

IT : Formation of opinion by another Assessing Officer on same set of documents and materials cannot give justifiable ground to Assessing Officer of present assessee to contend that there is additional information or material at his command permitting him to have a relook at situation and to resort to reassessment

- Assessee in its return had shown a receipt of on transfer of leasehold rights in a landed property in favour of one Morarji Textiles and after claiming indexed cost and other related deductions, offered a certain by way of capital gain arising out of such transfer. In scrutiny Assessing Officer did not disturb petitioner's treatment to said receipt - Assessing Officer of Morarjee Textiles had held that leasehold rights belong to Morarjee Textiles itself and therefore, Morarjee was wrong in claiming that it had purchased such rights from assessee - On basis of same, Assessing Officer observed that assessee had filled inaccurate particulars and, thus, income had escaped assessment and issue reassessment notice.

- The High Court held that what the Assessing Officer is attempting to do is to review his own conclusions formed during original assessment after full examination, with aid of not new or additional materials but on basis of conclusions of another Assessing Officer; which are based on same materials available during original assessment before him and, that it is wholly impermissible and quashed impugned notice

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[2019] 102 taxmann.com 69 (Bombay)

HIGH COURT OF BOMBAY

Integra Garments & Textiles Ltd.

v.

Income Tax officer, Ward 6(3)(2), Mumbai

AKIL KURESHI AND M. S. SANKLECHA, JJ.

WRIT PETITION NO. 3443 OF 2018

JANUARY 25, 2019

Saurabh Soparkar, Sr. Counsel **Madhur Agrawal** and **Atul Jasani** *for the Petitioner.* **N.C. Mohanty** *for the Respondent.*

ORDER

P.C. .- We have heard learned counsel for the parties for final disposal of the petition.

2. The petitioner has challenged a notice of reopening of assessment dated 29.3.2018 issued by respondent No. 1 -Assessing Officer. Brief facts are as under:—

- (a) Petitioner is a company registered under the Companies Act. For the assessment year 2013-14, the petitioner had filed return of income on 30.9.2013 declaring NIL income. In such return, the petitioner had shown a receipt of Rs. 40.51 crore (rounded off) on transfer of leasehold rights in a landed property in favour of one Morarji Textiles Limited. The petitioner, after claiming indexed cost and other related deductions, offered net of Rs. 32.04

crore (rounded off) by way of capital gain arising out of such transfer.

- (b) The return of the petitioner was taken in scrutiny by the Assessing Officer. He passed an order under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 18.3.2016 in which the Assessing Officer did not disturb the petitioner's treatment to the said receipt. To reopen such assessment, the Assessing Officer issued the impugned notice. In order to do so, he had recorded the following reasons:—

Reasons for reopening of the assessment in the case of M/s. Integra Garments & Textiles Ltd. for A.Y. 2013-14 u/S. 147 of the Act.

1. The assessee company M/s. Integra Garments & Textiles Ltd. PAN : AABCF1212H has e-filed its return of income for A.Y. 2013-14 on 30.9.2013 declaring total income of Rs. NIL. Subsequently, the case was selected for Scrutiny and order u/S. 143(3) of the Act was passed on 18.3.2016 assessing the Total Income at Nil.
2. Subsequently, information has been received from the O/o ITO 7(3)-2, Mumbai. According to the information during the course of assessment proceedings in the case of M/s. Morarjee Textiles Ltd for A.Y. 2013-14, it was found that M/s. Morarjee Textiles Ltd. had entered into a paper transaction of Rs. 40.50 crore with the assessee company i.e purchase of land from the assessee company for a sale consideration of the aforesaid sum. It has been informed that on verification of the documents and records of M/s. Morarjee Textiles Ltd., at the time of merger and demerger of M/s. Integra Garments & Textiles Ltd (earlier also known as M/s. Integra Apparels P Ltd) to and from M/s. Morarjee Textiles Ltd., the assessee company i.e M/s. Integra Garments & Textiles Ltd. did not own the Land, which has been claimed to have been sold to M/s. Morarjee Textiles Ltd by M/s. Integra Garments & Textiles Ltd. for a consideration of Rs. 40.50 crore.
3. The information received was analyzed and the records of the assessee company were verified. On verification of the records, it is seen that the assessee has claimed to have received the Lease hold property as per the Scheme of Demerger and Merger order of Hon. Bombay High Court dated 29.6.2012 by which the Integra Division of M/s. Morajree Textile Ltd was demerged to Five Star Mercantile Ltd., w.e.f. 1.4.2011, which is now known as M/s. Integra Garments & Textiles Ltd. (after amalgamation of M/s. Morajree Holdings P Ltd.) i.e. the assessee company. Further, during the year under consideration, the assessee company has claimed to have sold the Lease hold property at Rs. 40.51 crore to M/s. Morajree Textiles Ltd. and offered the Capital Gain of Rs. 32,04,55,157/- on the transaction.
4. Based on the information, the history of the Lease hold Land which the assessee company has claimed to have sold during the year under consideration has been verified. It is seen that vide Lease Agreement dated 23.11.1995, M/s. Morarjee Legler Private Limited had acquired the land from M/s. Maharashtra Industrial Development Corporation. Further, vide Deed of Assignment dated 24.11.2004, the rights were assigned to M/s. Morarjee Brembana Limited now known as Morajree Textile Limited for a consideration at NIL. Thus, the Leasehold Land in question is owned by M/s. Morarjee Textile Limited as per the aforesaid Deed of Assignment.
5. Further, M/s. Integra Apparels & Textiles Limited got merged with M/s. Morarjee Textiles Limited (previously) known as Morarjee Brembana Limited) as per merger order of Hon. Karnataka High Court dated 27.8.2010 with record date 1.1.2010. Subsequently, as per Scheme of Demerger and Merger order of Hon. Bombay High

