IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 951 OF 2022

E-Land Apparel Ltd. ….Petitioner

V/s.

Assistant Commissioner of Income Tax
Central Circle-6(3) & Ors. …Respondents

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b Lumiere Law Partners for Petitioner
Mr. Suresh Kumar for Respondents

CORAM : K.R. SHRIRAM &
N.J. JAMADAR, JJ
DATED : 21st FEBRUARY 2022

P.C. :

1 Petitioner carried on business of manufacturing different types of fabric and clothing. This business was carried on through two separate units. In previous year relevant to A.Y.-2014-2015, the unit carrying on the business of manufacturing of fabrics was transferred by petitioner under a slump sale agreement with all assets and liabilities to subsidiary of petitioner. The transfer of liabilities also included the loan taken by petitioner from various banks in connection with the business of the said unit.

2 Petitioner received a consideration of Rs.46.49 crore for transferring the fabric business factoring in the liabilities transferred by petitioner. The slump sale agreement was approved by the Corporate Debt Restructuring Committee in F.Y.-2014-2015 and thereafter an agreement was entered into

by E-Land Fashion, the transferee, with various banks for taking over the liabilities payable to banks. The assets and liabilities including the interest payable to banks and interest converted into a loan was transferred to the transferee who took over the liabilities to various banks. Petitioner, therefore, was discharged of all its liabilities to the banks.

3 During the Financial Year relevant to A.Y.-2015-2016, the transferee paid outstanding interest which was originally payable by petitioner to the banks. Petitioner claimed the deduction for the aforesaid payment aggregating to Rs.28,59,25,817/- even though the payment was made by transferee while filing the return of income for A.Y.-2015-2016.

4 In the original return of income that petitioner filed on 30th November 2015, petitioner declared the total income at Nil. Subsequently, case was selected for scrutiny and assessment order under Section 143 (3) of the Act was passed on 28th December 2017, with assessed loss of Rs.28,25,35,180/- after making various additions. In the assessment year, the assessed loss also included deduction as interest paid on Rs.28,59,25,817/- on loss or borrowing from Public / State / Industrial financial institution as claimed by the assessee vide Income Tax Return. This is an admitted position, as could be seen in the reasons recorded for reopening.

5 Thereafter, petitioner received a notice dated 31st March 2021 under Section 148 of the Act from respondent no.1 stating that there were reasons to believe that petitioner's income chargeable to tax for A.Y.-2015-2016 has escaped assessment. Petitioner was provided the reasons recorded for

reopening vide communication dated 14th May 2021. As per the reasons recorded, the deduction of interest paid of Rs.28,59,25,817/- on loan or borrowing from Public / State / Industrial financial institution as claimed by petitioner should not have been allowed because after slump sale, assets and liabilities belonged to the transferee and it was the transferee who paid the interest to these financial institutions in a subsequent Financial Year. Therefore, income of Rs.28,25,35,180/- which was the total loss that was assessed, has escaped assessment within the meaning of Section 147 of the Act.

6 In our view, the reasons expressly state that the Assessing Officer, who passed the original assessment order, had allowed this deduction of Rs.28,59,25,817/- and, therefore, reopening in our view, is only due to change of opinion, which, as held time and again by various courts, is not permissible. Moreover, in the notes to the Form 3CD submitted by petitioner alongwith its return of income expressly provided as under:

> *"Pursuant to the slump sale in the previous year 13-14, the liability on account of interest payable and property tax payable was transferred to E-land Fashion India Private Limited. In case of E-land Apparel Limited, the said interest and property tax liability was disallowed u/s 43B of the Income Tax Act 1961 and was remaining unpaid as at the end of the previous year 13-14.*
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> *The assessee has relied on the decision in the case of CIT V Diza Electrical (222 ITR 156), wherein the deduction on payment has been granted to the predecessor while the payment was made by successor.*
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> *Accordingly, based on the payment of interest by E-land Fashion India Private Limited, that was outstanding on the first day of the rpevious year 14-15, the deduction of interest paid of Rs.28,59,25,817 has been claimed by the assessee u/s 43B of the Income Tax Act, 1961 in the previous year 14-15."*

7 Therefore, as held by this court in ***3i Infotech Ltd. vs. Assistant Commissioner of Income Tax***[1], petitioner had brought to the attention of the Assessing Officer this facet while submitting the tax audit report as a part of its return of income. This is not a case where petitioner can be regarded as having merely produced its books of account or other evidence during the course of the assessment proceedings on the basis of which material evidence could have been deduced by the Assessing Officer with the exercise of due diligence. Petitioner, under Section 139 of the Act had a mandatory obligation to furnish with its return of income the report of audit. Petitioner fulfilled its obligation. Paragraphs 14 and 15 of *3i Infotech Ltd.* (supra) read as under:

