

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3244 OF 2019

Sterling and Wilson Pvt. Ltd.] ... Petitioner

Versus

Assistant Commissioner of Income Tax,]
Circle 14(3)(2), Mumbai & Ors.] ... Respondents

Mr. Jitendra Jain i/b Mr. Atul K. Jasani for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM :- K. R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATE :- 21 DECEMBER, 2021

P. C. :-

1. Petitioner is impugning a notice issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') and order dated 24/10/2019 rejecting Petitioner's objections.

2. At the outset, we have to note that the undated form for recording the reasons for initiating proceeding under Section 148 of the Act provided to Petitioner is at variance with the undated form for recording the reasons annexed to the Affidavit-in-Reply. A major part of paragraph 5 – finding of the Assessing Officer – and the entire paragraph 6 containing applicability of the provisions of Section 147/151 to the facts

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of the case mentioned in the reasons annexed to the Affidavit-in-Reply are missing from the reasons annexed to the Petition though it is signed by the same Ankit Verma. We also note that in quite a few cases, date on the reasons or dates in the sanctions being granted are missing. Respondents are directed, henceforth, in all reasons and form for recording approval, the date will be mentioned including the date on which the officers have signed. Whichever authority is granting the sanction shall write the date and time digitally below the signature. Mr. Suresh Kumar is directed to convey these directions to the Principal Chief CIT and CIT(Judicial) who shall, in turn, convey to all officers in the Income Tax Department. This direction has to be followed meticulously.

3. We have considered the reasons annexed to the Petition as well as reply and in our view, it is nothing but change of opinion. Power under Section 147 cannot be used to review any assessment order. In the present case, though the Assessing Officer has used the phrase '*reason to believe*', admittedly between the date of order of assessment, i.e., 09/12/2016, sought to be re-opened and the date of formation of opinion by the Assessing Officer, nothing new has happened, therefore, no new material has come on record, no new information has been received. It is merely a fresh application of mind by a different Assessing Officer to the same set of facts.

4. Mr. Suresh Kumar submitted that there was no change of opinion but only after the Assessing Officer found relevant material with due diligence from the material on record he found that reason to believe that income has escaped assessment. Mr. Suresh Kumar submitted that the expression "*has reason to believe*" is wider than "*is satisfied*". Information for re-opening "*may come from external source or even from the material already on record or may be it is from the derived and new and important matters or fresh facts*". Mr. Suresh Kumar submitted that when material were found to be *prima-facie* in variance with special provisions, opinion formed would not prevent Assessing Officer from examining the issue. As the Assessing Officer made additional enquiry and came to conclusion that income had escaped assessment, Courts should not interfere.

5. The reasons state "*It was seen from the assessment record*" and "*it can be seen that while assessee has secured loan*", "*the assessment record of the assessee were accessed and were used to enquire.....*". Therefore, the entire basis to re-open or to form an opinion has been based on the same set of facts and material which were available before the Assessing Officer who passed the original Assessment Order.

6. The present Assessing Officer has problems with 2 issues viz. loan given by Petitioner to its foreign subsidiary at 11% p.a. rate of interest and claim of depreciation of goodwill from an amalgamating company. Both these details were made available to the Assessing Officer. who had passed the order of assessment sought to be re-opened.

7. As regards loan to a subsidiary, during the assessment proceedings, a letter dated 07/10/2016 was addressed by Petitioners' Chartered Accountant to the Assessing Officer where the details of the loan given to its overseas subsidiary and rate of interest charged have been provided. As regards depreciation claimed on goodwill, Petitioner had received a notice dated 08/08/2016 under Section 142(1) of the Act seeking following information :-

“4. *Please furnish details of your Income-tax assessments for last 3 A.Y.s in the given format :*

13. *Please provide details of the brought forward losses and unabsorbed depreciation of the earlier years alongwith relevant proof thereof. Please confirm whether any of the above losses have been reduced due to any addition in scrutiny or in appeal. Also furnish details of losses which have not yet been set off.*

16. *Please submit complete party-wise details of all the additions made to fixed assets and capital work in progress along with nature of items purchased, date of purchase, value, rate of depreciation claimed and proof of installation with copy of supporting documents, bills,*

delivery proof.

26. *Please give complete details of Depreciation claimed at higher rates / Higher additional depreciation claimed with supporting documents.”*

8. In reply, Petitioner, by its letter dated 07/09/2016, provided the details. Petitioner, in its statement giving details of disallowances made, also has stated that for AY 2012-13 and AY 2013-14, there was disallowance on account of depreciation of goodwill. Notwithstanding that the Assessing Officer has allowed depreciation of goodwill for AY 2014-15. As held by Apex Court in the case of ***Indian & Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi***¹, even if it is an error that the Assessing Officer discovered, still an error discovered on a re-consideration of the same material does not given him power to re-open. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the vary

¹ ***119 ITR 996***

same material with a view to take another view.

9. In the circumstances, we are satisfied it is nothing but change of opinion.

10. Petition is disposed in terms of prayer clause (a) which reads thus :-

“(a) this Hon’ble Court may be pleased to issue a Writ of Certiorati or a writ in the nature of Certiorati or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner’s case and after examining the legality and validity thereof quash and set aside the notice dated 26th March 2019 (Exhibit “A”) issued by Respondents under section 148 of the Act seeking to reopen the assessment for the assessment year 2014-15 and order rejecting objections dated 24th October, 2019 (Exhibit “AF”).

(AMIT B. BORKAR, J.)

(K. R. SHRIRAM, J.)