IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 3342 OF 2018

Precilion Holdings Limited .. Petitioner

Versus

The Deputy Commissioner of Income Tax,
International Taxation -3(3)(2), Mumbai & Ors. .. Respondents

.....

- Mr. Jehangir Mistri, Senior Counsel a/w Mr. Madhur Agrawal i/by Atul Jasani for the Petitioner
- Mr. P.C. Chhotaray for the Respondents

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : FEBRUARY 25, 2019.

ORAL JUDGMENT (Per Akil Kureshi, J.)

1. The petitioner has challenged a notice of reopening of assessment dated 3.4.2018.

2. Brief facts are as under:-

2.1 Petitioner is a company incorporated in Cyprus enjoying tax residency certificate issued by the Cyprus Authorities. Petitioner's principal activity is to act as an investment holding company. During the assessment year 2011-12, the petitioner had made investment in Compulsory Convertible

Debentures of M/s. Wadhwa Residency Pvt Ltd, a company incorporated in India, of a sum of Rs. 161.31 crore (rounded off). On such investment, the petitioner had received interest amount of Rs. 11.93 crore (rounded off) during the relevant period. The petitioner had filed return of income for the assessment year 2012-13 declaring total income of Rs. 11.93 crore being the interest eared by the petitioner and offered the same to tax @ 10%, placing reliance on Article 11 of the Double Taxation Avoidance Agreement ("DTAA" for short) between India and Cyprus. It is undisputed that M/s. Wadhwa Residency Pvt Ltd is an associated enterprise of the petitioner and the receipt of interest income was subject to transfer pricing mechanism. The order of assessment came to be passed by the Assessing Officer on the petitioner's said return of income under Section 143(3) of the Income Tax Act, 1961 ("the Act) for short) on 23.3.2016. The income was taxed at 10%, as offered by the petitioner. In order to reopen such assessment, the Assessing Officer had issued the impugned notice. For doing so, the Assessing Officer had recorded following reasons:-

"THE REASONS FOR INITIATING PROCEEDINGS U/S 148 FOR A.Y. 2012-13

The return of income for A.Y. 2012-13 was e-filed on 30.11.2012 declaring total income of Rs. 11,93,41,710/- On which assessee has deducted TDS of Rs. 1,19,34,170/. @ 10%. The return was processed u/s 143(1) on 31.12.2013.

2. The assessee company ie. Precilion Holding Limited is a company incorporated in Cyprus. The assessee has offered interest income at tax rate of 10% claiming beneficial ownership of interest income as per Article 11 of DTAA.

3. The case was selected for scrutiny and assessment order u/s 143(3) r.w.s. 92CA(3) of the I. T. Act was passed on 23.03.2016 accepting the returned income.

4. The draft assessment order u/s 143(3) r.w.s 92CA(3) r.w.s. 144C(1) of the Income Tax Act, 1961 was completed for A.Y. 2014-15 on 29.12.2017. During the course of assessment proceedings following facts merged out and assessee was denied beneficial ownership of interest income.

5. In this case for A.Y. 2014-15, assessee is Cyprus based Foreign Company. It holds investments in Compulsory Convertible Debentures (CCD's) in various Indian companies and offers for tax the interest income on such investments on receipt basis. The said income of Rs. 55,01,17,499/- has been offered to tax @ 10% as per the provisions of Article 11(2) of the DTAA by the assessee as beneficial owner of interest income.

6. To be beneficial owner of interest income assessee should be independent and free to utilize its interest income on its own and it should have substantial commercial activity in Cyprus.

7. In order of the interest income at lower tax rate @ 10%, assessee has to be beneficial owner of such interest income.

8. Accordingly in order to verify the same movement of the receipts and payments through bank account transfer was verified and analyzed. Source of the investment made by the assessee was inquired into and

nature of payback to investors was analyzed. A inquiry regarding whether assessee has any office and employees on its payroll in Cyprus was made. Activities of directors were studied and related party transactions if any were looked into. Articles of Association and memorandum of association of company were gone through and terms and conditions of issue of various types of shares were studied.