Court dated 29.6.2012, the Integra Division of Morarjee Textile Limited was demerged as M/s. Five Star Mercantile Limited and M/s. Morarjee Holdings Private Limited was merged with M/s. Five Star Mercantile Limited. The new entity so formed was renamed as M/s. Integra Garments and Textiles Limited i.e the assessee company.

6. As per the Scheme of demerger, the Assets and Liabilities pertaining to Integra Division were to be demerged. The composition scheme of demerger and merger approved by the Hon. Bombay High Court was as under:-

PART - II

DEMERGER OF INTEGRA DIVISION OF MORAR JEE TO FIVE STAR MERCANTILE LTD.

4. VESTING OF INTEGRA DIVISION

Upon this scheme becoming effective and with effect from the appointment Date, the Integra Division of Morarjee, as defined in Clause 1.8 shall stand demerged to and vested in or deemed to be demerged to and vested in FSML, as a going concern, in accordance with section 2(19AA) of the Income Tax Act, 1961 and in the following manner.

4.1 With effect from the Appointment Date, the whole of the undertaking including **assets, investments and properties of Morajree relatable to the Integra Division shall**, under the provisions of Section 391-394 read with Section 100 to 103 and all other applicable provisions, if any, of the Act, without any further act or deed, **stand transferred and/or deemed to be transferred to and vested in FSML as a going concern so as to vest in FSML all the rights, title and interest pertaining to the Integra Division.**

4.4 Any and **all immovable properties (including land together with the building and structure standing thereon) of the Morajree relating to Integra Division**, whether freehold and any documents of title, rights and easements in relation thereto, **shall stand transferred to and be vested in the FSML**, without any act or deed done by the Morarjee or the FSML. With effect from the Appointment Date, the FSML shall be entitled to exercise all rights and privileges and be liable to pay ground rent, municipal taxes and fulfill all obligations, in relation to or applicable to such immovable properties. The mutation of title to the immovable properties in the name of the FSML shall be made and duly recorded by the appropriate authorities pursuant to the sanction of this Scheme by the Hon'ble High Court and this Scheme becoming effective in accordance with the terms hereof without any further act or deed on the part of the FSML."

Thus, as per the approved scheme, the Assets and Liabilities relatable to Integra Division **only** were to be transferred to the new entity i.e M/s. Five Star Mercantile Limited now known as M/s. Integra Garments and Textiles Limited, the assessee company. Therefore, the Lease hold Land in question has to remain with M/s. Morajree Textiles Limited, being the owner as per Deed of Assignment dated 24.11.2004.

7. There is no mutation of title of the Lease hold land in favour of M/s. Integra Garments & Textiles Limited which has been recorded by the Appropriate Authority. Therefore, the ownership of the Lease hold land rests with M/s.

Morarjee Textiles Limited and the same was never transferred to the assessee company.

