IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.10.2021

CORAM :

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.No.2521 of 2021
and
C.M.P.Nos.16405 & 16406 of 2021

M/s. Cognizant Technology Solutions India
Private Limited,
Represented by Authorised Signatory N.S.Balaji,
No.165, Menon Eternity Building,
6th Floor, St Mary's Road,
Chennai 600 034. ... Appellant

Vs.

1.Assistant Commissioner of Income Tax,
Large Taxpayer Unit- I,
7th Floor, Room No 712,
121 Nungambakkam High Road,
Chennai – 600 034.

2.Joint Commissioner of Income Tax,
Large Taxpayer Unit- I,
7th Floor, Room No 712,
121 Nungambakkam High Road,
Chennai – 600 034. ... Respondents

Prayer : Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order dated 09.08.2021 made in W.P.No.29023 of 2018.

For Appellant : Mr.N.V.Balaji

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

JUDGMENT

(Judgment was delivered by **T.S. SIVAGNANAM, J.**)

This Writ Appeal filed by the assessee is directed against the order, dated 09.08.2021, in W.P.No.29023 of 2018, filed by the appellant/assessee.

2.The said writ petition was filed, challenging the order passed by the 1st respondent, dated 29.03.2018, under Section 148 of the Income Tax Act, 1961 ("the Act" for brevity), for the Assessment Year 2013-2014.

3.The assessment for the year under consideration was completed by order, dated 31.12.2016, under Section 143(3) read with Section 92CA of the Act. Notice under Section 148 was issued on 29.03.2018, proposing to

reopen the assessment. The assessee sought for the reasons for reopening, by letter dated 27.04.2018. The reasons were not furnished. However, notice under Section 143(2) of the Act, dated 21.08.2018, was issued. Therefore, the assessee sent another letter, dated 27.08.2018, requesting for furnishing the reasons for reopening. Ultimately, the reasons were furnished on 30.08.2018. The assessee submitted their objections, dated 12.09.2018, which were disposed of by the Assessing Officer, by order dated 16.10.2018, which was impugned in the writ petition.

4.The learned Single Bench had dismissed the writ petition on the ground that the Assessing Officer, if he is able to trace out a new information, material or dimension in consonance with the provisions of the Act, which was omitted by the Original Assessing Authority, it is a good ground for reopening the assessment. Further, the learned Single Bench held that, mere comparison of subject or issues with reference to the original Assessment Order and disposal of objections cannot be a ground for the purpose of setting aside the reopening proceedings and if the reasons furnished for reopening of assessment provide any new information or

material or based on different dimension under the provisions of the Act, which was not considered by the Original Authority, then the reopening of assessment is permissible.

5.This finding rendered by the learned Single Bench does not reflect correct legal position. In this regard, we may refer to the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income Tax v. Kelvinator India Limited*** reported in ***320 ITR 561 SC***, wherein, it has been held that, one needs to give a schematic interpretation to the words "reason to believe", failing which, Section 147 of the Act would give arbitrary powers to the Assessing Officer to reopen the assessment on the basis of mere "change of opinion", which cannot be *per se* reason to reopen. Further, it was pointed out that the conceptual difference between the power to review and power to re-assess has to be kept in mind; the Assessing Officer has no power to review, he has power to re-assess, but reassessment is to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, then, in the garb of reopening the assessment, review would take place and one must treat the concept of "change of opinion" as an

in-built test to check abuse of power by the Assessing Officer. In ***Commissioner of Income Tax v. Techspan India Pvt. Ltd.*** reported in ***ITO (2018) (302 CTR 74)***, it was held that the reassessment proceedings cannot be initiated on the basis of same facts as was available during the regular assessment and in the absence of any new material coming to the light of the Assessing Authority.

6.There are several other decisions which lay down the legal principles with regard to reopening of assessment. The legal position that can be culled out from those decisions is that "reason to believe" shall be supported by new material facts, which come to the attention of the Assessing Officer, and shall not be a re-appreciation of the facts already available at the time of passing the original Assessment Order.

7.We need not labour much on the legal principle which has been well settled and therefore, the observations made in the impugned order by the learned Single Bench do not lay down the correct legal position.

8.Reverting back to the case of the assessee, the assessment was reopened on 5 grounds.