9. Thus, it is clearly established that assessee has invested in CCD's of Indian company out of its share holders funds. Upon receipt of interest income related to CCD's, invariably within 6 to 20 days, this income amount is transferred to share holder by paying dividend. Pay out of income is dependent on receipt of interest income in terms of timing and availability of funds. Assessee does not have a single employee and any substantial economic activity in Cyprus and working of the company is controlled by beneficial share holder of the company by hiring of services of working as directors from employees of IPS Mauritius by whom local address is given in Mauritius to beneficial owner of Assessee Company.

10. In the assessment proceedings, it is held that the assessee is not beneficial owner of this income on these tests and thus treaty benefits are denied to the assessee to the extent of interest income only in the present case. Interest income of Rs. 55,01,17,499/- is taxed at rate @ 20% as per provision of section 115A(1)(a)(ii) of I.T. Act, 1961 instead of 10% offered by the assessee.

11. In view of this, it was held that the assessee is not beneficial owner of this income on these tests and thus treaty benefits are denied to the assessee in respect of interest income. Interest income is taxed at the rate @ 20% as per provision of Section 115A(1)(a)(ii) of I.T. Act, 1961.

12. It is pertinent to note that during the assessment proceedings, order u/S. 143(3) r.w.s. 92CA(3) of the I.T. Act, 1961 for the A.Y. 2012-13 was passed on 23.03.2016. The assessing officer has not raised any query on the above issue and the same was not verified during the course of assessment proceedings for A.Y. 2012-13. Keeping in view of the above fact, the issue is required to be verified for the A.Y. 2012-13.

13. In view of the above facts, it is clear that interest income is taxed at low rate of 10% instead of 20% and I have reason to believe that the provisions of clause (c) of Explanation 2 to Section 147 of the Income Tax Act are applicable to the facts of this case and the assessment year under consideration is deemed to be a case where the income which is more than Rs. 1,00,000/- chargeable to tax @ 20% rate tax has escaped assessment.

14. In this case, more than four years have lapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice u/S. 148 has been obtained separately from the Commissioner of Income Tax(IT)-3, Mumbai as per the provisions of Section 151 of the Act."

2.2 The petitioner raised objections to the notice of reopening of assessment under communication dated 28.5.2018. Such objections were disposed of by the Assessing Officer by order dated 25.9.2018. Upon which, this petition came to be filed.

3. Appearing for the petitioner, learned senior counsel Shri. Mistri raised the following contentions in support of challenge:-

i. The impugned notice has been issued beyond the period of four years from the end of relevant assessment year. The petitioner had made true and full disclosures in the return filed. The Assessing Officer, therefore, could not have

reopened the assessment;

ii. During the scrutiny assessment, the entire issue was examined by the Assessing Officer. Only after which the order of assessment was passed accepting the stand of the petitioner that the interest income was correctly offered to tax @ 10%. Even in the order of assessment, this aspect has been referred by the Assessing Officer;

iii. Even on merits, the Assessing Officer's stand is completely incorrect. The petitioner enjoys a tax residency certificate issued by Cyprus Authorities. The Assessing Officer cannot disregard such certificate to hold a belief that the assessee company is not a genuine company based in Cyprus and that, therefore, the benefit of reduced rate of tax as per DTAA was wrongly claimed.

4. On the other hand, learned counsel Shri. Chhotaray opposed the petition contending that the Assessing Officer has recorded proper reasons. During the course of the assessment of the petitioner assessee for the subsequent assessment years, the entire issue was examined by the Assessing Officer at length and he has come to the

conclusion that the assessee had wrongly claimed reduced rate of tax on the interest income. Thus, the formation of belief of the Assessing Officer in the present case is based on information available subsequent to the framing of assessment. He relied on several decisions reference to which would be made at an appropriate stage.