8. In view of the above facts and circumstances, it is very much clear that the assessee company is not the owner of the Lease hold Land claimed to have sold for a consideration of Rs. 40,51,00,000/- to M/s. Morarjee Textile Ltd., vide Deed of conveyance for Transfer of Lease Land dated 25.3.2013. Therefore, the receipt of Rs. 40.51 crore during the year under consideration remains unexplained. The facts of the case prove that the assessee had filed inaccurate particulars of income related to the receipt of Rs. 40.51 crore during the year under consideration.

9. In view of the above discussed facts and circumstances, I am satisfied that income chargeable to tax has escaped assessment and have the "reason to believe" that income chargeable to tax, to the tune of **Rs. 40,51,00,000/-** has escaped assessment for **A.Y. 2013-14** within the meaning of Section 147 of the IT. Act, 1961.

10. As per Section 147 of the I T Act, if the Assessing Officer has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. The expression "has reason to believe" is wider than "is satisfied". "Information" for re-opening may come from external sources or even from materials already on record or may be derived from the discovery of new and important matter or fresh facts. Reliance in this regard is placed on the Judgment of the Apex Court in the case of ACIT V/s. Rajesh Jhaveri Stock Brokers Pvt Ltd. [2007] 291 ITR 500. In this judgment, the Hon'ble Supreme Court has held that -

"Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion."

11. In view of the above narrated facts, the assessment is to be reopened u/s. 147 of the IT. Act, 1961 by way of issue of notice u/s. 148.

12. Considering the afore-discussed facts and circumstances, it is requested that approval may be granted to reopen the assessment u/s. 147 of the IT Act and issue notice u/S. 148 of the Act in this case as required under proviso to Section 151(2) of the Act."

(c). Upon receiving the reasons recorded by the Assessing Officer, the petitioner raised objection to the notice of reopening of assessment under a communication dated 18.10.2018. Such objections were rejected by the Assessing Officer by order dated 22.10.2018, hence, this petition.

3. The gist of the reasons recorded by the Assessing Officer may be recorded which would enable us to appreciate the contentions of the learned counsel of the parties better. In the reasons, the Assessing Officer has referred to a chain of mergers and demergers between different companies and divisions of some of the companies which ultimately culminated into the assessee claiming leasehold rights over the landed property in question. In the return filed, the assessee stated that such leasehold rights were

transferred in favour of Morarjee Textiles Ltd during the period relevant to the assessment year in question and by way of sale consideration, the petitioner received a sum of Rs. 40.11 crore from Morarjee Textiles Ltd. This amount was treated as capital gain of the assessee and after adjusting the indexed cost of acquisition, the assessee offered a net of Rs. 32.04 crore by way of capital gain tax. The Assessing Officer in the reasons referred to the order of assessment passed by the Assessing Officer of Morarjee Textiles Ltd in which he had held that the leasehold rights belong to Morarjee Textiles Ltd itself and therefore, Morarjee Textiles Ltd was wrong in claiming that it had purchased such rights from the present petitioner company. On the basis of such information, respondent No. 1 - Assessing officer recorded in the reasons that the records of the assessee company were verified and upon verification of such records, it was noticed that the assessee had claimed the said transaction giving rise to capital gain of Rs. 32.04 crore. He formed a belief that leasehold rights were owned by Morarjee Textiles Ltd and in view of such facts, not being the owner of such leasehold rights, the petitioner had wrongly claimed to have sold such rights for consideration of Rs. 40.51 crore to Morarjee Textiles Ltd. In the view of the Assessing Officer, "Therefore, the receipt of Rs. 40.51 crore during the year under consideration remains unexplained." He thereafter formed a belief that the assessee had filed inaccurate particulars of income in relation to receipt of Rs. 40.51 crore during the year under consideration. In view of such facts, he recorded the satisfaction that the income of the assessee to the tune of Rs. 40.51 crore chargeable to tax had escaped assessment.

4. In view of such facts, learned counsel for the petitioner raised following contentions:-

- i.* That the assessee had already offered the entire consideration to tax. There was, therefore, no question of the income chargeable to tax having escaped assessment;
- ii.* If the Assessing Officer is correct in contending that the property in question does not belong to the petitioner assessee, then, at best, it can be said that the petitioner received a sum of Rs. 40.51 crore from Morarjee Textiles Ltd not in exchange of any consideration and therefore, it remains a gift. He contended that at the relevant time, the gift received by a company was not taxable in any manner, therefore, there was no question of income chargeable to tax having escaped assessment;
- iii.* In any case, the entire issue was examined minutely by the Assessing Officer during the original scrutiny assessment. Any attempt on the part of the Assessing Officer to reopen this issue would be based on mere change of opinion. In these context, learned counsel relied on certain decisions reference to which would be made at a later stage.

