IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 30.06.2023

Pronounced on : 15.09.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P. Nos.23284 & 22737 of 2022
and
WMP.Nos.21769, 21776, 22231, 22233, 29114 & 30379 of 2022

IDFC Limited
4th Floor Capitale Tower 555 Anna Salai
Thiru Vi Ka kudiyirupu Teynampet
Chennai 600 018
Represented by its Director Mahendra N Shah

... Petitioner in WP.23284 of 2022

IDFC First Bank Limited
KPM Towers 7th Floor No. 1 Harrington Road
Chetpet, Chennai - 600031
Represented by its Managing Director.

... Petitioner in WP.22737 of 2022

Vs

1.The Deputy Commissioner of Income Tax
Corporate Circle 1(1) Room No.611
Wanaparthy Block
121 Mahatma Gandhi Road
Nungambakkam, Chennai 600 034

2.The Assistant Commissioner of Income tax
Corporate Circle 2 (1)
121 Mahatma Gandhi Road
Nungambakkam Chennai 600 034 ... Respondents in both WPs

Prayer in WP.No.23284 of 2022: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorarified Mandamus,** to call for the records of the 1st Respondent and to quash impugned Notice under section 148 of the Act in DIN and Notice No. ITBA/AST /S/91/2022-23/1044345042(1) dated 30.07.2022 and the impugned order passed under section 148A(d) of the Act in ITBA/COM/F/17/ 2022-23 /1044275646 (1) dated 29.07.2022 by the 1st respondent for Assessment year 2014-15 in PAN AAACI2663N.

Prayer in WP.No.22737 of 2022: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of **Certiorarified Mandamus,** to call for the records of the 1st Respondent and to quash Impugned Notice under Section 148 of the Act in DIN and Notice No.ITBA/AST/S/91/2022-23/1044312692(1) dated 29.07.2022 and the impugned order passed under section 148A(d) of the Act in ITBA/COM/F/17/2022-23/1044247700(1) dated 28.07.2022 by the 1st Respondent for Assessment Year 2017-18m in PAN.AADCI6523Q.

(In both WPs)

For Petitioners : Mr.Niraj Sheth
For Mr.S.P.Chidambaram
For Respondents : Ms.Hema Muralikrishnan

COMMON ORDER

The petitioner in these writ petitions is a Bank and an assessee on the file of the respondents under the provisions of the Income-Tax Act, 1961 (in short, 'Act'). The challenge relates to proceedings for re-assessment for assessment years (in short, 'AY'), 2014 – 2015 and 2017 – 2018.

2. The facts in relation to AY 2014 – 2015 are first narrated. An original return of income was filed on 29.11.2014, followed by revised return on 31.03.2016. Even prior to the filing of revised return, notice had been issued on 28.08.2015 under Section 143(2), to which a response was filed on 29.08.2016.

3. An order of assessment came to be passed under scrutiny on 29.12.2017 which is stated to be pending in appeal before the first appellant authority. On 07.04.2021, a notice under Section 148 was issued, the officer having reason to believe that income had escaped assessment for that year.

4. The petitioner complied with the notice by filing return of income on 28.04.2021 and preliminary objections on 19.05.2021 and 23.07.2021. Interalia, it was submitted that the procedure under Section 148A, substituted by Finance Act, 2021 with effect from 01.04.2021, had not been properly followed by the assessing

officer and thus the issue of notice on 07.04.2021 invoking the old provision for re-assessment was bad in law.

5. A writ petition had been filed in W.P.No.6251 of 2022 challenging the notice and interim protection obtained. In the meanwhile, on 04.05.2022, the Hon'ble Supreme Court passed judgment in the case of *Union of India vs Ashish Agarwal* (2022 SCC online 543), to the effect that notices under Section 148 issued after 31.03.2021 shall be deemed to have been issued under Section 148A of the Act.

6. A slew of directions had been issued to enable the Revenue to proceed further with re-assessment as per the substituted provisions under Section 147, complying with all statutory and procedural requirements. The Central Board of Direct Taxes (in short, 'CBDT') issued Instruction No.1 of 2022 dated 11.05.2022 paving the way for implementation of the judgment in *Ashish Agarwal*.

