IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 271 OF 2018
ALONGWITH
WRIT PETITION NO. 278 OF 2018

State Bank of India, Mumbai ....Petitioner
v/s.
Assistant Commissioner of Income-Tax, Circle-2(2)(1), Mumbai and Ors. ....Respondents

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Mr. Percy Pardiwala, Senior Counsel a/w. Mr. Nitesh Joshi i/by. Mr. Atul Jasani, Advocate for the petitioner.

Mr. P.C. Chottaray, Advocate for respondents no.1 to 3.

Ms. D.N. Mishra, Advocate for respondent no.4.

CORAM :- M.S. SANKLECHA, &
SANDEEP K. SHINDE, JJ.

DATE :- 15TH JUNE, 2018.

P.C. :-

1. Heard.

2. Rule.

3. These two petitions challenge the notices for reopening of assessment issued Section 148 of the Income Tax Act (the Act). One petition challenges the notice dated 21st March, 2017 seeking to re-open the Assessment Year 2013-14 and the other challenges the notice dated 24th March, 2017 seeking to re-open the assessment for the Assessment Year 2014-15. The regular assessment for the Assessment Year 2013-14 and Assessment Year 2014-15 were completed under Section 143(3) of the Act. Both the impugned notices have been issued within a period of four years from the end of the relevant Assessment Year and therefore not hit by the first proviso to Section 147 of the Act. The reasons in support of both the impugned notices are identical in having proceeded on the basis that deduction in the value of its advances on account of change in the contractual terms consequent to the restructuring of the assets were

of a contingent nature and do not qualify to be allowed as a loss/deductible expenditure. The reasons also place reliance upon the decision of the Apex Court in the case of **Southern Technologies Ltd. V/s. Commissioner of Income-Tax reported in 320 ITR 577** to contend that RBI guidelines will not determine taxability under the Act. All this to form the reasonable belief that income chargeable to tax has escaped assessment.

4. The petitioner objected to the reasons for re-opening notices dated 21st March, 2017 and 24th March, 2017 and the same were rejected by orders dated 2nd November, 2017. It is the petitioner's contention that, the reasons in support of the impugned notice indicate a change of opinion. Thus, it is submitted that the Assessing Officer had no reason to believe that the income chargeable to tax has escaped assessment. Our attention is drawn to the fact that the claim for deduction on the above account viz. restructuring of its loans/advances

was made in its computation of income and the notes annexed thereto specifically note 21 (Assessment Year 2013-14) and note 22 (Assessment Year 2014-15) thereof had made reference to the fact that the provision for diminution on account of restructured Advances of Rs.710.81 crores (Assessment Year 2013-14) and Rs.495.11 crores (Assessment Year 2014-15) was claimed in accordance with RBI guidelines. It is the petitioner's case that this claim for above provision as a deduction was considered during the assessment proceedings and accepted. This is evident from the fact that, the assessment orders for both the years had disallowed some claims made in its computation of income alongwith the subject claim. However, while disallowing some claims in the assessment orders the claim for provision on restructured assets (diminution in fair value thereof) as claimed by the petitioner was not disallowed. On the basis of the above, it is the submission of the petitioners that the Assessing Officer has whilst

considering the basic document for assessment viz. computation of income has taken a conscious decision to allow the same, while disallowing some other claims made in the computation of income. Therefore, it is submitted that the reasons recorded to issue the impugned notices indicate a change of opinion and thus the re-opening notices are without jurisdiction.

5. As against the above, it is the case of the Revenue that the re-opening notices should not be interdicted at this stage and the petitioners should be directed to contest the same before the Authorities under the Act. It is submitted that in this case, the Assessing Officer while passing the regular assessment orders had overlooked and/or ignored this particular claim. It is submitted that it is not a case of change of opinion as neither the assessment order referred to allowing of this claim nor the assessment order was preceded by any queries with regard to the subject claim of the petitioners.

