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

WRIT PETITION NO. 1584 OF 2022

Sterlite Technologies Limited
Godrej Millenium, 9, Koregaon
Park Rd, Vasani Nagar,
Koregaon Park, Pune,
Maharashtra – 411 001.

....Petitioner

V/s.

1. The Deputy Commission of
Income Tax, Circle 3(4)
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

2. The Additional Commissioner
of Income Tax Range 3(4),
Aayakar Bhavan, M.K. Road,
Mumbai – 400 020.

3. The Union of India
Through the Secretary,
Government of India,
Ministry of Finance,
New Delhi – 110 001.

...Respondents

Mr. P.J. Pardiwalla, Senior Advocate a/w Ms. Jasmin Amalsadvala i/b Mint &
Confreres for Petitioner.

Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel for Respondents-Revenue.

**CORAM : K.R. SHRIRAM &
FIRDOSH P POONIWALLA, JJ.
DATED : 7th AUGUST 2023**

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. With the consent of counsel this petition is taken up for disposal
at this stage itself since pleadings are completed.

2. Petitioner is primarily impugning a notice dated 27th March

2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) for Assessment Year 2016-17 where it is alleged that there are reasons to believe that petitioner's income chargeable to tax for Assessment Year 2016-17 has escaped assessment within the meaning of Section 147 of the Act. The reasons to believe can be found in communication dated 17th November 2021 addressed to petitioner and the same reads as under :

The assessee has filed the e-return on 29.11.2016 declaring total income at Rs.161,79,93,020/- computed under normal provision of the Act and Book Profit of Rs.219,56,07,298/- u/s 115JB of the Act. This case was selected for scrutiny and assessment for A.Y. 2016-17 was completed on 21.12.2018 after scrutiny and assessed income of Rs.176,32,00,710 under normal provision of the Act and Book profit at Rs.225,45,68,489 u/s 115JB of the Act.

2. Subsequently on perusal of the records it was observed that the assessee had purchased 100% shares of M/s ETPL on 22nd September 2015 for a total purchase consideration of Rs.187.35 crore and immediately thereafter on 29th September 2015, M/s ETPL merged with the assessee. Keeping in view the acquisition of all assets and liabilities of M/s ETPL, the amount paid in excess thereof was determined as Rs.148.19 crore and the same was treated as goodwill and depreciation thereon of Rs.38,15,17,889 was claimed by the assessee @25% treating it as intangible asset.

Keeping in view the above mentioned provisions, the depreciation so claimed was not allowable. Further it was relevant to be mentioned that in a similar case of M/s Johnson and Johnson Ltd. for AY 2015-16, the depreciation on Goodwill had been disallowed concluding that purchase consideration paid for buying the shares were high and subsequent amalgamation was towards creating spurious goodwill in the books of the assessee.

Hence from the point of consistency also it was required to be disallowed, which was not done in the assessment. This resulted in under assessment to the same extent.

2.1 Therefore I am of the view that income to the extent of amount of Rs.38,15,17,889/- as explained above, has escaped assessment.

3. Petitioner had during Financial Year 2015-16 acquired the entire paid up share capital of one Elitecore Technologies Pvt. Ltd. (ETPL)

from third party seller with discharge of fair value consideration. Thereafter, petitioner applied for amalgamating ETPL with itself vide a scheme of amalgamation which was sanctioned by the Hon'ble Gujarat High Court and High Court Bombay vide order dated 21st March 2016 and 7th April 2016 respectively with effect from 29th September 2015. Pursuant to the amalgamation and in accordance with the scheme of amalgamation as approved by two High Courts, petitioner recognized all the assets and liabilities transferred by ETPL to it on their respective book value and recognized goodwill of Rs.148.19 Crores in its financial statements. It is the claim of petitioner's depreciation on this goodwill which is the subject matter of the notice impugned in the petition.