7. On 23.05.2022, taking note of benefit of the judgment in *Ashish Agarwal*, a notice was issued under Section 148 A(b) calling upon the petitioner to submit objections thereto. The petitioner filed objections on 06.06.2022 that have come to be rejected by way of an order under Section 148A(d) dated 29.07.2022 accompanied by notice under Section 148 dated 30.07.2022, both impugned in this

writ petition.

8. According to the petitioner, respondents have overplayed their hands in the issuance of the impugned order and notice, not noting that liberty granted by the Hon'ble Supreme Court was subject to all defenses available to the assessee under the newly substituted scheme of re-assessment. Specific reference has been made to the bar of limitation as per Section 149, particularly the first proviso thereof, which states that a notice may be issued after 01.04.2021 in respect of a particular year only, subject to such notice being legally permissible under the provisions of the Act as they stood prior to substitution of the Scheme of re-assessment on and from 01.04.2021.

9. According to petitioner, the time available under the erstwhile provisions for re-assessment as relating to AY 2014 – 2015, would normally expire on 31.03.2019. Even assuming without admitting that the maximum period of six years be reckoned in light of the first proviso to Section 147, limitation expired on 31.03.2021. Thus, the issuance of notice on 30.07.2022 is way beyond the statutory time limit.

10. Without prejudice to the above argument and on merits, the petitioner would submit that the issue sought to be addressed by the respondents does not constitute 'information' as per the risk management strategy formulated by the CBDT or relate to any objections raised by the Comptroller and Auditor General of India as required under Section 149.

11. On merits, petitioner argues that all material in regard to the issues sought to be re-assessed had already been supplied to the respondents at the time of original scrutiny assessment and there is thus no justification for the present re-assessment. That apart, unrealized loss of foreign currency devaluation assumes the nature of a revenue deduction and provision of Rs.51.11 crore, which was sought to be added back to taxable income had already been disallowed by the petitioner. The proposal to tax the sum would only result in double taxation of the same amount.

12. Coming to the second writ petition relating to AY 2017 – 2018, the petitioner had filed returns of income, original and revised on 30.11.2017 and 29.03.2019 respectively. On 30.12.2019, an order of assessment had been passed under scrutiny which is stated to be pending in first appeal. Notice under the old provisions of Section 148 had been issued on 30.06.2021.

13. Upon due response by the petitioner, notice had been issued on 23.05.2022 and the sequence of events thereafter was similar to what had transpired for AY 2014 – 2015 pursuant to the judgment in the case of *Ashish Agarwal* and CBDT Instruction dated 11.05.2022.

14. On merits, the proposal relates to the computation of loss due to conversion of PCD's to equity shares which have been the subject-matter of original assessment. That apart, the allocation of expenditure eligible for deduction under Section 36(1) (vii) has also not been appreciated. The officer ought to have noted that the petitioner is in the business of banking and loss of sale of loans to Asset Reconstruction Company would qualify as deductible business expenditure or bad debts. In any event, the issues identified for re-assessment do not meet the specific requirement that the escapement should be in relation to an 'asset'.

15. A counter has been filed in the second writ petition. As regards the argument of limitation, it is the contention of the respondent that the Taxation and other laws (Relaxation and Amendment of Certain Provisions) Act, 2020 (hereinafter referred to as 'TOLA') would protect the impugned proceedings.

16. Under the TOLA, time was extended till 30.06.2021 and the proceedings in this case have been initiated on 30.06.2021 within the extension provided. For this purpose, they specifically rely on Section 3 of the TOLA read with Notification 10 of 2021 dated 01.03.2021 and Notification No.38 of 2021 dated 27.04.2021.

17. As per the above notifications, time was extended in respect of notices falling within the period 20.03.2020 to 31.03.2021, to 30.06.2021. Thus according to them, the impugned notice has been issued within the time extended and is hence saved. They also rely wholly on the judgment of the Supreme Court in *Ashish Agarwal*.

18. On merits, they state that the matter would be duly considered in assessment proceedings and it is premature for the petitioner to contest the matter in writ petition. The suppression of income by an assessee results in addition to the assets of the business. In the present case, the information relates to NPA loan and value of shares that constitute assets.

19. Hence, the phrase 'in the form of asset' should not be restricted to tangible and visible assets alone. They further state that the 'information' available with the officer was in consonance with the unamended provisions of Section 148 of the Act

which is valid for the extended period of limitation and 'risk management strategy' as well.

