

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 3011 of 2022.

Maharashtra State Power Generation]
Company Limited,]
Plot No. G9, Prakashgad, 2nd Floor,]
Anant Kanekar Marg, Station Road,]
Bandra (East), Mumbai – 400 051] ...Petitioner

Versus

1. Assistant Commissioner of]
Income Tax,]
Circle – 14(1)(1), Mumbai,]
Room no. 432, 4th Floor,]
Aayakar Bhavan, Maharishi Karve Road,]
Mumbai – 400 020]

2. Additional/Joint/Deputy/]
Assistant Commissioner]
Of Income-tax / Income-tax Officer,]
National Faceless Assessment]
Centre, Delhi]

3. Principal Commissioner of Income-]
tax-6, Room No. 501, 5th Floor,]
Aayakar Bhavan, Maharishi Karve Road,]
Mumbai – 400 020] ...Respondents

...

Mr. Niraj Sheth a/w. Mr. Gujan Kakkad i/by Mr. Atul K. Jasani for the petitioner.

Mr. Suresh Kumar for the respondents.

...

**CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.**

PRONOUNCED ON : 27TH JUNE, 2023.

J U D G M E N T

[PER: KAMAL KHATA, J.]

1. The challenge in this proceedings is to a notice under section 148 of the Income-tax Act, 1961 ('Act') dated 26th March 2021 issued by Respondent No. 1 for reopening the assessment for the Assessment Year (AY) 2013-14 and the order dated 21st March 2022, rejecting the objections raised by Petitioner to the aforesaid notice.

2. Petitioner is a company engaged in the business of generation of electricity for the State of Maharashtra. The Petition relates to A.Y. 2013-14.

3. Petitioner filed its original return of income for A.Y. 2013-14 on 20th November 2013 and the revised return of income on 20th March 2014. The Petitioner's case was selected for scrutiny. During the course of proceedings various details that were sought were produced, including the Statement of Accounts with annexures and schedules. In note no. 20 annexed to the accounts, details of "other expenses" in the sum of ₹290,92,13,655/- was debited as 'contribution towards assets not owned by company / CSR expenditure' and therefore been considered as 'Revenue expenditure' and charged to 'profit and loss'. It also contained Net Prior Period (gain) / loss of ₹ 163,08,92,252/- claimed as 'normal business expenditure' in computation of total income. On 30th December 2016 the Respondent No.1 passed an assessment order u/s 143 (3) of the Act for A.Y. 2013-14 wherein disallowance was made in respect of the claim of Prior Period Expenditure. Thereafter the audit department objected to the allowability of the expenditure of ₹.290,92,13,655/- and computed ₹.87,27,64,095/- as potential loss of revenue as tax.

4. Respondent No.1 issued a notice under section u/s 148 of the Act to reopen the assessment. Petitioner filed return of income in response to the said notice on 23rd April 2021 for A.Y. 2013-14 under protest vide email dated 26th April 2021. At the request of the Petitioner, almost after 8 months, reasons for reopening was supplied on 11th December 2021. Notices dated 3rd January 2022 and 22nd February 2022 were issued u/s 142 (1) seeking various details to continue assessment proceedings. On 28th February 2022 the Petitioner objected to the proposed action by pointing out that all material facts were fully and truly disclosed in the original assessment and it was based on a change of opinion. Further, the reopening beyond four years was not based on any tangible material nor there was any escapement of income.

5. On 21st March 2022 the Respondent No. 2 passed an order, rejecting objections raised by Petitioner and issued a show cause notice along with draft assessment order seeking reply for completion of assessment.

6. Petitioner requested the Respondent no. 2 to keep the proceedings in abeyance and filed the present Petition, challenging impugned notice dated 26th March 2021 and impugned order 21st March 2022.

7. Respondent No. 1 in its reply stated that the Petitioner has an alternate efficacious remedy available. That the National Faceless Assessment Centre (NFAC) had rejected the objections and passed order. It is stated that it was evident from the records that the issue under consideration was not examined by the AO during the course of regular assessment proceedings and the Petitioner had failed to fully and truly disclose material facts in the original assessment.

