IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 04.09.2023	**Pronounced on:** 13.12.2023

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.1846 of 2020
and
W.M.P.Nos.2149 of 2020 & 25105 of 2022

M/s.Lucas TVS Ltd.,
No.11 & 13, Patullos road,
Chennai – 600 002.
Rep by its Senior General Manager – Finance
& Company Secretary, Shri K Ramaswamy .. Petitioner

Vs.

The Assistant Commissioner of Income Tax,
Corporate Circle – 4(1),
121, Mahatma Gandhi Road, Chennai – 600 034. .. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the petitioner on the file of the respondent and quash the Impugned Order in DIN: 20121185476 dated 31.12.2019 in PAN: AAACL3763E for the Assessment Year 2012-13 passed by the respondent.

For Petitioner : Mr.R.Vijayaraghavan &
Mr.R.Venkatanarayanan
for M/s. Subbaraya Aiyar
Padmanabhan & Ramamani

For Respondent : Mr.V.Mahalingam
Senior Standing Counsel

O R D E R

The petitioner is aggrieved by the impugned assessment order dated 31.12.2019 passed by the Assessing Officer, the respondent herein under section 143(3) read with section 147 of the Income Tax Act, 1961.

2.The impugned order has a re-determined the taxable income of the petitioner as Rs.62,93,86,042/. Although, the impugned order is an appealable order, the petitioner has filed this Writ Petition.

3.The petitioner had earlier filed a Return of Income for the assessment year 2012-13 under section 139 of the Income Tax Act, 1961 on 28.09.2012. In the said Return of Income, the petitioner had declared a taxable income of Rs.56,13,25,680/-.

4.The Assessing Officer vide scrutiny Assessment Order dated 31.03.2015 under section 143 (3) of the Income Tax Act, 1961, re-determined taxable income of the petitioner as Rs.56,66,13,640/-.

5.In the aforesaid assessment order dated 31.03.2015, the gross tax payable by the petitioner was determined as Rs.16,99,84,092/-. After adjusting the payments already made by the petitioner, the net tax payable by the petitioner was quantified as Rs.34,66,540/- in the computation which accompanied the scrutiny assessment order dated 31.03.2015.

6.In the aforesaid Assessment Order dated 31.03.2015, the Assessing Officer had disallowed an amount of Rs.52,87,967/- under section 14A of the Income Tax Act, 1961 Read with Rule 8D of the Income Tax Rules, 1962.

7.The petitioner herein had received an amount of Rs.7,12,12,703/- as dividend income and claimed exemption under section 10(34) of the Income Tax Act, 1961.

8.It was the case of the petitioner that the petitioner had not borrowed any amount for making investment which has resulted in the dividend of Rs.7,12,12,703/- and therefore section 14A of the Income Tax Act, 1961 was not attracted.

9.Assessment Order dated 31.03.2015 was subject matter of challenge before the Commissioner of Income Tax (Appeals) in ITA

No.65/2015-16.

10.The Commissioner of Income Tax (Appeals) vide order dated 21.11.2016, dismissed ITA No. 65/2015-16 filed by the petitioner.

11.In order dated 21.11.2016, the Commissioner of Income Tax (Appeals) observed that income from investment which does not form part of the total income should only be considered while computing the deduction under Section 14A r/w Rule 8D of the Income Tax Rules, 1962.

12.The Commissioner of Income Tax (Appeals) ultimately held that disallowance made by the Assessing Officer was under section14A read with rule 8D was reasonable and did not warrant any interference.

13.The Commissioner of Income Tax (Appeals) held that the average value of the investment, income which did not form part of the total income, should only be considered while computing the disallowance under Section 14A of the Income Tax Act, 1961, Rule 8D of the Income Tax Rules, 1962.

14.Therefore, the Assessing Officer was directed to recompute the disallowance under the aforesaid provision by considering 0.5% of the average value of investment being the income which did not form part of the total income.

15.The said order of the Commissioner of Income Tax (Appeals) was appealed before the Income Tax Appellate Tribunal in ITA No. 331/MDS/2017 By the Income Tax Department.

16.The Appellate Tribunal by its order dated 09.10.2017 allowed the department's appeal following its decision in **Computer Age Management Service Private Limited** vide order dated 28.11.2014 in ITA No. 1259-1261/MDS/2014, following its decision **REI Agro Ltd** versus **DC IT** wherein it was held that disallowance under section 14 A read with rule 8D can be made only by taking into consideration of the investments which has given rise to such income, which does not form part of the total income.

17.It is in this background, the petitioner has been issued with a notice under section 148 of the Income Tax Act, 1960 seeking to reopen the assessment on the ground that the Department had reasonable grounds to believe that income chargeable to tax for the Assessment Year 2012-13 escaped Assessment within the meaning of section 147 of the Income Tax Act, 1961.