20. The tests of 'full and true disclosure', 'tangible material' and 'change of opinion' have been eschewed under the new scheme of assessment and are wholly immaterial now. According to them, the scheme of re-assessment has been radically changed with effect from 01.04.2021 requiring no necessity any longer for the satisfaction of such tests.

21. Without prejudice, they point out that the test of full and true disclosure is premised upon the proviso to old Section 147 which is no longer in the statute book. Moreover, the bar under the proviso would apply only if notice had been issued beyond four years whereas in the present case, notice has been issued within three years. Thus even on this score, invoking the provisions of Section 148, the argument of the petitioner is to be rejected.

22. An additional ground has been filed in W.P.No.22737 of 2022 urging that the liberty granted in *Ashish Agarwal's* case would be available only in those cases where the re-assessment notice had been challenged either before the High Courts or

the Supreme Court. In the present case, that notice was never challenged and hence, the liberty that has been assumed by the respondent is misplaced.

23. This submission is misplaced, since in that judgment, the Hon'ble Supreme Court has granted liberty, carte blanch to the revenue, to both continue with proceedings where notices had already been issued, or afresh, where the law so provided. The Court clarified that all defences as are available in law to an assessee, may be pressed into service. The relevant portion of the judgment reads thus:

> *'(i)The impugned section 148 notices issued to the respective assessees which were issued under unamended section 148 of the IT Act, which were the subject matter of writ petitions before the various respective High Courts shall be deemed to have been issued under section 148A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of section 148A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assessees can reply to the show-cause notices within two weeks thereafter;*
>
> *(ii)The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(a) is hereby dispensed with as a one-time measure vis-à-vis those notices which have been issued under section 148 of the unamended Act from 01.04.2021 till date, including those which have been quashed by the High Courts.*
>
> *Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required;*

(iii)The assessing officers shall thereafter pass orders in terms of section 148A(d) in respect of each of the concerned assessees; Thereafter after following the procedure as required under section 148A may issue notice under section 148 (as substituted).

(iv)All defences which may be available to the assesses including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assessees and Revenue under the Finance Act, 2021 and in law shall continue to be available.

(v)The above order shall also govern the pending writ petitions, pending before the various High Courts in which similar notices u/s. 148 of the Act issued after 01.04.2021 are under challenge.'

24. In light of the liberty, issuance of notice cannot be faulted and what remains is for the Court to decide the challenge in light of the defences put forth by the petitioner. The additional grounds are rejected and the arguments put forth challenging the proceedings both on assumption of jurisdiction and on the merits, are considered.

25. The issues that arise in these writ petitions for consideration are crystallized as follows:-

(i) Whether the assumption of jurisdiction for re-assessment for AY 2014-15 and 17-18 is right in law.

(ii) Whether the officer had 'information' in terms of Explanation 1 to section

149, to proceed with the impugned re-assessments for AY 2014-15 and 2017-18.

(iii) Whether the officer had in his possession books of accounts or other documents or evidence that are represented in the form of an asset to come to a conclusion that income that had escaped assessment.

26. Having heard the detailed submissions of Mr.Niraj Sheth for Mr.S.P.Chidambaram for the petitioner and Mr.A.P.Srinivas for the respondents, my decision is as under.

27. Section 148 has been substituted with effect from 01.04.2021 and the new provision, with the Explanation (as it stood then), is extracted below:-

> ***Issue of notice where income has escaped assessment.***
> *148. Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*
>
> *Provided that no notice under this section shall be issued unless there is*

information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.
Explanation 1.-For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,-
(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;
(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

28. Section 148A deals with the conduct of enquiry and provision of opportunity prior to issuance of notice under section 148 of the Act. Section 149 deals with time limit for issuance of notice under section 148 and the provision, (as it stood then), reads thus:

***149. Time limit for notice**.-(1) No notice under section 148 shall be issued for the relevant assessment year,-*

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

(c) if four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year unless the income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment.

29. Substituted provisions of section 149 w.e.f. 01.04.2021 (as they stood then), read as follows:

149. Time limit for notice
No notice under Section 148 shall be issued for the relevant assessment year.
(a) If three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);
(b) If three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year.
Provided that no notice under Section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 01st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section as they stood immediately before the commencement of the Finance Act, 2021.

