.

16. In the present case, it is an admitted position that the said Notice dated 24th March 2021 had been issued after the expiry of four years from the end of the relevant Assessment Year, i.e., Assessment Year 2014-15. Therefore, the first proviso to Section 147 of the Act (prior to its substitution by the Finance Act, 2021 w.e.f. 1st April 2021) is applicable and reads as under:-

“Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

17. In the present case, an Assessment Order under Section 143(3) of the Act had been made for the relevant Assessment Year, i.e., Assessment Year 2014-15. Therefore, after the expiry of four years from the end of the

Assessment Year 2014-15, the assessment could not be reopened unless any income chargeable to tax had escaped assessment for such assessment year by reason of the failure on the part of the Petitioner to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

18. The aforesaid position in law is well settled and has been accepted by this Court in the case of **Ananta Landmark (P) Ltd. Vs. Deputy Commissioner of Income-tax, Central Circle 5(3), Mumbai**¹. Paragraph Nos.8 and 9 of the said judgment are relevant and read as under:-

“8. It is settled law that where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to Section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. Since in the case at hand, the assessment is sought to be reopened after a period of four years, the proviso to Section 147 is applicable.

It is also settled law that the Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee. If we consider the reasons for reopening, except stating in paragraph 3 that a sum of Rs.7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to

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disclose fully and truly all material facts necessary, there is nothing else in the reasons. In an unreported judgment of this Court in First Source Solutions Limited V/s. Asst. CIT[WP No.2762 of 2019, dated 31-8-2021], relied upon by Mr. Pardiwalla, the Court held that a general statement that the escapement of income is by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is not enough. The Assessing Officer should indicate what was the material fact that was not truly and fully disclosed to him. In the affidavit in reply, it is stated that the reassessment proceedings was based on audit objections. In another unreported judgment of this Court in Jainam Investments V/s. Asst. CIT[WP No. 2760 of 2019, dated 24-8-2021] relied upon by Mr. Pardiwalla, it is held that the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. In Indian and Eastern Newspaper Society V/s. CIT[1979 2 Taxman 197/119 ITR 996 (SC), also relied upon by Mr. Pardiwalla, the Court held that in every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. Therefore, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer.

9. Mr. Suresh Kumar relied upon a judgment of this Court in Crompton Greaves Ltd. V/s. Assist. CIT [2015] 55 taxmann.com 59/229 Taxman 545 to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. We would certainly agree with Mr. Suresh Kumar but as held in Crompton Greaves Ltd. (Supra), this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled down from the reasons in support of the notice seeking to reopen assessment, that will

certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. The Court held "However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Section 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act"."

19. In our view, a perusal of the reasons for reopening set out in the said letter dated 23rd July 2021 show that there is no such failure on the part of the Petitioner to disclose fully and truly any material fact necessary for the Assessment. The first reason given in the said letter dated 23rd July 2021 for reopening the Assessment is in respect of the Bad Debts Written Off to the tune of Rs.1,24,96,27,594/- claimed as deduction. The said reasons are found in paragraph 2.1 of the said letter which read as under:-

"2.1 On verification of records it is observed that the assessee claimed and was allowed a deduction of Rs.124,96,27,594 towards bad debts written off. In its justification, the assessee had submitted the details. It was seen from the details submitted that there was a technical write off of Rs.124,96,27,594/- by the assessee which was treated by it as provision for bad debts. Against this provision, there were actual write off of Rs.95,74,20,093/-. The difference of Rs.29,22,07,502/- between these two was taken to the P & L as provision for bad and doubtful debts which was added back by the assessee in the computation of income. The assessee, however, instead, claimed a deduction of Rs.124,96,27,594/- towards bad debts written off which amounted to patently wrong claim.

This resulted in underassessment of income by Rs.124,96,27,594/- with a short levy of tax of Rs.42,47,48,419/- (positive and potential). The exact potential and positive tax effects have not been calculated in the absence of the exact amount of carry forward of losses."

20. The reasons so recorded in paragraph 2.1 themselves clearly show that, even according to Respondent No.1, there was no failure to disclose any material fact. According to Respondent No.1, on the facts disclosed by the Petitioner during the assessment proceedings, it had wrongly claimed and was allowed a deduction of Rs.1,24,96,27,594/- towards Bad Debts Written Off. Further, paragraph 29 of the letter dated 27th July 2016 of the Petitioner and paragraph 1 of the letter dated 11th August 2016 of the Petitioner clearly showed that the Petitioner had in response to specific queries raised during the assessment proceedings, disclosed to the Respondents all the material facts in respect of Bad Debts Written Off. Therefore, the reason given by Respondent No.1 in the said letter dated 23rd July 2021 for reopening the reassessment in respect of Bad Debts Writing Off cannot be a reason to reopen the Assessment under Section 148 of the Act.

21. The second reason given by Respondent No.1 in his letter dated 23rd July 2021 is in respect of computation of MAT liability under Section 115JB of the Act. The said reason is recorded in paragraph 2.2 of the said letter and reads as under:

“2.2 The assessee had reduced a sum of Rs.50,99,00,000 from the 115JB computation towards Unabsorbed

book depreciation. Form No.29B was neither submitted nor asked for by the Department. Instead, the assessee submitted its own working of MAT income. The assessee submitted that the assessee had right to pick and choose any component out of business loss or depreciation for set off which is favourable to it. The department did not contest the view taken by the assessee.