5. Having thus, heard the learned counsel for the parties, we may record that the impugned notice has been issued beyond the period of 4 years from the end of relevant assessment year. Under these circumstances, the additional requirement flowing from the first proviso of Section 147 of the Act that escapement of income chargeable to tax should be due to a failure on the part of the assessee to disclose truly and fully all material facts, must be satisfied. We may peruse the materials on record on such basis.

6. The perusal of the reasons recorded by the Assessing Officer would show that according to the Assessing Officer, in order to claim the benefit of Article 11 of the DTAA, the assessee had to be a beneficial owner of the interest income

and in turn, the assessee should be independent and free to utilize its interest income on its own and should have substantial commercial activities in Cyprus. He has further recorded during the course of assessment for the assessment year 2014-15 to verify the movement and the receipt of payments, bank account was verified and analyzed. Source of investment of the assessee was inquired into and nature of payback to the investors was analyzed by the Assessing Officer. He has also verified the activities of the directors and related party transactions. He had also gone through the Articles of Association and Memorandum of Association of the company. On the basis of such material, the Assessing Officer had come to certain important conclusions ultimately leading to his belief that the assessee was not the beneficial owner of the interest income and that, therefore, the reduced rate of tax @ 10% was not available, instead, the assessee would have to pay tax at higher rate on such income.

7. In the reasons, the Assessing Officer further records that in respect of the scrutiny assessment for the

assessment year 2012-13, "the Assessing Officer has not raised any query on the above issue and the same was not verified during the course of the assessment proceedings for the assessment year 2012-13". Keeping in view the above fact, the issue requires to be verified for the assessment year 2012-13"

8. We notice that during the course of the assessment proceedings for assessment year 2012.13, the Assessing Officer had raised multiple queries and elicited replies from the petitioner assessee. For example, under a letter dated 16.2.2016, the Assessing officer had called for, besides other, following information:-

> "7. Furnish the details of share holding / investments / loans / advances & interest earned / paid with M/s. Wadhwa Residency Pvt Ltd as on 31.3.2011, 31.3.2012 and 31.3.2013.
> 8. Furnish details of purchases of debentures / shares from Wadhwa Residency Pvt Ltd;
> 9. Furnish list of directors of the company along with details of their share holdings;
> 10. Furnish details of investments made / interest with M/s. Wadhwa Residency this is your associated enterprises."

In reply to such queries, the assessee under communication dated 2.3.2016 had provided following

information and documents :-

"A. At the outset, we wish to inform you that assessee is an investment holding company incorporated in Cyprus on 20 April 2011.

The assessee has made investment in compulsory convertible debentures ("CCDs") of Wadhwa Residency Private Limited ("WRPL") amounting to Rs. 1,61,53,50,000 during the year under consideration. Further, the assessee has received interest on CCDs amounting to Rs. 11,93,41,705/-

The assessee has earned interest on CCDs and has not earned any other income in India during the year under consideration.

B. .....

3. Copy of incorporation certification is enclosed as Annexure III

5. Copy of financial statements is enclosed as Annexure VI. Further, the assessee is a foreign company and made investment in India and therefore, the assessee is not required to prepare tax audit report.

7. The assessee has earned interest on CCDs from WRPL as follows:-

AY 2011-12 - Nil. Investment was made in CCDs in AY 2012-13

AY 2012-13 - Rs. 11,93,41,705

AY 2013-14 - Rs. 32,30,70,000

8. Copy of the agreement in respect of investment in CCDs of WRPL is enclosed as Annexure VII.

9. Directors of the assessee company are as follows:

a. Briantserve Limited

b. Ceantrust Limited

c. Basanta Lala Couldiplall

Shareholding structure of the assessee is as under:-

Sr. No.	Name of the Shareholder	Percentage of shareholding
1	IL & FS Realty Fund II LLC	74.46%
2	Saffron India Real Estate Fund I	25.54%
	Total	100%

10. Please refer point A above.

12. Copy of bank account and bank statement is enclosed as Annexure IX and Annexure X.

Along with this communication, the petitioner had annexed certain documents which included the bank statement.