30. In light of the proviso to new section 149, limitation for issuance of notice under Section 148 shall be tested on the basis of the ingredients of the relevant provision as it stood immediately before the commencement of Finance Act, 2021.

Section 149(1)(b) as it stood prior to 01.04.2021 stated that no notice for re-assessment shall be issued if four years, but not six years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

31. On a conjoint reading of the provisions newly introduced, the new scheme of re-assessment is seen to have incorporated the procedure set out in the judgement of the Supreme Court in *GKN Driveshafts (India) Ltd., vs. Income Tax Officer* (259 ITR 19), statutorily. The statute now requires the officer to supply the reasons upon which the re-assessment is proposed, solicit objections for the proposed reopening and pass an order upon such objections, in terms of Section 148A(d). If the aforesaid order is adverse to the assessee, it will be followed/accompanied by a notice under section 148.

32. The respondents argue that the new scheme, with the omission of the phrase 'reason to believe' has done away with the requirement that the officer must establish 'escapement of tax', prima facie, at the stage of assumption of jurisdiction. I do not agree. Such requirement continues in light of the proviso under section 148

that casts a statutory burden upon the officer to be in possession of 'information' suggesting that income chargeable to tax has escaped assessment for the concerned year. If the existence of such information is not established even at the initial stage, the foundation of the proceedings stand vitiated in law.

33. The raison d'etre of the new provisions is itself to streamline the scheme of re-assessment and induce certainty. The limitation under the old scheme extended upto 10 years and Legislature was of the view that such a long period breeded uncertainty in finalisation of assessments which was undesirable. The above view emanates from the speech of the Hon'ble Finance Minister introducing the new scheme of re-assessment as follows:

> ***Reduction in Time for Income Tax Proceedings***
> *153. Honourable Speaker, presently, an assessment can be re-opened up to 6 years and in serious tax fraud cases for up to 10 years. As a result, taxpayers have to remain under uncertainty for a long time.*
> *154. I therefore propose to reduce this time-limit for re-opening of assessment to 3 years from the present 6 years. In serious tax evasion cases too, only where there is evidence of concealment of income of Rs.50 lakh or more in a year, can the assessment be re-opened up to 10 years. Even this reopening can be done only after the approval of the Principal Chief Commissioner, the highest level of the Income Tax Department.*

34. The new scheme and provisions have thus to be interpreted in line with the legislative intent and mandate that they usher in certainty and ease of procedure. This aligns with the observations, in conclusion, of the Hon'ble Supreme Court in *Parashuram Pottery Works vs. Income tax officer* (106 ITR 1), as follows:

> *It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment under section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case. The appeal is consequently allowed.'*

35. The assumption of jurisdiction of the officer in time must thus be tested in light of the reasons adduced by the officer, and on the anvil of whether such reasons qualify as 'information' under the proviso to new section 148 of the Act, defined as any information flagged in the case of the assessee for that AY in accordance with

the risk management strategy formulated by the Board, or a final objection raised by the Comptroller & Auditor General of India that the assessment of that assessee for that year has not been made in accordance with the provisions of the Act.

36. The facts in relation to the original assessment relating to A Y 2014-15 are that, pursuant to the filing of returns in time, the assessment was selected for scrutiny and notice was issued u/s 143(2) on 28.05.2015. Since the petitioner had entered into international transactions with associated enterprises, there was a reference to the transfer pricing officer (TPO). After the TPO passed a transfer pricing order on 29.06.2017 holding that no adjustment was necessary, the assessing officer issued notices and completed the assessment u/s 143(3) r.w.s. 92 CA(3) of the Act by order dated 29.12.2017.

37. The issues that have been identified for re-assessment in notice under Section 143(2) r/w 147 dated 04.05.2021, are (A)disallowance of unrealised loss and (B)amortization of sale consideration. In notice dated 21.05.2021, the Officer outlines the issues for re-assessment thus:

> *The company has entered into interest rate swaps in the nature of fixed/floating for national principal of Rs.4396.00 crore outstanding as on 31.03.2014 for varying maturities linked to various benchmarks for*

asset liability management and hedging. The company has foreign currency borrowings equivalent to Rs.7240.47 crore against which the company has also entered into coupon only current swaps for notional principal of Rs.391.16 crore and forward contracts of Rs.14.16 crore to hedge the foreign currency risks forwards interest on the foreign currency borrowings.