4. Petitioner filed its return of income on 29th November 2016 declaring a total income under normal provisions of the Act at Rs.1,61,79,93,020/- and book profit at Rs.2,19,56,07,298/- under Section 115 JB of the Act, inter alia, claiming depreciation of Rs.38,15,17,889/- on the goodwill. Petitioner has disclosed this aspect of claiming depreciation on goodwill pursuant to the amalgamation in the documents filed alongwith the returns.

5. Petitioner's case was selected for scrutiny and notice dated 19th September 2017 under Section 143(2) of the Act was issued. Petitioner filed its response vide letter dated 26th September 2017 and furnished all the

details called for. On 18th September 2018 a detailed questionnaire along with notice under Section 142 (1) of the Act was issued to petitioner. Petitioner responded vide its letters dated 22nd October 2018 and two letters both dated 1st November 2018. A fresh notice dated 14th November 2018 under Section 142(1) of the Act was issued enquiring details of the amalgamation, satisfaction of conditions under Section 72A of the Act and specifically seeking details of valuation and other documentary evidences which resulted into goodwill. Petitioner was also handed over a list of reasons based on which petitioner's return for Assessment Year 2016-17 was selected for scrutiny under CASS. The list included details relating to amalgamation and required petitioner to address whether tax aspects related to intangible assets have been considered in the return of income. In response, petitioner, by letter dated 19th November 2018, filed the court orders approving amalgamation as well as the scheme for amalgamation and also explained the basis of recording of goodwill and claim of depreciation thereon.

6. By a letter dated 22nd November 2018 petitioner gave more detailed submissions on the valuation and reporting of assets acquired pursuant to the amalgamation including goodwill and claim for depreciation thereon. This was further reply to the notice dated 14th November 2018 and petitioner also cited decisions of the Hon'ble Apex Court as well as the Bombay High Court.

7. During hearing on 6th December 2018, it is stated in the petition, Respondent No.1 specifically asked petitioner to justify its claim for depreciation on goodwill arisen as a result of the amalgamation of ETPL with itself. A letter dated 13th December 2018 recording what transpired during the earlier hearing was also submitted. As there were certain further queries raised, petitioner submitted another letter dated 13th December 2018 providing further details. In short a detailed enquiry was conducted into by Respondent No.1 before the Assessment Order dated 21st December 2018 came to be passed.

8. During the assessment proceedings another issue which caught the Assessing Officer (A.O.)'s attention was the Employee Stock Option Expenses of Rs.13.46 Crores which petitioner had claimed. Petitioner was called upon to explain why that should not be disallowed as was done in earlier years. In the Assessment Order the A.O. has disallowed this ESOP expenses.

9. Subsequently, petitioner received the impugned notice dated 27th March 2021 and also reasons to believe that income has escaped assessment also. Petitioner filed its objections to reopening which was rejected by an order dated 24th January 2022 which is also impugned in this petition.

10. Mr. Pardiwalla submitted that though the proposed reopening is within four years and there are judgments to the effect that the reasons

to reopen should only contain tangible material, if the reason to reopen is based on change of opinion even such a notice has to be quashed and set aside. Mr. Pardiwalla submitted that jurisdiction to reopen an assessment under Section 148 read with Section 147 of the Act can be assumed only on the belief of the A.O. Respondents have failed to appreciate the fact that the claim for depreciation on goodwill was enquired into during the original assessment proceedings and the A.O. being satisfied with the explanation offered has allowed the claim for depreciation. Mr. Pardiwalla submitted that just because the Assessment Order did not refer to this issue in the Assessment Order does not mean it has not been considered. Relying on the judgment of this court in *Aroni Commercial Ltd. vs. Deputy Commissioner of Income Tax 2(1)*¹, Mr. Pardiwalla submitted that once the query is raised during the assessment proceedings and assessee has replied to it, it follows that the query raised was a subject of consideration of the A.O. while completing the assessment and it is not necessary that the Assessment Order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Mr. Pardiwalla also submitted that even reading the reasons recorded for reopening clearly indicates that reopening is merely on the basis of change of opinion of the A.O. from that held earlier during the course of assessment proceedings and this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