On 16.3.2016, the petitioner supplied further information to the Assessing Officer which included the following:-

"The total grossed up amount of interest was INR 119,341,705. WRPL deducted tax at the rate of 10 percent as per Article 11 of Double Taxation Avoidance Agreement between India and Cyprus.

3. The assessee company was formed on 20 April 2011. IL&FS Realty Fund II LLC and Saffron India Real Estate I invested into 74.46% and 25.54% of equity shares of the assessee respectively.

   The assessee had invested the money received against the equity shares into CCDs of WRPL. Copy of the bank statement depicting the flow is enclosed as Annexure III.

4. Details of the shareholders of the assessee are as under

Sr. No.	Name of the Shareholder	Percentage of shareholding
1	IL & FS Realty Fund II LLC Address : IFS Court, Twenty Eight Cybercity, Ebene, Mauritius	74.46%

2	Saffron India Real Estate Fund I Address : Rogers House, 5 Joh N. President Cennedt Street, Port Lueis Mauritius	25.54%
	Total	100%

We further confirm that the above entities are tax residents of Mauritius and do not have any upstream shareholders in India."

Under letter dated 21.3.2016, the petitioner supplied following additional documents:

"Further, without prejudice to the above, as requested by your goodself, we submit as under:-

1. Shareholding structure of IL&FS Realty Fund II LLC as on 31 March 2012 as Annexure I
2. Shareholding structure of Saffron India Real Estate Fund I as on 31st March 2012 as Annexure II
3. Bank statement for the period from 1 January 2011 to 31 March 2013 of IL&FS Realty Fund II LLC as Annexure III
4. Bank statement for the period from 1 January 2011 to 31 March 2013 of Saffron India Real Estate Fund I as Annexure IV."

It was after such exchange of communications that the Assessing Officer had passed the the order of assessment on 23.3.2016 in which he has observed as under:-

"4. The assessee i.e Precilion Holdings Limited is a company incorporated in Cyprus. The Principal activity of the assessee is to act as an investment holding company.

5. During the year, the assessee has received interest on compulsory convertible debentures amounting to Rs. 11,93,41,705/- from Wadhwa Residency Private Limited, which is Associated Enterprises of the assessee.

6. The Arm's length price of the international transaction as reported by the assessee has been accepted by the transfer pricing officer. The details furnished by the assessee have been verified and discussed.

7. In view of the facts of the case as discussed above, the total income of the assessee is assessed on the income of Rs. 11,93,41,705/- i.e income returned.

8. Assessed accordingly under Section 143(3) r.w.s. 92CA(3) of the Act at the total income of Rs. 11,93,41,710 (round off) as interest income. Give credit for TDS and taxes paid, if any after due verification. Charge interest as applicable. Issue D.N./R.O/ Challan accordingly."

9. It can thus be seen that the entire financial activity of the petitioner during the relevant period came up for scrutiny before the Assessing Officer during the original scrutiny assessment. The petitioner had limited financial activities during the said period resulting into only one principal transaction of earning interest income. The Assessing officer had inquired about the nature of activities of the assessee and the nature of source of income. Even if, it is believed that the question of taxing such interest income at the concessional rate as per the DTAA was not in the mind of the Assessing Officer when such queries were raised and the order of assessment was passed, one thing that cannot be denied is that there was no failure on the part of the assessee to disclose truly and fully all material facts

necessary for assessment. Whatsoever allegations by the Assessing Officer in the reasons recorded that there was no failure on the part of the assessee to disclose true and full all material facts. The assessee had filed the return of income making all necessary declaration. Detailed scrutiny examination during the original assessment was carried out. The assessee supplied full information called for by the Assessing Officer and also placed on record voluminous documents for his consideration. Nowhere in the reasons, the Assessing Officer contends that in the process of such scrutiny also, there was any failure on the part of the assessee to disclose truly and fully all material facts. Whatever be the validity of the Assessing Officer's contention that the assessor's interest income in the case on hand could not be taxed at the concessional rate, reopening of assessment beyond the period of four years was simply not permissible.