On verification of the cash flow from operating activities, it was noticed there was unrealized loss on foreign currency revaluation to the extent of Rs.221.44 crore.

As per Section 43A of the IT Act, in respect of unrealised foreign exchange loss, only deferred tax is required to be created on the unrealised portion and no claim is to be allowed for the same. Hence, the claim of unrealised loss relating to capital asset by the assessee company to the tune of Rs.221.44 crore is to be disallowed and brought to tax."

(B)Amortisation of sale consideration:

The company has transferred certain assets to Assets Reconstruction Companies (ARC) for cash/security receipts. Fro the purpose of the valuation of the underlying securities receipts issued by the underlying trusts managed by ARCs, the security receipts are valued in accordance with the provisioning policy of the company.

In note no.23 under Revenue from operations, the assessee had offered the following details of income from other sources financial services:

	For the year ended 31st March 2014
No of accounts	*4*
Aggregate value (net of	*133.43*

provisions) of accounts sold to ARC	
Aggregate consideration: Security receipts	*175.30*
Cash	*16.23*
Aggregate gain over net book value not credited to the statement of profit and loss	*51.11*
Aggregate gain over net book value credited to the statement of profit and loss	*7.00*

Fee (net) *129.48 crore*

Profit amortised on assignment/sale of loans *0.02 crore*

It is seen that the assessee had not offered entire sale consideration of Rs.51.11 crore but amortised the income over the future years. The method of recognition of revenue with regard to assignment of loans through follows RBI Guidelines, the unamortised income of Rs.51.11 crore needs to be taxed under the Income tax Act, as there is no concept of amortisation and the sale value is received in full at the time assignment of such loan."

38. The impugned proceedings have commenced with issuance of notice u/s 148 on 07.04.2021, seven years from the end of the assessment year in question. There is no averment in the notice that 'information' has been received indicating escapement of income attributable to the petitioner. There is no allegation that any

new material has been found justifying a re-look into the matter. In fact, in order dated 29.07.2022 under section 148A(d), the officer opens stating *'As per the information available on record, it is observed that following discrepancies were noticed in the case of the assessee or A.Y.2014-15 described as under'*.

39. All materials in relation to foreign currency borrowings and transfer of assets to Asset Reconstruction Companies have been fully and comprehensively placed before the Officer, even at the time of scrutiny proceedings. The original assessment order passed on 29.12.2017 specifically recorded detailed examination of the financials of the petitioner. One of the issues dealt with under original assessment relates to disallowance under Section 14a r/w Rule 8 of Income Tax Rules in the course of which the investments of the petitioner have been subject to minute scrutiny.

40. Interest from investments, including external commercial borrowings, income from venture capital funds and deduction under Section 36(1)(viii) in relation to transfer to special reserve, have not escaped the Officer's scrutiny. An addition has been made under capital gain and disallowance of deduction of interest

cost on zero coupon bonds. Thus, there is no doubt that the Officer has examined all aspects of the return and framed an assessment after thorough scrutiny.

41. While so, the impugned proceedings are initiated based on the financial records already available with the Officer and indicating that a different view invoking Section 43A in respect of unrealised loss should have been taken. As regards the sale consideration from assets transferred to ARC, the officer records that income has been offered under the head other sources but expresses the view that the sale consideration ought to have been offered in full and not amortised over the years.

42. In regard to AY-2017-18, the original order of scrutiny has been passed on 14.12.2019 under Section 143(3) of the Act. Inter alia, the Officer confirms that original and revised returns of the petitioner, as well as documents called for in relation to the issues that arise from the returns have been identified and put to the authorised representative. Thus, all materials in regard to issues arising from the returns of income were made available at the time of completion of the assessment.