¹ (2014) 44 taxmann.com 304 (Bombay)

11. Mr. Sharma submitted relying on *Export Credit Guarantee Corporation of India Ltd. vs. Additional Commissioner of Income Tax*² that when the A.O. has tangible material to come to the conclusion that there is an escapement of income from assessment, the power to reopen can be exercised. The reason to believe means a cause or justification. At the stage when the A.O. reopens an assessment, it is not necessary that the material before the court should conclusively prove or establish that income has escaped assessment. A reason to believe at the stage of reopening is all that is relevant. Mr. Sharma also submitted that Division Bench of this court in *Export Credit Guarantee Corporation of India Ltd.* (supra) has held that the test to be applied is whether there is tangible material when an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, what is tangible material is something which is not illusory, hypothetical or a matter of conjecture. There is nothing to indicate that what has been raised is illusory or hypothetical or a matter of conjecture. Mr. Sharma also submitted that in this case there is no change of opinion as there is no discussion on the issue in the Assessment Order and only the primary details were filed by assessee on the issue, no finding either positive or negative can be said to have been arrived at during the course of original assessment proceedings. Hence, there is no question of change of opinion.

In our view, this judgment is distinguishable in as much as in

² (2013) 30 taxmann.com 211 BOM

Export Credit Guarantee Corporation of India Ltd. (supra) the A.O. did not seek any response/enquiry into the claim made by assessee where as in the facts of the present case, respondent has not only considered the factual aspects surrounding recording of goodwill but also delved into the details regarding the legal aspects of claim of depreciation on such goodwill.

12. Mr. Sharma also submitted that even though the reopening notice has been issued pursuant to objections raised by audit during revenue audit, A.O. has formed his own opinion and only after being satisfied that income chargeable to tax has escaped assessment the A.O. recommended reopening of assessment.

13. In our view, the impugned notice issued under Section 148 of the Act is not sustainable and therefore it has to be quashed and set aside. The reasons to reopen itself indicates that it is a clear change of opinion. We say this because in Paragraph No.2 of the reasons quoted above, the A.O. says “.....*Keeping in view the above mentioned provisions, the depreciation so claimed was not allowable.....*”. Therefore the A.O. accepts that in the original Assessment Order depreciation claim was allowed and by way of change of his opinion, he proposed to reopen.

14. Moreover, it also indicates non application of mind in as much as in the reasons for reopening it is stated “..... *Keeping in view the*

above mentioned provisions”. There are no provisions mentioned in the reasons above this portion. That also indicates non application of mind.

15. Further as regards the audit objections, in Paragraph No. 18 of the petition, petitioner states as under :

“The Petitioner is under a bone fide belief that the Impugned Notice has been issued pursuant to objections raised by audit party during revenue audit to which the Respondent No.1 had responded defending the Assessment Order as passed, and it was only on the insistence of the audit party that the Respondent No.1 was compelled to replicate the audit objection in the form of reasons and issue the Impugned Notice.

In the affidavit in reply filed through one Dr. Deepak Shukla affirmed on 12th April 2022 respondents do not deny the allegations of petitioner, but state in Paragraph No.17 as under :

17. I say that para 18 of the petition pertains to objection in the form of reasons raised by audit party during revenue audit. In this case, the objections raised by the Audit was duly examined by the Assessing Officer with reference to the particular filed during the assessment proceedings. The Assessing Officer has formed his own opinion and only after being satisfied that income chargeable to tax has escaped assessment, the Assessing Officer recommended for reopening the assessment. It is only after being satisfied, the reasons for reopening of assessment was recorded and belief was formed that income to that extent has escaped assessment.