5. On the other hand, learned counsel Mr. Mohanty for the Department opposed the petition raising following contentions:-

- i.* The Assessing Officer has recorded proper reasons for issuing the notice of reopening of assessment;
- ii.* He received information and material after the assessment was completed which would prima facie show escapement of income chargeable to tax. On the basis of such material, the Assessing Officer correctly formed a belief that it was a case for reopening of assessment. At this stage, the Court would not examine sufficiency of such reasons.
- iii.* He contended that if the theory of the petitioner having received Rs. 40.51 crore by way of sale of leasehold rights in the land is disproved, the receipt remains unexplained. To support these contentions, learned counsel relied

on certain decisions which we would refer at later stage.

6. Having heard the learned counsel for the parties and having perused the documents on record, we find that undisputedly, the petitioner had disclosed the transaction in question of having received a sum of Rs. 40.51 crore from Morarjee Textiles Ltd under a deed evidencing transfer of leasehold rights in the land. Not only in the return, during assessment also, the petitioner had made such disclosures as would be clear from the discussion to follow. This transaction was also examined by the Assessing Officer during assessment. In the reasons recorded itself, the Assessing Officer has referred to this transaction as emerging from the assessment records. Thus, in clear terms, the assessee had offered such receipt to tax. However, if the Assessing Officer has sufficient reason to believe that the same ought to have been taxed under a different provisions at a higher rate, the question of reopening of assessment may still become relevant. However, in the present case, the issue stands on a different footing altogether.

7. This is so because if the Assessing Officer is correct in contending that the assessee was not the owner of the leasehold rights and therefore, could not have transferred the same to Morarjee Textiles Ltd, the question of taxing the receipt of Rs. 40.51 crore under appropriate provisions would immediately arise. In other words, if the Assessing Officer is correct in holding a belief that the assessee not being the owner of such leasehold rights, could not have transferred the same to Morarjee Textile, he would also then have to show under which provision, the Department would tax the receipt of Rs. 40.51 crore. In plain terms, it would be a receipt in the hands of the assessee without any consideration in the return being transferred to Morarjee Textiles Ltd. In other words, it would be a receipt without exchange of consideration and therefore, can at best be seen as a gift from Morarjee Textiles Ltd to the assessee company. No provision under the Act was brought to our notice under which in the present circumstances, the Revenue could call upon the recipient of such gift to offer the same to tax. We notice that Section 56 of the Act which pertains to income from other sources. Sub-section 1 of Section 56 provides that income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head "income from other sources", if it is not chargeable to income tax under any of the heads specified in Section 14 items A to E. Sub-section 2 of Section 56 in turn provides that in particular, and without prejudice to the generality of the provisions of sub-section (1), the incomes specified in following classes shall be chargeable to income tax under the income from other sources. Clause (vii) of sub-section (2) of Section 56 provides that where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009 but before the 1st day of April, 2017, any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum. Thus clause (vii) applies only to individual or a Hindu undivided family. Clause (viiia) of sub-section (2) of Section 56 provides that where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010 [but before the 1st day of April, 2017], any property, being shares of a company not being a company in which public are substantially interested, inter alia without consideration or for a consideration which is less than the aggregate fair market value of the property. Under this clause, therefore, in case of a firm or a company other than a company in which the public had substantially interested, under certain circumstances, receipt without consideration or fair consideration would be taxed as income from other source. However, this clause also would not include the petitioner company.

8. This was, however, changed by the legislature by insertion of clause (x) to sub-section (2) of Section 57 which would taken within its sweep receipt of any sum of money without consideration in case of any person. This clause was introduced w.e.f. 1.4.2017. This clause would include any person being individual, Hindu undivided family or company. It was for this reason, the legislature has simultaneously limited the applicability of clause (vii) and (viiia) by making corresponding amendments in such clauses by adding following words:

"but before the 1st day of April, 2017" and "on or after 1st day of October, 2009".

This clause was thus introduced w.e.f. 1.4.2017 and therefore, would not cover the present case.