43. Notice had been issued, albeit under the old provision of section 148, on 20.06.2021. Thereafter, proceedings were continued vide a notice issued on 23.05.22

taking a cue from the judgement in *Ashish Agarwal* incorporating the reasons based upon which the proceedings had been initiated. The issues identified in the reasons are:

(i) Bad debts written off

(ii) Disallowance u/s 43B

(iii) Disallowance of loss claimed on sale of NPA loan to ARC

(iv) MAT computation

44. The reasons are extracted below, omitting the tables contained therein, in the interests of brevity:

(A) Bad Debts Written Off:

The assessee had claimed a sum of Rs.111,94,95,405/- as deduction for bad debts written off and the working for the same was furnished in Annexure-II to the computation statement, as under:

Table omitted

During the security proceedings, the assessee had furnished the copy of the subscription statement dated 11.03.2016 entered with M/s. Lanco Infratech Limited, wherein the following details are, inter alia, available:

1.Subscription Amount shall mean and refer to an amount of Rs.321,45,38,850/- towards subscription to the CCDs.

2.Para 2.4- the CCDs along with the accrued interest thereon as on the conversion date shall on the conversion date be compulsorily

convertible into such number of equity shares as determined by dividing the conversion amount by the conversion price.

3. Para 3 consideration - The principal amount of the loan outstanding along with interest accrued thereon payable by the company (Lanco Infratech) to the Investor (the assessee) was agreed to and the outstanding loan of Rs. 321 crore shall be adjusted towards the subscription amount of the investor.

4.Schedule-I to the agreement-Para 4 Interest-The subscription amount carry an interest @ 10.50% p.a. and such interest along with subscription amount will compulsorily get converted into equity shares on the Conversion Date.

5 Schedule-l to the agreement-Para 7.1.4 Conversion Price shall mean Rs.6.23 per share.

From the above, it is evident that the assessee is aware on the subscription date itself that the subscription amount to CCDs, along with accrued interest, shall compulsorily converted into equity shares on the agreed conversion price. The value of the shares viz, Rs. 206,12,90,787 now cited by the assessee pertains to a diminution in the value of investments and the sum of Rs.111,94,95,405/- on this account pertains to investments in the nature of capital assets. The difference between the subscription amount and the value of shares, at best, would from part of cost of acquisition of Investments and can be reckoned only at the time of transfer of such investments for purpose of capital gains. In view of the above, the loss of Rs.111,94,95,405/- claimed as deduction needs to be disallowed.

(8) Disallowance u/s 43B:

The assessee has claimed a sum of Rs.61,92,43,093/- as deduction u/s 36(1)(viii) and the workings for the same was furnished in Annexure-IV to the computation statement, as under.

Table omitted

Section 36(1)(viii) provides that in respect of any special reserve created and maintained by a specified entity, an amount not exceeding twenty per cent of the profits derived from eligible business computed under the head profits and gains of business or profession before making any deduction under this clause carried to such reserve account.

The assessee has not adopted the above method prescribed in section 36(1)(vii) and instead computed the eligible profits based on the books of accounts, which is liable to be rejected. If the correct method of computing the profits of the eligible business under the head profits and gains of business for the purpose of sec.36(1)(viii) is adopted, the eligible deduction would be Rs. 21,27,44,229/- instead of Rs. 61,92,43,093/- as under:

Table omitted

In the computation of income and tax statement, the assessee has claimed Rs.1,16,00,000/- u/s 43B disallowed earlier (bonus). As per the annexure G to Form 3CD, note 1, it was stated that the amount has been reversed during the previous year. Since the amount of Rs.1,16,00,000/- has only been reversed and not actually paid. The same needs to be disallowed.

(C) Disallowance of Loss claimed on sale of NPA Loan to ARC:

During AY 2017-18 the assessee has claimed Deduction of loss on assignment of loan of Rs.1233.73 Crore in business income computation statement, which has occurred due to loss on sale of Non Performing Asset(NPA) loans to Asset Reconstruction Company(ARC).

In P&L account of AY 2017-18 the Assessee has claimed loss of (Rs.1233.73 Crore) on sale of NPA. The relevant portion of the same is reproduced below-

Table omitted

-from the above table it is clear that the loss of Rs.1233.73 has not been accounted by the assessee as write-off of bad debt (P&I Item Serial no.39 shown above) rather it has been accounted under reversal of Provision for bad and doubtful debt (P&I Item Serial no.40 shown above) for corresponding deletion of Gross NPA Block on account of sale of NPA loan to ARC (refer Schedule 18.11 of the Annual report reproduced in para C.2).