The submission of the assessee was at variance from the factual position. It was noticed that the Authority for Advance Rulings (AAR) had vide 155 Taxman 60 [2006] had clearly disapproved of the method adopted by the assessee in similar case. Similarly, the Circular No.495 dated 22.9.1987 of the CBDT had clearly specified with example as to how the losses were to be adjusted in cases of MAT. Thus, the submission of the assessee was factually incorrect. Factually incorrect submission on part of assessee led the Department to believe the submission of the assessee. It was seen from the records that the figure for book depreciation or book loss was Nil for the assessee for the current year.

Incorrect application of provisions of the Act by the Department resulted in underassessment of income of Rs.50,99,00,000 with a consequent short levy of tax of Rs.10,68,77,590.”

22. Again a perusal of the said reasons given clearly show that there is no failure on the part of the Petitioner to disclose any material fact. In fact, in paragraph 2.2 itself, Respondent No.1 records that the “*incorrect application of provisions of the Act by the Department resulted in under assessment of income of Rs.50,99,00,000/- with a consequent short levy of tax of Rs.10,68,77,590/-*”. This itself shows that there is merely a change of opinion on the part of Respondent No.1 and no failure to disclose any material fact on the part of the Petitioner. Further, in paragraph 1 of its letter dated 27th July 2016 and in paragraph 3 of its letter dated 16th September

2016 in response to specific queries raised during the assessment proceedings, the Petitioner had given the computation in respect of MAT liability. This once again shows, that the Petitioner had disclosed all material facts in respect of computation of MAT liability and there was no failure on its part to disclose any material fact.

23. The third reason given in the said letter dated 23rd July 2021 for reopening the Assessment of the Petitioner is in respect of disallowance under Section 14A of the Act. The said reason is given in paragraph 2.3 of the said letter and reads as under:-

“2.3 Assessment record revealed that the Tax auditor after audit arrived at the figure of Rs.55792968 under Section 14A disallowance. However, the AO instead of calling for records to see the cash flow to identify the sources of investments in earning exempt income, assumed that the assessee had enough own funds and levied disallowance under Section 14A at Rs.4114887 instead of the figures arrived at by the Tax Auditor. No notice was found served on the Tax Auditor to enquire as to how the said figure arrived at by him and concurred by the assessee at the time of filing of return was wrong.

Thus, the rejection of the professional advice simply on the basis of assumption resulted in short disallowance of Rs.51678081 with a consequent short levy of tax of Rs.17565380 (potential).”

24. Again a perusal of the contents of paragraph 2.3 clearly shows that there is no failure on the part of the Petitioner to disclose any material

fact. The reasons given in paragraph 2.3 of the said letter attribute the alleged short disallowance and the alleged consequent short levy of tax to the rejection of professional advice by the Petitioner and not to any failure to disclose any material fact. In fact, in paragraph 4 of the Assessment Order dated 20th December 2016 passed under Section 143(3) of the Act, the Assessing Officer had discussed in detail this disallowance under Section 14A and had passed orders in respect thereof. This, by itself, shows that there is no failure on the part of the Petitioner to disclose any material fact in respect of the disallowance under Section 14A of the Act. Further, in paragraph 25 of its letter dated 27th July 2016, and in paragraph 1 of its letter dated 18th November 2016, the Petitioner has given the facts and the reasons as to why no disallowance can be made under Section 14A of the Act, except disallowance of 1% of exempt income considered by the Petitioner as an administrative expenditure relating to exempt income. Thus, the said Assessment Order and the said letters once again clearly show that there is no failure on the part of the Petitioner to disclose any material fact even in respect of the issue of disallowance under Section 14A of the Act.

25. In the impugned Order dated 13th January 2022, Respondent No.1 has only held that the Assessment of the Petitioner could be reopened

as there was tangible material on record to believe that income chargeable to tax had escaped assessment. Respondent No.1 has not given any reason in the said Order as to why, according to him, as required by the first proviso to Section 147 of the Act, the Petitioner had failed to disclose any material fact. The said Order dated 13th January 2022 does not deal with the specific objections of the Petitioner that there was no failure on its part to disclose any material fact and therefore its assessment cannot be reopened under the provisions of Section 148 of the Act. In our view, without arriving at a finding that the Petitioner had failed to disclose any material fact, it was not open to Respondent No.1 to reopen the Assessment of the Petitioner. The same is a *sine qua non* for reopening the Assessment under Section 148 of the Act. Even otherwise, for all the reasons stated hereinabove, we are of the view that the reasons for reopening stated in the said letter dated 23rd July 2021 do not at all show that there is any failure on the part of the Petitioner to disclose any material fact.

26. In the aforesaid circumstances, and for all the reasons stated hereinabove, the present Writ Petition is allowed in terms of prayer (b) which reads as under:-

“(b) 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, quashing the impugned notice under section 148 of the Act dated 24th March, 2021 (Exhibit G), and the impugned order dated 13th January, 2022 (Exhibit M) as being wholly without jurisdiction, illegal and arbitrary;”

27. In the facts and circumstances of the case, there shall be no order as to costs.

(FIRDOSH P POONIWALLA., J.)

(K. R. SHRIRAM, J.)