9. We are conscious, as pointed out by Mr. Mohanty, the learned counsel for the Department that the Assessing Officer attempted to bring the receipt within Section 68 of the Act as unexplained cash credit. However, for obvious reasons, such provision cannot be invoked. Firstly, the receipt was from banking channel. The Assessing Officer does not doubt the creditworthiness of the company paying the amount. He has not even suggested that it is the income of the assessee which is being routed through Morarjee Textiles Ltd under the present transaction.

10. There is one more reason why we cannot sustain the impugned notice which is, the entire issue was examined by the Assessing Officer during the original scrutiny assessment. As noted, the assessee had disclosed such transaction in the return of income filed. In the return, in addition to offering a sum of Rs. 32.04 crore by way of capital gain tax, the assessee had given the break up thereof as under:—

(B) Long Term Capital Gain

(1) From slump sale			
(a) Full Value of consideration	(a)	NIL	
(b) Net worth of the under taking or division	(b)	NIL	
(c) Long Term Capital gains from slump sale	(c)	NIL	
(d) Deduction under sections 54D/54EC/54G/54GA	(d)	NIL	
(E) Net long term capital gain from slump sale (1c-1d)			(1) NIL
			e)
(2) Asset in case of non-resident to which first proviso to section 48 applicable			(2) NIL
(3) Assets in case of others were proviso under Section 112(1) not exercises			
(a) Full value of consideration	3(a)	405100000	
(b) Deductions under section 48			
(i) Cost of acquisition after indexation	(bi)	84644843	
(ii) Cost of improvement after indexation	(bii)	NIL	
(iii) Expenditure of Transfer	(biii)	NIL	
(iv) Total (bi + bii + biii)	(biv)	84644843	
(c) Balance (3a-biv)		320455157	

11. Further, the assessment proceedings, in response to the query raised by the Assessing Officer, the petitioner had explained the transaction giving rise to such long term capital gain by stating as under:—

Sr. No.	Particulars	Annexure No
1	Long term capital gains on Sale of Land/Property:	1

Reference to Computation of Income submitted vide our earlier submissions, the assessee company has sold land during the concerned assessment year. Copy of sale agreement for sale of land at Nagapur has been submitted vide our earlier letter/submissions. The said property is situated in the Maharashtra Industrial Development Corporation (MIDC).

We now submit herewith copy of MIDC circular dated 05.01.2013 evidencing rate of land for transfer in Butburi (Nagpur) at Rs. 1150/- (much less than Rate at which the assessee company has sold the specified Land/Property).

12. However, the assessee elaborated the entire transaction in a communicated dated 4.3.2016, the relevant portion of which reads as under:—

"In this regard, we submit as under:—

(A) Working of Long Term Capital Gain on Transfer of Leasehold rights

Sr. No.	Particulars	Relevant Dates	Relevant Section	Amount in INR
A	Sale Consideration	25th March,	Sec. 2	40,51,00,000

	for Leasehold Rights in Land	2013		
B	Cost of Acquisitions			
	Cost of acquisition and Date of Purchase of Previous Owner considered as date of acquisition in hand of Transfer for computation of Capital Gain	23rd Nov. 1995	34871291	
C	Indexed Cost of Acquisition Based Year considered for Indexation as previous owner got complete ownership Rights in leasehold Rights in Year 1998. Ref. Clause 1 of Agreement with MIDC dt. 23.11.1995	1998	852/351=2.42 45	8,46,44,843
D	Long Term Capital Gain (LTCG)	A.Y. 2013-14	45	32,04,55,157
E	Current Years Short Term Capital Loss adjusted against LTCG (on sale of Depreciable Block of Assets) - Separate Working Provided as Annexure "A"	A.Y. 2013-14	Section 70(2)	(9,24,18,526)
F	Current Year Business Loss adjusted against LTCG	A.Y. 2013-14	Section 71(2)	(18,38,19,064)
G	Previous Years unabsorbed Depreciation considered as Current Year Depreciation U/s. 32(2) - As per Separate Annexure "B"	A.Y. 2013-14	Section 71(2) read with Section 32(2)	(4,42,17,567)
NET TAXABLE CAPAITAL GAIN LIABLE FOR TAX				0

(B) List chronological Events for cost with reference to Certain mode of acquisitions, where the capital assets become property of the assessee by way of certain modes stated under Section 49 of the Income Tax Act.