Thus, there was no formation of opinion on the issue in the regular assessment proceedings. Consequently, there can be no change of opinion of the issue which forms the basis of the reasons recorded for issuing the impugned notices.

6. We note that the Apex Court in **Income-Tax Officer V/s. Techspan India Private Limited and Another, reported in [2018] 404 ITR 10(SC)** reiterated the settled principle of law laid down by the Supreme Court in **CIT V/s. Kelvinator of India Ltd. [2010] 320 ITR 561(SC)** that the Assessing Officer has a power only to reassess and has no power to review the assessment order. Thus, it held that no re-opening notice can be issued which is premised on a change of opinion. It further goes on to hold that before interference with a proposed reopening of the assessment, the Court should verify whether the assessment order made earlier has expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged

escapement of income that was taxable. Infact, in this case we find that the assessment orders passed in regular assessment proceedings do refer to examining the computation of income filed alongwith the Return of Income. Moreover, the Assessment order in regular assessment proceedings in terms disallowed some of the claims made for deduction under Section 143(3) of the Act. Therefore, in the present facts, we are *prima-facie* of the view that, the Assessing Officer has by necessary implication allowed the claim. Moreover, the basic document for completing the assessment under Section 143(3) of the Act is the computation of income. Therefore, to the extent the claims made for deduction in the computation of come, were disallowed by the Assessing Officer, discussion on the same is found in the assessment order. It is an accepted position that the assessment orders would necessarily deal only with the claims being disallowed and not with the claims being allowed. This is for the reason as observed by the Gujarat

High Court in **CIT Vs. Nirma Chemicals Ltd 309 ITR 67**, that if the Assessing Officer was to deal with all the claims which were to be allowed in the assessment order, the result would be an epictome. This is so, as it would cast an impossible burden upon the Assessing Officer considering his workload and the period of limitation. There was also no reason in the present facts for the Assessing Officer to ask any queries in respect of this claim of the petitioner, as the basic document viz. computation of income at note 21 (Assessment Year 2013-14) and note 22 (Assessment Year 2014-15) thereof explained the basis of the claim being made to the satisfaction of the Assessing Officer. Thus, it must necessarily be inferred that the Assessing Officer has applied his mind at the time of passing an assessment order to this particular claim made in the basic document viz. computation of the income by not disallowing it in proceedings under Section 143(3) of the Act as he was satisfied with the basis of the claim as indicated in that

very document. Therefore, where he accepts the claim made, the occasion to ask questions on it will not arise nor does it have to be indicated in the order passed in the regular assessment proceedings. Thus, issuing the impugned notices on the above ground would, prima-facie, amount to a change of opinion.

7. The decisions relied upon by the Revenue, prima-facie, are distinguishable and have no application to the present facts. The decision of this Court in **Export Credit Guarantee Corporation vs. Additional CIT 350 ITR 651** has no application in the present facts as it proceeded on a finding that the Assessing Officer had overlooked/ignored a particular claim made in the assessment order. In this case, we find that the Assessing Officer has allowed the claim in regular Assessment order on application of mind by implication. It cannot be said to be overlooked or ignored as this claim alongwith other claims were made in the basic document i.e. computation

of income. The disallowance of some of the claims therein implies allowing the same after considering it. Similarly, the decision of this Court in **M/s. Eleganza Jewellery Limited Vs. CIT (Writ Petition (Lodg) No. 2763 of 2013) dated 1st February, 2014**, prima-facie will not apply to the present facts, as in that case it was not the contention of the assessee that the regular assessment order impliedly indicate that there was an opinion formed by the Assessing Officer at the time of passing an assessment order.

8. The decision in the case of **A.L.A. Firm v. Commissioner of Income-Tax [1991] 189 ITR 285** of the Apex Court, wherein the Proposition (4) as enunciated in **Kalyanji Mavji and Co., V. CIT, reported in [1976] 102 ITR 287 (SC)** was held to be applicable which reads as under :-

> *"where the information may be obtained even from the record of the original assessment from the*

investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law".