16. Further in the objections to the proposed reopening filed vide communication dated 15th December 2021, petitioner in Paragraph No.5.5 states as under :

5.5 The present reassessment proceeding is initiated pursuant to audit objection which has been responded by the then learned AO in favour of the Assessee. Considering the same, the Assessee submits that audit objection cannot be considered as the valid

ground for initiating reassessment proceedings and initiation should be based on the independent assessment of the assessing officer. In this regard, reliance is placed on the decision of the Hon'ble Supreme Court in case of Indian & Eastern Newspaper Society vs CIT (supra). Accordingly, re-assessment proceeding is bad in law and should be dropped.

In the order dated 24th January 2022 disposing objections which is also impugned in the petition, respondent does not deny that the re-assessment was initiated pursuant to audit objections or that it has been responded by the then A.O. in favour of assessee.

17. As held in ***Indian & Eastern Newspaper Society vs. Commissioner of Income Tax***³, in every case the Income Tax Officer must determine for himself what is the effect and consequences of the law mentioned in the audit note and whether in consequences 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.

18. This court in ***Sterling and Wilson (P) Ltd. vs. Assistant Commissioner of Income-tax, Circle 14(3)(2), Mumbai***⁴ while considering the *Indian & Eastern Newspaper Society* (supra) held in Paragraph No.8 of the said judgment which reads as under :

³ (1979) 2 Taxman 197 (SC)

⁴ (2022) 135 taxmann.com 216 (Bombay)

8. In reply, Petitioner, by its letter dated 07-09-2016, provided the details. Petitioner, in its statement giving details of disallowances made, also has stated that for AY 2012-13 and AY 2013-14, there was disallowance on account of depreciation of goodwill. Notwithstanding that the Assessing Officer has allowed depreciation of goodwill for AY 2014-15. As held by Apex Court in the case of *Indian & Eastern Newspaper Society, New Delhi v. CIT* (1979) 2 Taxman/197/119 ITR 996 even if it is an error that the Assessing Officer discovered, still an error discovered on a reconsideration of the same material does not give him power to reopen. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view.

19. As held by the Hon'ble Apex Court in case of *Indian & Eastern Newspaper Society* (supra), even if it is an error that the A.O. discovered, still the error discovered on a reconsideration of the same material does not give him power to reopen the assessment. Though the primary facts necessary for assessment are fully and truly disclosed, the A.O. is not entitled on change of opinion to commence proceedings for reassessment. Even if the A.O. who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the A.O., who has decided to reopen the assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the A.O., it would not be open to reopen the assessment based on the very same material with a view to take another view.

20. Moreover, as held by the Division Bench of this court in *Aroni Commercial Ltd.* (supra) it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Admittedly, as recorded in the assessment order petitioner's case was selected for scrutiny under CASS and accordingly notice dated 19th September 2018 under Section 143(2) of the Act and further notice dated 14th November 2018 under Section 142(1) of the Act alongwith questionnaire were issued and served on assessee. Petitioner was asked to furnish details from time to time. Petitioner has submitted all the details and also attended personal hearing. In the assessment order petitioner's submission regarding ESOP was rejected. The fact that the Assessment Order does not contain any reference or discussion relating to depreciation claimed by petitioner on the goodwill of Rs.148.19 Crores that it had paid while applying the shares of ETPL would mean that the query raised was considered by the A.O. while completing the assessment and the A.O. was satisfied with the explanation offered in respect of the query raised.

Paragraph Nos.11, 12 and 14 of *Aroni Commercial Ltd.* (supra) read as under :

11. In this case we are dealing with the reopening of assessment completed by order dated 12 October 2010 under Section 143(3) of the Act. The law with regard to reopening of assessment is fairly settled by decisions of Courts. The power of the Assessing Officers under Sections 147 and 148 of the Act to reopen an assessment is classified into two :-

(a) Reopening of assessment within a period of 4 years from the end of the relevant assessment year and

(b) Reopening of assessment beyond a period of 4 years from the end of the relevant assessment year.