Original Owner of Lease hold rights in Industrial Land Morarjee Legler Private Limited	Cost Rs. 3,48,71,291/-(Rs. 1,05,32,100 + Rs. 2,43,39,191,)	Documents (1) Lease Agreement between Morarjee Legler Private Limited and Maharashtra Industrial Development Corporation dated
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Supplemental Agreement Rs. 12,07,926

Deed of Assignment (Gift of rights in Leasehold Land by way of assignment at NIL value) Cost in Books - NIL Cost for the purpose of working of Capital Gain in view of Section 49(1) read with Section 47

Rs. 3,48,71,291

Integra Apparels & Textiles Limited got merged with Morarjee Textile Limited (Previously) known as Morarjee Brembana Limited)

Transfer of said Leasehold Land from Morarjee Textile Limited to Integra Garments and Textiles Limited Cost for the purpose of working of Capital Gain in view of Section 49(1) read with Section 47 Rs. 3,48,71,291

Sale of Leasehold Land by Integra Garments and Textiles Limited (Previously known as to Five Star Mercantile Limited) to Morarjee Textile Limited
Change in name of Five star Mercantile Limited to Integra Garments and Textiles Limited

Sale Consideration Rs. 40,51,00,000/-

23rd Nov. 1995, enclosed as **annexure "1"**

(2) Audited Balance Sheet of Morarjee Legler Private Limited for the year ended 31.03.2003. enclosed as **annexure "2"**

(3) Supplemental Agreement between Morarjee Legler and Maharashtra Industrial Development Corporation dated 24th Sept 2004 as **Annexure "3"**

(4) Deed of Assignment between Morarjee Legler Private Limited and Morarjee Brembana Limited (Morarjee Textile Ltd) dated 24th Nov. 2004 enclosed as **annexure 4"**

(5) Mumbai ITAT judgment in case of Morarjee Textile Limited A.Y. 2005-06 - ITA 2077/MUM/2009 enclosed as **annexure 5"**

(6) Merger Order of Hon. Karnataka High Court Order dated 27th August 2010 is enclosed as **Annexure "6"** (Record date 1st Jan. 2010)

(7) Scheme of Demerger and Merger order of Hon. Bombay High Court dated 29th June 2012 (Demerger of Integra Division of Morarjee Textile Ltd to Five Star Mercantile Ltd (now known as Integra Garment and Textile Limited) w.e.f. 1st April, 2011 and Amalgamation of Morarjee Holdings Private Limited (renamed Integra Garments and Textiles Limited) w.e.f. 1st Jan. 2012 enclosed as **Annexure "7"**

(8) Deed of Conveyance for Transfer of Lease land dated 25th March 2013 at **Annexure "8"**

(9) Fresh Certificate of Incorporation consequent upon Change in name is enclosed as **Annexure "9"**

(C) Submissions on working of Long Term Capital Gain resulted from Transfer of Lease hold land

During the year under consideration Assessee Company has computed Long Term Capital Gain on Transfer of Lease hold land (i.e. Plot No. G-1 situated at MIDC, Nagpur) to Morarjee Textile Limited. The said leasehold land transferred at Rs. 40,51,00,000/- and adopted as a Full Value of Sale Consideration for Computation of Long Term Capital Gain u/S. 45.

For computation of Capital Gain, Your assessee has considered a Cost of acquisition at Rs. 3,48,71,291/-, which is a cost of acquisition in hand of Last previous owner of the Property i.e.

(Morarjee Legler Limited) since your assessee has acquired said property by one of the mode specified under Section 49 from previous owner and Previous to previous owner M/s. Morarjee Brembana Limited (i.e. Gift by way of assignment) also acquired said property by one of the mode specified under Section 49.

Cost of acquisition means any capital expenditure at the time of acquiring capital asset under Transfer which includes purchase price, various expenses incurred up to date of complete acquisition.

The Leased land under consideration was originally acquired by Morarjee Legler Private Limited in 1995 from MIDC and got complete possession of the property in 1998 (refer clause 1 of Agreement dated 23rd Nov. 1995 entered with MIDC), Therefore, in working of Indexed cost of acquisition, base year for applying index has been taken as F.Y. 1998-99 and not F.Y. 1995-96."