18.The reasons for reopening the assessment on the ground of income having escaped assessment for the above assessment year was furnished to the petitioner by the respondent on 13.05.2019. About 8 different issues were flagged.

19.Relevant portion of the notice dated13.5.2019 read as under:-

> “2.The assessee filed its Return of income for A.Y 2012-13 on 28-09-2012 disclosing Total income of Rs.139,23,19,130/- Return of income for A.Y. 2012-13 was filed on 28-09-2012 disclosing total income of Rs. 56,13,25,680/-. The case was selected for scrutiny and assessment order u/s 143(3) was made on 31-03-2015 determining taxable income at Rs.56,66,13,640.
>
> 3.Subsequently, the assessee's case for the Asst.Year 2012-13 has been reopened by issuance of notice u/s 148 dated 16.03.2019 for the following reasons;
>
> <u>Issue 1.</u> As per Col. 15 of Part B-TI Computation of Total income of the return of income filed by assessee, deemed income u/s 115JB is Rs. 93,19,91,425. Col. 1 of Part B-TTI Computation of tax liability on total income of the return of income filed by assessee shows tax payable u/s 115JB together with surcharge and education cess at Rs. 18,64,70,515.
> As against this, tax payable together with surcharge and

education cess computed in the assessment order as per the normal provisions of 1.T. Act is only Rs. 18,38,37,796. This being lower than tax payable as per sec. 115JB, the assessment ought to have been made u/s 115JB. However the deemed income as per sec. 115JB is shown at Rs.7,09,45,703 in the Tax Computation statement [Col. 16] attached with the return as against Rs.93,19,91,425 disclosed by the assessee in Col.15 of Part B-TI Computation of Total income of the return of income. This lead to under assessment of income.

Shortfall in tax calculation

Tax payable as per sec. 115JB (as per return)	Rs.18,64.70.515/-
Tax payable as per normal provisions (as per asst. order)	Rs.18,38,37,796/-
Tax escaped	Rs.26,32,719/-
Interest u/s 234B	Rs.10,79,415/-
Interest u/s 234C	Rs.1,32,951/-

It has to be verified.

Issue 2. In the normal computation of income, disallowance u/s 14A was arrived at Rs.52.87,967. This sum minus Rs. 2,67,000 already added back by the assesse ought to have been added back while computing income for the purpose of sec. 115JB. It has to be verified and the excess disallowance has to be disallowed.

Issue 3 As per letter dated 10-02-2015 of assessee, disallowance as per sec. 14A rw. Rule 6D is Rs. 67,76.073 out of which sum of Rs. 2.67.000 was already disallowed by assesse and balance amount to be disallowed is Rs.65,09.073. As against this, only a sum of Rs.52.87.068 had been disallowed resulting in short disallowance of Rs.12.21.105 which needs to be added back.

Issue 4 As per letter dated 10-02-2015 of assessee, disallowance u/s 35(2AB) is Rs.1.59.000 since R & D expenditure allowed by DSR is Rs.2626.90 lakhs as against sum of Rs.26.28.48.925 claimed by assesse. However AO omitted to make such disallowance. It has to be verified and the excess deduction granted of Rs.1,59,000 has to be disallowed.

Issue 5 As per Col. 29 of Sch.BP of return of income, assesse claimed deduction of Rs.17,50,000 u/s 35AC. As per Col.15 of Form 3CD audit report also, the claim is made u/s 35AC. However it is seen that assesse paid only sum of Rs.10 lakhs during the year to Vision Research Foundation which is eligible for deduction @ 100% and not @ 175% as claimed by assesse. It has to be verified and the excess deduction granted of Rs.7,50,000 has to be disallowed.

Issue 6. As per Note 30 to Financial Statement, donation debited to P & L a/c is Rs.146.28 lakhs. As against this, only sum of Rs.138,30,500 was added back in the Income Computation statement. It has to be verified and the excess deduction granted of Rs.7,97,500 has to be disallowed.

Issue 7 As per Note 29 to Financial Statement, loss on foreign currency transaction debited to P & L a/c is Rs.533.36 lakhs. As per Note 37 to Financial Statement, assesse was using forward contract in foreign exchange to hedge its exposure to the movements in foreign currency exchange rates. Assessee is not a trader in foreign exchange. Hence it will not get the exemption provided in sec. 43(5)(a). Since such foreign currency forward contracts were done without actual physical delivery, it constitutes speculative transactions.