The common jurisdictional requirement for reopening of assessment both within and beyond a period of 4 years has to be on the basis of reason to believe that income chargeable to tax has escaped assessment and the reason for issuing a notice to reopen are recorded before issuing a notice. However, there is one additional jurisdictional requirement to be satisfied while seeking to reopen the assessment beyond the period of 4 years from the end of the relevant assessment year viz. that there must have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings. Thus the primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. However, as observed by the Supreme Court in the case of CIT vs. Kelvinator India Limited [2010] 320 ITR 561/187 Taxman 312 in the context of Sections 147/148 of the Act that reason to believe found therein does not give arbitrary powers to reopen an assessment. The concept of change of opinion is excluded/omitted from the words reason to believe. Thus a change of opinion would not be reason to believe that income chargeable to tax has escaped assessment. Besides the power to reassess is not a power to review. Further reopening must be on the basis of tangible material.

12) Therefore the power to reassess cannot be exercised on the basis of mere change of opinion i.e. if all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under Section 147/148 of the Act is not permissible. The powers under Section-147/148 of the Act cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under Sections 147/148 of the Act only on satisfaction of the jurisdictional requirements. Further, the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and/or oral submissions. Moreover, 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. Moreover, the tangible material upon the basis of which the Assessing Officer comes to the reason to believe that income chargeable to tax has escaped assessment can come to him from any source, however, reasons for the reopening has to be only of the Assessing Officer issuing the notice. At the stage of issuing notice under Section 148 of the Act to reopen a concluded assessment the satisfaction of the Assessing Officer issuing the notice is of primary importance. This satisfaction must be prima facie satisfaction of having a reason to believe that income

chargeable to tax has escaped assessment. At the stage of the issuing of the notice under Section 148 of the Act it is not necessary for the Assessing officer to establish beyond doubt that income indeed has escaped assessment.

14. We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice

dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

21. Having considered the reasons to reopen and the query raised and the replies filed, we are satisfied that it is merely on the basis of change of opinion from that held earlier during the course of assessment proceedings that reopening of the assessment by the impugned notice is proposed. This change of opinion does not constitute justification and the reasons to believe that income chargeable to tax has escaped assessment.

22. We also note that in the affidavit in rejoinder dated 2nd May 2022, in Paragraph No.6, petitioner has averred as under :

“the judgment relied upon by the Respondents in the case of Consolidated Photo & Finvest Ltd. v/s. ACIT (2006) 151 Taxman 41 (Delhi) has been subsequently disapproved by the judgment in the case of KLM Royal Dutch Airlines v/s. ADIT (2007) 292 ITR 49 (Delhi) and the judgment of the Full Bench in the case of CIT v/s. Usha International Ltd. (2012) 348 ITR 485 (Delhi) as also the said decision runs counter to the Full Bench decision of the Hon'ble Delhi High Court in the case of CIT v/s. Kelvinator India Limited (2002) 256 ITR 1 which has also been approved by the Hon'ble Supreme Court in (2010) 320 ITR 561(SC).

23. There is no denial by respondents. Hence, the petition is allowed in terms of prayer clause – (a) which reads as under :

(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or any other writ order or direction under Article 226/227 of the Constitution of India calling for the records of the case leading to the issue of the Impugned Notice dated March 27, 2021 (Exhibit R), issuance of Impugned Scrutiny Notice dated 7 December 2021 (Exhibit W) and passing of the Impugned Order dated 24 January 2022 (Exhibit Y) and after going through the same and examining the question of legality thereof quash, cancel and set aside the Impugned Notice dated March 27, 2021 (Exhibit R), Impugned

Scrutiny Notice dated 7 December 2021 (Exhibit W) and Impugned Order dated 24 January 2022 (Exhibit Y);

24. Petition disposed.

(FIRDOSH P POONIWALLA, J.)

(K.R. SHRIRAM, J.)