Hence, based on the discussion the claim of loss (Rs.1233.73 Crore) on sale of NPA Loans to ARC cannot be considered as write off as irrecoverable within the meaning of section 36(1)(vii). Any deduction on write off of bad loan, also is limited u/s 36(1)(vii) to the excess amount of bad debt over the provision made earlier for bad debt. The loss arising from NPA Loan sold, is in nature of bad debt, which comes under section 36(1). Hence, cannot be considered u/s 37. Reliance is also placed on the Apex court in the case of Southern Technologies Ltd Vs JCIT (CA NO.1337 of 2003 and 154 of 2010 order dated 11.01.2010), where it has been held that-

....If an item falls under sections 30 to 36, but is excluded by an Explanation to section 36(1)(vii), then section 37 cannot come in. Section 37 applies only to items which do not fall in sections 30 to 36.

In view of the above, Assessee's Claim of loss (Rs. 1233.73 Crore) on sale of NPA Loans to ARC needs to be disallowed.

(D)The assessee has submitted Revised Computation of income and had computed a minus book profits of Rs.70,30,13,987 u/s 115JB. While re-computing the book profits, the minus figure of

Rs.71,17,21,866/- has been adopted instead of Rs.70,30,13,987. The difference of Rs.87,07,879 is required to be brought to tax u/s 115JB."

45. A perusal of the reasons will confirm that in all the issues, the officer merely refers to the financials, Form 3CD, profit and loss account, computation statement and the details furnished during original scrutiny. Thus, in this case as well, there is no new or tangible information that has come to the notice of the authority to justify re-assessment as all relevant information was well available with the original authority.

46. That apart, in one issue, the officer has referred to, and relied upon a judgement of the Hon'ble Supreme Court in the case of *Southern Technologies vs JCIT* (CA No.1337 of 2003 and 154 of 2010) which judgement was rendered on 11.01.2010, well available even at the time of original proceedings.

47. Thus, the question is as to whether, in a situation where all material in regard to the issues in respect of which reassessment is proposed have been placed on record even at the original instance, the assessment has been completed under scrutiny and no new material brought on record to warrant re-opening, there could be any legal justification for re-assessment.

48. It is relevant that in both years under consideration, the stand of the revenue is only that the methodology followed at the time of scrutiny assessment ought to have been different. The officer admittedly does not have any material over and above the material already with the department to justify the proceedings, which does not, in my view justify or warrant re-assessment in light of the new scheme.

49. The reference to 'information' in the Explanation to Section 148 relates to information flagged in the risk management strategy formulated by the Board or a final objection raised by the Comptroller & Auditor General of India pointing to a flaw in the assessment made earlier. No risk management strategy has been placed before the court despite a specific query in this regard. This assumes importance as the term used in Explanation 1 clause (i) in this connection, 'flagged', is deliberate and conscious.

50. Obviously, only some specific information that has come to the notice of the officer, and hitherto unknown, would satisfy this requirement. Such information must be tangible and new and stale information already part of the record simply cannot qualify. Incidentally, the term 'flagged' has been omitted from this clause w.e.f 01.04.22 by Finance Act 2022.

51. Thus, and evidently, material already on record and that has undergone scrutiny at the first instance cannot satisfy the statutory condition. On this score, the assumption of jurisdiction for initiation of proceedings for re-assessments is seen to be bad in law and quashed.

52. Additionally, the validity of the impugned proceedings have also to be tested on the anvil of the statutory condition in section 149 that the officer has in his possession, *'books of accounts or other documents or evidence which reveal that income chargeable to tax, represented in the form of an asset'* has escaped assessment. This additional requirement flows from the reason that the notices have been issued beyond three years from the end of the relevant assessment years. In the present case, the petitioner argues that there is no such asset.

53. Per contra, the submission of the revenue is that the suppressed income/wrong claim of disallowances, will constitute an asset. The submission does not appeal for the reason that what the revenue has in this case are only the books of account and material furnished by the petitioner at the time of original assessment and there is no mention anywhere in the impugned proceedings about an 'asset' representing the income that is alleged to have escaped.

