IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1410 OF 2022

Hindoostan Mills Limited, a company incorporated in India, having registered office at D-Block 8th floor, Shiv Sagar Estate, Dr.Annie Besant Road, Worli, Mumbai-400 0018. ...Petitioner

Versus

1. Deputy Commissioner of Income-tax – 2(1)(1),Mumbai Room No.561, Aaykar Bhavan, M.K. Road, Mumbai-400 020.

2. The Principal Commissioner of Income Tax – 2, Aaykar Bhavan, M.K. Road, Mumbai-400 020.

3. The Union of India Through the Secretary, Ministry of Finance, Government of India, North Block, New Delhi-110 001.

4. National Faceless Assessment Centre, 2nd floor, E-Ramp, Jawaharlal Nehru

Stadium, Delhi – 110003.] ... Respondents

CORAM: DHIRAJ SINGH THAKUR

KAMAL KHATA, JJ.

PRONOUNCED ON : 27THE JUNE 2023

JUDGMENT : [PER KAMAL KHATA, J.]

1. This Petition under Article 226 of the Constitution filed on 2nd March 2022 impugns notice dated 30th March 2021 issued under section (u/s) 148 of the Income Tax Act, 1961 (Act) for Assessment Year (AY) 2014-15 and the order dated 14th February 2022 disposing of the objections raised for reassessment.

2. The record indicates that the notice dated 30th March 2021 u/s 148 of the Act is issued after expiry of four years and the proviso to section 147 of the Act applies. Respondents have to show there was failure to truly and fully disclose material facts as decided by this Court in ***Ananta Landmark (P) Ltd. v DCIT CC 5(3) Mumbai.***[1]

1 [2021] 131 taxmann.com 52

3. We have examined the reasons for initiation of proceedings u/s 147 of the Act annexed to the Petition that are evidently premised on the statement *'It is seen from the case records".* The Assessment Officer (AO) recorded that:

> *"2. .... the assessee had claimed set off of brought forward loss of ₹5,63,29,331 (to the extent of income) and claimed 'carry forward' of remaining loss of AY 2011-12 of ₹72,15,93,165 (₹77,79,22,496 less ₹5,63,29,331) which was accepted during scrutiny assessment.*
>
> *It is seen from the case records of AY-2011-12 that, the total 'carry forward', claimed by the assessee during AY 2011-12 was of ₹88,20,53,360, which was claimed after 'set off' of 'brought forward' losses of ₹95,39,09,867 (incorrectly claimed as 95,39,99,867). This loss included 'business loss' of ₹93,40,99,039 i.e. total of (₹ 55,82,30,163 for AY 2003-04 and ₹37,58,68,876 for AY 2004-05) pertaining to the amalgamated unit M/s. The Hindoostan Spinning and Weaving Mills Ltd.*
>
> *2(a) Further it is seen from the order u/s 263 dated 21st March 2016, the Pr. CIT had directed the Assessing Officer to verify the fact existing in the case of 'amalgamating' as well as 'amalgamated company' with reference to the conditions laid down in Section 72A(2)(a) and (b) of the Act and decide about the allowable 'carry forward' and 'set off' of accumulated loss and unabsorbed depreciation allowance of*

Hindoostan Spinning and Weaving Mills Ltd. in the amalgamated company. On the basis of this order, case was reopened for AY 2011-12 and order u/s 143(3) r.w.s. 263 of the Act was passed on 27th December 2016 wherein vide para 6.3 the assessing officer has concluded that as per section 72A(2) of the Act, the losses on amalgamation get fresh life for further 8 years from the date of amalgamation.

Thus, it is simply clear from the reading of 72A(2) of the Act that, though the 'carried forward' losses of amalgamated company will become the loss of amalgamated company in the year of amalgamation, but other provisions of the Act (viz. 'carry forward' of a maximum period of 8 years) will apply accordingly. Hence the amalgamated company will be entitled for the claim for only the unexpired period and not full 8 years afresh. Hence the assessee is not entitled for set off of losses of M/s The Hindoostan Spinning and Weaving Mills for AY 2003-04 and AY 2004-05 as it has exceeded the period of carry forward of 8 years as prescribed in Section 72(3) of the Act...."

4. Upon examination of the recorded reasons, we find nothing to indicate failure to disclose any material fact. Upon examining the order u/s 143(3) r.w.s 263 of the Act, we find that the AO has considered all submissions and documents and accepted the Loss of ₹88,07,62,670/- to be carried forward. Furthermore, with regard to section 72A(2) of the

Act, he held that the losses on the amalgamated assessee company are carried forward and on amalgamation get fresh life for further 8 years from the date of amalgamation. The impugned order dated 14th February 2022 rejecting the objections place reliance on the judgement of the Supreme Court in the case of ***Kalyanji Mavji & Co v CIT***[2] to contend that when an income liable to tax has escaped assessment in the original assessment proceedings 'owing to inadvertence or oversight or other lacuna attributable to the assessing authorities" the case could be reopened. In our view in the facts of this case this judgement would not be applicable since it is not inadvertence or oversight or a lacuna but clearly a change of opinion.

5. This passage from the Reply filed by the Respondent on 5th May 2022 crystalizes our view:

"...the assessee has claimed losses of amalgamating company, which were not allowable as per the provisions of the Act as such losses have already lapsed. Therefore, the facts reported in the ITR and the submissions made at time of assessment, <u>the view drawn by the then Assessing Officer is not as per the provisions of Section 72A of the Act.</u> The

2 102 ITR 287 (S.C)

incorrect claim of such losses and allowed in the assessment has been brought out by the Revenue Audit, which is one of the agencies identifying the revenue leakages and hence reopening proceedings have been rightly initiated which is within the ambit of law."

6. There appears no new tangible material available on record to conclude that income had escaped assessment. In our view it is clearly an exercise to review the original assessment order based on a *'change of opinion'* which is impermissible as held in ***CIT v Kelvinator of India Ltd.***[3]

7. In view of all the reasons aforesaid, we pass the following order-

   i. The impugned notice dated 30th March 2021 and the order dated 14th February 2022, issued by Respondent No.1 for AY 2014-15 are quashed and set aside and all further action in respect thereof is prohibited;

   ii. Rule made absolute in above terms. No costs.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR,J.)**

3 320 ITR 561 (S.C)