As per sec. 43(5) only if such foreign currency is the commodity used by assessee as raw material or merchandise in its manufacturing process or trading, it is eligible for exemption. In order that forward transaction in commodities may fall within the purview of proviso (a) to sec. 43(5), it is necessary that the raw materials or merchandise in respect of which the forward transactions have been made by the assessee must have a direct connection with the goods manufactured or the merchandise sold by him. Also, booking and cancellation of forward contracts of foreign exchange were not in respect of specified export or import orders and all contracts have been cancelled. Since there was no actual delivery of foreign exchange, loss is speculative in nature and cannot be deducted from business income. It has to be verified.

Further to get exemption treating such foreign currency forward contracts as transactions in derivatives, it has to be an eligible transaction fulfilling the conditions prescribed in sec.43(5)(d) ie, transactions carried out in a recognised stock exchange etc. whereas assessee did not carry out foreign currency forward contracts through any recognised stock exchange and instead it did it through banks only. Hence on this count also assessee is not eligible for exemption. It has to be verified and the excess deduction granted of Rs.533.36 lnkhs has to be disallowed.

Issue 8. Sec. 40(a)(ia) mandates payment of TDS on or before the due date specified u/s 139(1) to be eligible for deduction. First proviso to sec. 40(a)(ia) provides that if TDS was made in a subsequent year or paid after the due date prescribed u/s 139(1), it will be allowed as deduction in the previous year in which the TDS was paid. In this case, expenditure incurred in A.Y.2010-11 of which TDS was paid during 18-04-2012 to 18-09-2012 amounting to Rs.84,79,902 was claimed as deduction in A.Y.2012-13 instead of A.Y.2013-14. It has to be verified and the excess deduction granted of Rs.84.79.902 has to be disallowed.

4) Hence, I have every reason to believe that the income chargeable to tax has escaped assessment under the provisions of section 147 of the Income-tax Act, 1961.

5) In this connection you are required to show-cause as to why not the above said provisions for return rights be disallowed and added back. Your objections, if any, should reach this office by 24.05.2019. A formal notice u/s 143(2) is also enclosed herewith."

20.The petitioner, replied to the same which has now culminated in the impugned Assessment Order dated 31.12.2019 under section 143(3) read with section 147 of the Income Tax Act, 1961.

21.The challenge to the impugned Assessment Order is on the ground that no speaking order was passed by the Assessing Officer before disposing of the petitioner's objection in accordance with the decision of the Supreme Court in **GKN Drive Shafts (India) Ltd.,** Vs. **Income Tax Officer and others,** 259 ITR 19.

22.The case of the petitioner that the reopening of the completed assessment was inspired from change of opinion and is contrary to the decision of Supreme Court in **CIT** versus **Kelvinator of India Ltd**, 320 ITR 561.

23.It is further case that the reason recorded for reopening the assessment does not indicate that there was a failure on the part of the petitioner to fully and to disclose all material necessary for completion of the assessment.

24.The writ petitioners opposed by the respondent on the ground that petitioner has an alternate remedy. It is submitted that failure to pass a separate speaking order is not fatal in terms of the decision of the Court in **Home Finders Housing Ltd** vs. **Income Tax Officer**, (2018) 404 ITR 611.

25.It is submitted that after the reasons were furnished to the petitioner, the petitioner did not ask for a separate speaking order disposing of the objection of the petitioner. It is further submitted that, the reopening of the assessment was not inspired from change of opinion.

26.I have considered the submission of the learned counsel for the petitioner. Wide powers vested for reopening the assessment under section 148 read with section 147 of theIncome Tax Act, 1961.

27.It is precisely for this reason, the Hon'ble Supreme Court had held that a speaking order should be passed after the assessee is furnished with reasons for reopening of the assessment. In this case, the safeguards enunciated by the Honourable Supreme Court in **GKN Drive Shafts (India) Ltd.,** Vs. **Income Tax Officer and others,** 259 ITR 19 has been ignored by directly passing the impugned assessment order. Therefore, impugned assessment order is therefore not sustainable.

28.Therefore, the impugned order is set aside and the case is remitted back to the respondent to pass a fresh order disposing of the petitioner's objection in the light of the decision of Supreme Court in **GKN Drive Shafts (India) Ltd.,** Vs. **Income Tax Officer and others,** 259 ITR 19.

29.This exercise shall be carried out by the respondent, within a period of eight (8) weeks from the date of receipt.

30.Writ Petition is allowed by way of remand.Consequently, W.M.P.No.25105 of 2022 is dismissed. Rest of Miscellaneous petitions are closed. No costs.

13.12.2023

Jas / krk

Index : Yes / No
Internet : Yes / No
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To

The Assistant Commissioner of Income Tax,
Corporate Circle – 4(1),
121, Mahatma Gandhi Road,
Chennai – 600 034.

C.SARAVANAN, J.

Jas / krk

<u>W.P.No.1846 of 2020</u>

13.12.2023