54. Section 149, as it stood then, does not contemplate that the books of account/documents/evidences must themselves represent an asset. In fact, that provision has been amended by Finance Act 2022 to include situations such as the present as well, By virtue of this amendment, Section 149 w.e.f. 01.04.2022 reads as follows:

> ***149. Time limit for notice***
>
> *No notice under Section 148 shall be issued for the relevant assessment year.*
>
> *(a) If three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*
>
> *(b) If three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of-*
>
> *(i) an asset*
>
> *(ii)expenditure in respect of a transaction or in relation to an event or occasion:*
>
> *or*
>
> *(iii)an entry or entries in the books of account*
>
> *which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more.*

55. Thus, with effect from 01.04.2022, even entries in the books of account could be pressed into service by an officer to initiate re-assessment after a period of three years. This cannot be resorted to prior to 01.04.2022 as the law, as it stood then,

did not enable the same. Needless to state, the amendment of section 149 by way of substitution on 01.04.2022 is substantive making substantial inroads into the rights of an assessee and can only be taken to be prospective.

56. Thus, as on 01.04.2021 the command of the law is to the effect that there must be material indicating the existence of an 'asset' that leads to the inference of escapement of income. The import of the phrase 'books of income' has been considered by a Division Bench of this Court in *Commissioner of Income-tax vs Taj Borewells* (291 ITR 232) that makes reference to an earlier decision in *S.Rajagopala Vandayar vs. CIT* (184 ITR 450).

57. The substantial question framed in the case of Taj Borewells as relevant to this matter, was this:

> *"1. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in not considering the balance sheet and profit and loss account wherein contribution of the partners have been shown could be taken to be the books of account and the credits appearing therein have to be explained?"*

58. After taking note of the judgement of the Supreme Court in *CIT vs. National Syndicate* (41 ITR 225) and the Madras High Court in *P.Appavu Pillai vs CIT* (58 ITR 622), this Court in Rajagopala Vandayar's case had taken the view that

a profit and loss account does not form part of the books of accounts. The Bench, in Taj Borewells, notes this aforesaid position and that subsequently, 'books or books of accounts' have been defined under the Act w.e.f.01.06.2021.

59. That definition is inclusive and wide, bringing into the ambit of that phrase, 'ledgers, day-books, cash books, account-books and other books, whether kept in the written form or as print-outs of data stored in a floppy, disc, tape or any other form of electro-magnetic data storage device'. The Bench also took note of the definition under P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition 2005, that defined 'Books of account' as 'Books in which merchants, businessmen, and traders generally keep their accounts. 'Books of Accounts' means such books of account as are usual in the business, and do not extend to "letters, cheques, and vouchers from which books of account can be made up" (Per CAVE, J., Re Winslow, 55 LJQB 238).

60. The Bench concluded holding that:

> *'12. So, the books of account is defined as any book which forms an integral part of system of book keeping employed in any particular business and consequently includes both the ledger and the books of original entry. The Profit and Loss Account of a trade is the statement wherein the various items of profit and revenue on the one hand and*

the losses and expenditure on the other hand, are collected and offset, the one class against the other, that is, in compiling such an account being - debit all the losses, credit all the gains. The resulting balance of this account represents the Net Profits or the Net Losses for the period under review. The object of a Profit and Loss Account is to ascertain the income of a business and by offsetting the expenses of earning that income, to ascertain the net increase (profit) or decrease (loss) in the traders' "net worth" for the period. Balance Sheet lists the assets and liabilities and equity accounts of the company. It is prepared 'as on' a particular day and the accounts reflect the balances that existed at the close of business on that day. By following the judgment of the Madras High Court cited supra and taking note of the definition of the books or books of account in the Income-tax Act as well as in P.Ramanatha Aiyar's Advanced Law Lexicon, 3rd Edition 2005, and also the meaning of the Profit and Loss Account and Balance Sheet, we can safely conclude that the Profit and Loss Account and the Balance Sheet are not the books of account as contemplated under the provisions of the Act. The learned Standing Counsel for the Revenue has not placed any authority or any case law or any other material or evidence to show that the books of account includes Profit and Loss Account and Balance Sheet.

61. In light of the detailed discussion as above, the impugned notices and proceedings for reassessment are quashed and these writ petitions are allowed. No costs. Miscellaneous petitions stand closed.

15.09.2023

Index: Yes/No
Speaking order/Non-speaking order
Neutral Citation:Yes/No
ssm

Dr.ANITA SUMANTH, J.

ssm

To

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W.P. Nos.23284 & 22737 of 2022
and
WMP.Nos.21769, 21776, 22231, 22233, 29114 & 30379 of 2022

15.09.2023