The Court observed, the aforesaid proposition would entitle the Revenue to re-open an assessment on the basis of material already on record provided some information in the form of facts or law which the Assessing Officer was not earlier conscious, coming to his knowledge subsequently. In the present case, the Revenue suggested at the bar, that the re-opening was done on the basis of assessment order in the subsequent assessment year. However, the reasons in support do not indicate the above assertion of fresh facts or law coming to the knowledge of the Assessing Officer in the subsequent Assessment Year. Further, we are informed that the assessment order for the subsequent Assessment Year taking a fresh view was passed after the impugned notices were issued. Thus, it could not have formed the basis of reasons to believe that income chargeable to tax has escaped assessment. So far

as reliance on *Southern Technologies* (supra) is concerned, we are of the prima-facie view that the same may not apply to the facts of the present case as that case proceeded on the basis that provisions of the Act were not satisfied. This, is so as they were at variance with the directions given by the Reserve Bank of India. This prima-facie does not appear in the present facts. Further, the Delhi High Court in **Commissioner of Income-Tax vs. Vasisth Chay Vyapar Limited [2011] 330 ITR 440** had considered the Apex Court decision in *Southern Technologies* (supra) and held its applicability is dependent on facts. The above Delhi High Court decision would prima-facie apply to the present facts alongwith the decision of the Apex Court in **Vijaya Bank Vs. Commissioner of Income-Tax 323 ITR 166**. Moreover, the above decision of the Apex Court in *Southern Technologies* (supra) was available when the orders in regular assessment was passed and admittedly the Assessing Officer did not disallow the claim on satisfaction

as pointed out above. So far as the decision of this Court in **Rabo India Finance Ltd. vs. Deputy Commissioner of Income-Tax 356 ITR 200** is concerned, prima-facie the same cannot have any application to the present facts as it proceeded on the basis that the reopening notice was issued on the basis of information coming to the knowledge of the Assessing Officer after the original assessment order was passed. i.e. during the course of assessment proceedings of the subsequent year. In this case, nothing has been shown to us at this stage which would indicate that any subsequent information came to the knowledge of the Assessing Officer which warrant the issue of impugned notices. The decision of this Court in **Multiscreen Media Private Limited V. Union of India and another (No.2) [2010] 324 ITR 54 (Bom)** was again a case where the re-opening notice was issued on obtaining fresh information/material after the passing of an order in the regular assessment proceedings. In this case, admittedly no fresh material/information was

obtained by the Assessing Officer as the same does not find a mention in the reasons recorded in support of the impugned notice. Therefore, this is a case of change of opinion. The decision of the Apex Court in **Raymond Woollen Mills Ltd. v. Income-Tax Officer [1999] 236 ITR 34 (SC)**, while refusing to entertain the petition had directed the party to contest the re-opening notices before the authorities under the Act by observing that it would be open to the assessee to prove that no new facts came to the knowledge of the Assessing Officer after completion of the regular assessment proceedings. In this case, prima-facie the petitioner has shown absence of any new facts or law coming to the notice of the Assessing Officer after passing of assessment orders in regular assessment proceedings. In the present facts, (particularly the claim made in computation of income) prima-facie if the stand of the Revenue is to be accepted, the sanctity/finding attached to the proceedings under Section 143(3) of the Act would be done away with and it would be open to the

Revenue to do piecemeal assessments by re-opening the same. Therefore, the reasons in support of the notice, prima-facie indicates a change of opinion.

9. For the above reasons, we are prima-facie of the view, that the impugned notices are without jurisdiction. Therefore, there shall be interim stay in terms of prayer clause (d) in both the petitions.

10. Hearing expedited. Liberty to apply.

11. Mr. Chottaray, waives service of notice of behalf on respondents no.1 to 3.

(SANDEEP K. SHINDE, J) **(M.S. SANKLECHA, J)**