10. Even in the reasons, the Assessing Officer's logic revolves around the further scrutiny carried out by the Assessing Officer for the assessment year 2014-15 during

which he formed the belief that the income should have been charged at high rate of 20%. In the quoted portion of the reasons, he goes on to suggest that the Assessing Officer during the scrutiny for assessment year 2012.13 had not raised any query on this aspect and had not verified the same during the assessment. In that view of the matter, he was of the opinion that the issue requires verification; which would tantamount to fishing or roving inquiry. His reference to the subsequent assessment, in absence of any additional material outside of the present assessment proceedings would not form a valid source of information permitting him to reopen assessment. If during the assessment of the later assessment year, the Assessing officer collects or chances upon new material which may have bearing on the assessment of the assessee, and in case where the assessment is sought to be reopened beyond four years, he can also establish lack of true and full disclosures on the part of the assessee, it may be open for him to reopen assessment of the earlier year. However, merely because in the later year, the Assessing Officer takes a different view on the basis of similar material, which may have been collected

during such process, would not permit him to reopen the assessment. Under these circumstances, the Assessing Officer's reference to further exercise undertaken while carrying out scrutiny assessment for the assessment year 2014-15 during which he decided to tax the assessee at higher rate would not enable the Assessing Officer in the present case to reopen the assessment beyond four years.

11. We may now refer to the decisions cited by the learned counsel for the Revenue. In case of **Raymond Woolen Mills Ltd Vs. ITO[1],** information was obtained in assessment proceedings for subsequent year which would suggest that the disclosures by the assessee during the year under consideration were untrue. It was on that basis that reopening of assessment was permitted, however, observing that at that stage, the Court would consider only whether there was prima facie material on which the assessment could be reopened.

1 236 ITR 54 (SC)

12. In case of **Rabo India Finance Ltd Vs. Deputy CIT (Bom)**[2], this Court observed that the judgments of the Supreme Court lay down a principle that the Assessing Officer acts within jurisdiction in reopening the assessment on the basis of the information which comes to him after the original assessment and during the course of the assessment proceedings for subsequent assessment years. This principle was reiterated in later judgment in case of **Multiscreen Media Pvt Ltd Vs. Union of India & Anr.**[3]. With this proposition, there cannot be any doubt or dispute. What is to be gathered in a given case as in the present one is whether the Assessing Officer can be stated to have received any such additional information during the course of subsequent assessment. Significantly, in both these cases, the notice of reopening was issued within the period of four years.

13. In case of **Sociedade De Formento Industrial P Ltd Vs. Asst. CIT & Anr.**[4], this Court had not turned down the assessee's challenge to the notice of reopening of

2 [2013] 356 ITR 200 (Bom)
3 [2010] 324 ITR 54 (Bom)
4 [2011] 339 ITR 595 (Bom)

assessment but had merely refused to act in exercise of writ jurisdiction observing that the challenge could be more conveniently dealt with in the proceedings under the Income Tax Act rather than Writ Petition.

14. Reference to the decision in case of **Asst. CIT Vs. Rajesh Jhaveri Stock Brokers P Ltd**[5] was limited to the observations suggesting that at the stage of deciding the legality of reopening of assessment, the Court would be considering only with the prima facie satisfaction of the reasons recorded.

15. In view of the above discussion, the impugned notice of reopening of assessment cannot be sustained. We, however, make it clear that we have not examined the contention of the petitioner that even on merits, the additions could not have been made. In the result, the impugned notice is quashed. The petition is allowed and disposed of accordingly.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**

5 [2007] 291 ITR 500 (SC)