8. By a further affidavit the Petitioner has brought to the notice of this court that although ad-interim stay was granted by this Court, on 30th March 2022 and communicated to the Respondent on the same day, the Respondent No.2 passed an assessment order u/s 147 r.w. s. 144B of the Act on 30th March 2022 thereby raising a demand of ₹ 234,55,83,250/- u/s 156 of the Act. The Respondent No. 2 also issued a notice

dated 30th March 2022 u/s 274 r.w. section 271 (1) (c) of the Act for A.Y. 2013-14. Upon being noticed by this Court, at the instance of the Petitioner, by an Order dated 4th April 2022 the assessment order dated 30th March 2022 as well as the consequent notices u/s 274 r.w. s. 271 (1) (c) were quashed and set aside.

9. Section 147 of the Act permits Respondent No.1 to reopen an assessment, provided he has reasons to believe that income has escaped assessment. However, the exercise of such power is circumscribed by the first proviso. It is now well settled, with reference to the judgement of this Court in ***Acron Developers (P) Ltd. vs DCIT***¹ that unless any income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, the AO has no jurisdiction for reassessment. We find no failure to disclose fully and truly in the present case. The reasons evince reliance on facts and figures available in audited accounts.

1 135 taxmann.com 191 (Bom)

10. The criteria for reopening of assessment after a period of four years are no longer *res integra* in view of the judgement of this Court in the case of Ananta Landmark P. Ltd v Dy. CIT wherein this Court held that where assessment was not sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but was a case wherein assessment was sought to be reopened on account of change of opinion of AO the reopening was not justified. It also held that where primary facts necessary for assessment are fully and truly disclosed the AO is not entitled to reopen the assessment on a change of opinion. It was held that while considering the material on record, when one view is conclusively taken by AO, it would not be open for the AO to reopen the assessment based on the very same material and take another view. The judgment also holds that the disclosure envisaged by the proviso is a disclosure of primary facts and where primary facts are fully and truly disclosed, the AO is not entitled to reopen the assessment on a change of opinion.

11. Perusal of the reasons recorded by Respondent No. 1 indicates that the Respondent No. 1 has relied upon facts and figures available from the audited account. We find that Note No. 20 disclosed all material particulars, pursuant to which an assessment order u/s 143 (3) was passed on 30th December 2016. Furthermore, the AO proceeded on the footing that the entire expenditure of ₹ 290,92,13,655 was CSR expenditure and disallowed it placing reliance on Explanation 2 to section 37(1) of the Act. This was inserted with effect from 1st April 2015 for A.Y. 2015-16 and therefore not in the statute during the year under consideration. Consequently, as held in the case of *SGS India (P) Ltd. vs ACIT²* reopening based on provisions inserted subsequently cannot be sustained. Various Courts have taken a view that CSR expenditure is allowable u/s 37 (1) of the Act and insertion of Explanation 2 to section 37 (1) operates prospectively. Reliance is placed on *Honda Motor Cycle and Scooter India (P) Ltd. vs DCIT³*, *Garden Reach Ship Builders & Engineers Ltd. vs PCIT⁴*, *DCIT vs Great Eastern Energy*

2 292 ITR 93 (Bom)

3 124 taxmann.com 81 (Del)

4 121 taxmann.com 386 (Kol)

*Corporation Ltd.*⁵ and *Security Printing & Minting Corporation of India Ltd. vs ACIT*⁶.

12. In our view, Explanation 1 will not be applicable as CSR expenditure was incurred as required by section 135 of the Companies Act, 2013 and its proposed disallowance would not constitute an offense.

13. It appears that there was no tangible material available on record to conclude that income had escaped assessment. The Apex Court in case of *M.M. Aqua Technologies Ltd. vs CIT*⁷ has held that a provision in the Act, which is “for removal of doubts” cannot be presumed to be retrospective even where such language is used, if it alters the law as it earlier stood; and even if it is assumed that the said amendment is retrospective, it cannot give rise to a failure on the part of the Petitioner to disclose fully and truly material facts as held by this Court in the case of *Voltas Ltd. vs ACIT*⁸.

5 112 taxmann.com 412 (Del)

6 137 taxmann.com 72 (Del)

7 [2021] 129 taxmann.com 145 (SC)

8 349 ITR 656 (Bom)

14. For the aforesaid reasons the AO has acted in excess of the limit of his jurisdiction to reopen the assessment in the exercise of powers under section 147 read with section 148 of the Act. Accordingly the Petitioner would be entitled to succeed in this proceeding.

15. We, therefore pass the following order-

- i. The impugned notice dated 26th March 2021, the order dated 21st March 2021, issued by Respondent No.1 for A.Y. 2013-14 are quashed and set aside and the Respondents are prohibited from taking any further steps in respect thereto;
- ii. Rule made absolute in above terms.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)