13. In the final order of the assessment, the Assessing Officer did not disturb these workings offered by the petitioner. It can, thus, be seen that during the assessment proceedings, the transaction in question had come up for consideration of the Assessing Officer. Not only the source of the receipt, the working of the capital gain and sequence of the events under which the assessee claimed to have acquired such leasehold right was transferred, were brought to the attention of the Assessing Officer. The documents of merger, demerger and lease agreements were produced. Written submissions were made to justify the assessee's claim of being the owner of such leasehold rights. It is, therefore, not open to the Assessing Officer to contend that the issue was not examined during the original assessment proceedings. Perhaps, this was not even the argument of the learned counsel for the Revenue. His argument, however, was that after the assessment was completed, the Assessing Officer received certain information on the basis of which, he formed a belief that the income chargeable to tax has escaped assessment. If the Assessing Officer had in fact received any additional material or information which was alien to the assessment records, the contention of the learned counsel for the Revenue would require further consideration. In a given case, the situation may arise where even if the Assessing Officer has examined an issue during the assessment, he may receive additional information and material from outside sources prima facie suggesting that the stand of the assessee and the conclusion of the Assessing Officer on the basis of records of the assessment, were incorrect. In such situation, reopening of assessment may still be permitted. In the present case, however, no such material outside of the assessment records is shown to have been brought to the notice of the Assessing Officer. He only referred to the order of the assessment passed by the Assessing Officer of Morarjee Textiles Ltd. Such assessment was based on the documents which were already part of the assessment in case of the present petitioner. At best therefore, the opinion formed by the Assessing Officer of Morarjee Textiles can be seen to be another view point which may also be valid. However, the formation of the opinion by another Assessing Officer on the same set of documents and materials cannot give justifiable ground to the Assessing Officer of the present assessee to contend that there is additional information or material at his command permitting him to have a relook at the situation. In plain terms, what the Assessing Officer in the present case is attempting to do is to review his own conclusions formed during the original assessment after full examination, with the aid of not new or additional materials but on the basis of the conclusions of another Assessing Officer; which are based on the same materials available during the original assessment before him.

14. Situation thus, in the present case is that the Assessing Officer during the assessment examined the transaction in question on the strength of certain documents and accepted the capital gain offered by the assessee arising out of such transaction. Another Assessing Officer in the case of Morarjee Textiles examined the same set of documents and formed a different opinion. When this was placed before him, the Assessing Officer of the petitioner wishes to change his view and adopt the view of the Assessing Officer of Morarjee Textiles, which is wholly impermissible.

15. The concept of change of opinion not permitting reopening of assessment once an issue has been examined during the original scrutiny assessment is all too well established requiring reference to any judgments. However, we may refer to the decision of the Supreme Court in the case of *CIT v. Kelvinator of India Ltd.* [2010] 320 ITR 561 [SC] In the case of *GKN Sinter Metals Ltd v. Ms. Ramapriya Raghavan, Assistant Commissioner of Income Tax, Circle 2(1)* [2015] 371 ITR 225 [Bombay], this Court observed as under:

"21. It was lastly contended by Mr. Chhotary, learned Counsel appearing for the Revenue that the impugned notice is only for re-assessment for Assessment Year 2002-03. At this stage, the Revenue is not required to establish the case to the hilt, but only required to make out a prima facie case in support of its stand. In support of the above submission, reliance was also placed upon the decision of the Supreme Court in *Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd.* [2007] 291 ITR 500/161 Taxman 316. There can be no dispute to the above proposition. It is submitted that during the course of re-assessment proceedings, the Petitioner would have opportunities to satisfy the authorities that there has been no escapement of income and the allocation of the common expenses between the three manufacturing units for the purposes of claiming deduction under Section 80IA/IB of the Act is in accordance with law. However, issue being examined is whether the Assessing Officer has jurisdiction to issue the re-opening notice. Once an assessment order is being passed, it has some sanctity. If the assessment order is to be disturbed, then the Assessing Officer must strictly satisfy the condition precedent as provided under Section 147/148 of the Act before he can issue a notice, seeking to re-open an assessment. In this case, as we have pointed out herein above, there has been a change of opinion on the part of the Assessing Officer in issuing a notice and, therefore, he has no reason to believe that income chargeable to tax has escaped assessment. In these circumstances, the jurisdictional requirement for issuing a notice is not satisfied and, therefore, the impugned notice and the consequent order dated 14th November, 2007 disposing of the objections, are not sustainable."