> *14. The third ground on which the assessment has been sought to be reopened is that from Annexure 2, clauses 20 and 22(b), of Form 3CD an amount of Rs.31.32 lakhs is found to be debited to the profit and loss account on account of prior period expenses. This according to the Assessing Officer is not allowable under the Act and should be added back. To this extent, the Assessing Officer has found that there was an escapement of income. During the course of the submissions, the attention of the Court has been drawn by the learned counsel appearing on behalf of the assessee to the particulars of income and expenditure of the prior period, credited or debited to the account. Appended to the statement are the following notes :*
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> *"(1) Based on the recommendations of the Institute of Chartered Accountant of India in its publication "Guidance note on tax audit under Section 44AB of Income Tax Act, 1961" at para 44.2 of edition September 1999, expenditure of earlier years means expenditure which arose or accrued in any earlier year and which excludes any expenditure of any earlier year for which the liability to pay has crystallized during the year.*
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> *(2) Excess/short provision of earlier year and income and expenditure crystallized during the year though shown above has not been considered as prior period item."*

1. (2010) 192 Taxman 137 (Bombay)

> *15. These notes, according to the assessee are consistent with the guidance note issued by the Institute of Chartered Accountants on tax audit under Section 44AB of the Act. By its note, the assessee has recorded that the expenditure of the earlier years means expenditure which arose or which accrued in any earlier year and excludes any expenditure of an earlier year for which the liability to pay has crystallized during the year. Similarly, the assessee has clarified that excess/short of provision of an earlier year and income and expenditure crystallized during the year, though shown in the statement, have not been considered as prior period items. The assessee, as the material on record would show, therefore brought to bear the attention of the Assessing Officer to this facet while submitting the tax audit report as a part of its return of income. This is not a case where the assessee can be regarded as having merely produced its books of account or other evidence during the course of the assessment proceedings on the basis of which material evidence could have been deduced by the Assessing Officer with the exercise of due diligence. Under Section 139 the assessee was under a mandatory obligation to furnish with its return of income the report of audit under Section 44AB. The assessee fulfilled the obligation. The disclosures which are made as part of the report under s. 44AB cannot fall within the interdict of Explanation (1) to Section 147.*

8 Similar view has been taken by the High Court of Delhi in ***Ranbaxy Laboratories Ltd. Vs. Deputy Commissioner of Income Tax***[2] in which paragraphs 13 and 14 read as under:

> *"13. Mr Maratha appearing on behalf of the respondents, vehemently supported the re-opening of the assessment in respect of the assessment year 2003-04 and submitted that there was failure on the part of the assessee to fully and truly disclose all material facts which were necessary for assessment. He strongly relied upon the 4th reason, that is, of club expenses by stating that the assessee had not disclosed this at the time of the assessment. On a pointed query, Mr Maratha could not show as to which particular information or material fact had not been disclosed by the assessee at the time of the original assessment proceedings. He only sought to place reliance on Explanation 1 to Section 147 which reads as under:-*
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> *"Explanation 1: Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."*
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> *However, we do not see as to how Mr Maratha could place reliance on the said Explanation. Insofar as all the purported reasons other than the reason pertaining to club expenses are concerned, specific queries had been raised and the Assessing Officer had considered the material*

2. (2013) 30 taxmann.com 410(Delhi)

> *placed by the petitioner before him. As regards club expenses, Mr Maratha states that since no specific query had been raised, Explanation 1 would get triggered. We do not agree with this submission. This is so because the club expenses were specifically mentioned at serial No. 17(d) of the tax audit report in Form No. 3CD which was annexed along with the return. This was a clear statutory disclosure on the part of the assessee with regard to the claim of club expenditure. It was not a piece of evidence which was hidden in some books of accounts from which the Assessing Officer could have possibly, with due diligence, discovered the same. On the contrary, this was material which was placed before the Assessing Officer along with the return which the Assessing Officer was duty bound to go through before completing the assessment. Clearly this does not fall in the category of material which is referred to in Explanation 1 to Section 147 of the said Act.*
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> *14. Having considered the matter at length, we find that this is clearly not a case of failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment. This is of material significance because the notice under Section 148 has been issued after expiry of four years from the end of the relevant assessment year. Therefore, the notice is time barred. Apart from this, we also feel that it amounts to a mere change of opinion. On both counts, the petitioner is entitled to succeed. Consequently, the impugned notice dated 29.03.2010 is quashed and all proceedings pursuant thereto are also quashed. The writ petition is allowed. There shall be no order as to costs."*

9 In the case at hand, the reopening is proposed after the expiry of 4 years after the end of relevant assessment year and assessment has been completed under Section 143(3) of the Act. Therefore, the proviso to Section 147 would apply and the onus is on respondents to show that there was a failure on the part of petitioner to fully and truly disclose all material facts necessary for assessment. This has not been discharged by respondents.

10 In the affidavit in reply, as submitted by Mr. Suresh Kumar, what has been merely submitted is that there was incorrectness of the claim on the part of petitioner while filing its return of income, which has been discovered subsequent to the original assessment and, therefore, there is no

change of opinion. We are afraid, we cannot agree with the view expressed by respondents.

11 In the circumstances, we allow the petition and grant prayer clause (a) which reads as under:

> *(a) that this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 and/or Article 227 of the Constitution of India calling for the records of petitioner's case and after examining the legality and validity thereof quash and set aside the impugned notice under Section 148 of the Act (Exhibit E) the impugned order (Exhbit I) passed by respondent no.1, the notice dated 14th May 2021 issued under Section 143(2) (Exhibit G) and the Notice dated 18th October 2021 issued under Section 142(1) of the Act (Exhibit J).*

12 Petition disposed accordingly.

(N. J. JAMADAR, J.) (K.R. SHRIRAM, J.)