16. In case of *Commissioner of Income Tax v. Aroni Commercial Ltd* [2017] 393 ITR 673 [Bombay], this Court observed as under: -

"(h) The first contention urged before us by the Revenue is identical to the contentions which was urged by the Revenue in the earlier decision of this Court in respect of the same respondent assessee *Aroni Commercial Ltd. v. Dy. CIT* [2014] 362 ITR 403/224 Taxman 13 (Mag)/44 taxmann.com 304 (Bom). This Court had in the aforesaid decision dealt with the above objections raised by the Revenue as under :—

We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinised by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings."

The aforesaid observations will apply to the first grievance of the Revenue before us. In this case

also a query was raised during the regular assessment proceedings and it was responded to by the assessee. This non consideration of the same in the assessment order is no evidence of the Assessing Officer not being satisfied with the issue raised.

17. In case of *Pr. Commissioner of Income Tax -6 v. Century Textiles & Industries Ltd.* [2018] 99 taxmann.com 205 (Bom), it was observed as under:-

"11. The undisputed position in the present case is that the regular assessment was completed under Section 143(3) of the Act and the re-opening has been issued within a period of four years from the end of the relevant Assessment Year. Thus, the rigour of the first proviso to Section 147 of the Act is not to be satisfied for issue of a reopening notice i.e. failure to disclose all material facts truly and fully necessary for assessment. It is also not disputed that in the regular assessment proceedings, queries were raised in respect of claim under Section 80IC of the Act and the same were responded to by the Respondent - Assessee resulting in reduction of claim for deduction under Section 80IC of the Act. In the above facts, it is self evident that the Assessing Officer was conscious of the claim of deduction made by the Respondent - Assessee under Section 80IC of the Act which led to the enquiry. It is for the Assessing Officer to decide the extent and nature of enquiry in respect of claim under Section 80IC of the Act. Therefore, when the Assessing Officer has taken a conscious decision of making enquiry under Section 80IC of the Act then it is not open to him to turn around and claim that certain aspects of the claim under Section 80IC of the Act were not considered by him. It is undisputed as pointed out above, Section 80IC of the Act was a subject matter of enquiry and this resulted in disallowance of Rs.11.49 Crores out of the claim for Rs.33.67 Crores made by the Respondent under Section 80IC of the Act. The decision of this Court in *Export Credit Guarantee Corporation of India (Supra)*, in our view, would have no application to the present facts as in that case admittedly during the regular assessment proceedings, the Assessing Officer has not applied his mind to the issue sought to be raised in the re-opening proceedings. In the aforesaid decision, it was held that the Assessing Officer has ignored relevant material in arriving at an assessment contrary to law. It was also found as a fact in the above case of *Export Credit Guarantee Corporation of India (Supra)* that no query was raised during the course of the regular assessment proceedings. Thus, the occasion for the Assessing Officer to apply his mind to the claim by the Respondent - Assessee in that case, did not arise. As against the above in this case the Assessing Officer consciously considered the claim for deduction under Section 80IC of the Act as is admittedly evident from the issues raised during the regular assessment proceedings. This by itself would be evidence of the fact that the Assessing Officer had occasion to apply his mind to the claim for deduction under Section 80IC of the Act during the regular assessment proceedings and had taken a view on the claim of deduction under Section 80IC of the Act."

18. We now refer to the decisions cited by the learned counsel for the Revenue. Reliance was placed on a decision in the case of *Kalyanji Mavji & Co v. CIT* [1976] 102 ITR 287 [SC]. It was a case in which the Court found that the Assessing Officer had received additional information after the assessment was completed and on the basis of which it was held that the Tribunal was incorrect in holding that it was a case of mere change of opinion by the Assessing Officer on the material which was already on record.

19. Reliance was placed on a decision in the case of *Phool Chand Bajrang Lal & Anr. v. I.T.O* [1993] 203 ITR 456 [SC] in which it was found that the disclosures made by the Assessing Officer during the assessment proceedings were incorrect. This was established on the basis of subsequent information received. This Court held that in such a situation, reopening of assessment even beyond the period of four years from the end of relevant assessment year would be permissible.

20. In view of the detail discussion, on the facts on record, both the decisions cited by the learned counsel for the Revenue would have no applicability.

21. In the result, impugned notice is quashed and set aside.

22. The petition is allowed in the above terms.

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