9.The assessee, in their objections dated 12.09.2018, at the outset, submitted that the reasons for reassessment have been recorded on the basis of information forming part of records of the assessment under Section 143(3) of the Act. Further, it was pointed that, in the Assessment Order dated 31.12.2016 under Section 143(3) of the Act, certain disallowances were made, however, they were not considered and did not form part of the Statement of Computation of Assessed Income and Tax Liability. Therefore, the assessee, on their own volition, filed an application under Section 154 of the Act for rectification of the mistake apparent from the record in the Assessment Order and this issue, which was pointed out by the assessee, is one of the reasons for reopening the assessment. Thus, no reopening could have been done on the said issue, where, the Assessing Officer, at the time of completing the assessment under Section 143(3) of the Act, had made disallowances.

10.With regard to the 2nd issue, namely, Mark-to-Market loss on restatement of outstanding forward contracts to be disallowed in computing the income under the head profits and gains from business or profession, the assessee stated that, on this very issue, the Assessing Officer issued notice under Section 142(1), dated 11.08.2016, and directed the assessee to furnish specific information in respect of "Details of loss from foreign currency fluctuation" and the assessee has submitted the ledger account pertaining to "Effect of exchange differences on translation of forward contracts (un-realized)" vide their submission dated 16.09.2016. Further, the assessee had furnished by letter dated 21.09.2016, the ledger account pertaining to the expense in a Compact Disk, upon specific request made on the Assessing Officer. Further, the assessee, vide letter dated 26.12.2016, furnished the detailed submissions on the allowability of Mark-to-Market losses on outstanding forward contracts as a deduction in computing income under the head "profits and gains of business or profession". Thus the assessee submitted that the said issue was taken into consideration while completing the assessment under Section 143(3) of the Act.

11.On the 3rd issue with regard to "Repairs and Maintenance" pertaining to computer software, the assessee stated that, notice under Section 142(1), dated 11.08.2016, was issued calling for specific information regarding repairs and maintenance, which were furnished by the assessee and in this regard, the assessee pointed out that, in the questionnaire furnished to the assessee, Question No.16 pertains to "Repairs and Maintenance – Software". The assessee, vide letter dated 09.09.2016, submitted the monthly summary of the ledger account pertaining to "Repairs and Maintenance – Software" and a hard copy of the same was filed on 16.09.2016. Further, on a specific request made by the respondent, the assessee provided the ledger account in a Compact Disk. Therefore, the assessee contended that the said issue was duly taken into consideration at the time of passing the order under Section 143(3) of the Act.

12.On the 4th issue regarding computation of Long Term Capital Loss claimed in the return of income for carry-forward for future set-off, the assessee stated that, notice dated 11.08.2016 was issued under Section 142(1) and specific information was called for with respect to the documents

of Long Term Capital Loss. The assessee has furnished the computation of Long Term Capital Loss by their letter dated 09.09.2016 and in addition thereto, a copy of Valuation Report dated 09.10.2012, a copy of ODR Report filed with the RBI and a copy of SBI TT buying rate chart for the purpose of conversion of exchange rates were also furnished. Therefore, the assessee pointed out that the said issue was duly scrutinized and accepted by the Assessing Officer, while passing the Assessment Order under Section 143(3) of the Act.

13.With regard to the 5th issue, namely, deduction of unrealized Short Term Capital Gains, the assessee stated that, notice dated 11.08.2016 under Section 142(1) was issued and specific information was called for with respect to the "Details of Short Term Capital Gain". The assessee filed submissions, dated 09.09.2016, furnishing scrip-wise details and the computation statement and also pointed out that the unrealized capital gains accounted in the financial statements were added back and offered to tax in the assessment of preceding previous year. Therefore, the assessee stated that the said issue was also examined and the details were fully scrutinized

and accepted, while completing the assessment under Section 143(3) of the Act.

14.Unfortunately, the Assessing Officer, while disposing of the objections by order dated 16.10.2018, did not examine any of these aspects, but merely observed that the Assessing Officer nowhere left the traces for verification of the issues, therefore, it does not tantamount to change of opinion. This finding is wholly unsustainable. In other words, the Assessing Officer, while disposing of the objections by order dated 16.10.2018, has accepted the fact that the grounds on which the assessment was reopened were verified by his predecessor, while completing the assessment under Section 143(3) of the Act. If such is the understanding of the Assessing Officer, then we have no hesitation to hold that the reopening is a clear case of change of opinion.

15.The assessee, in their objections, had also referred to the Circular issued by the Central Board of Direct Taxes, vide Circular No.549 dated 31.10.1989, wherein, it was clarified that a mere change of opinion cannot

constitute a reason to believe under Section 147 of the Act so as to justify the reopening of assessment.

16.Thus, in the absence of new facts coming to the knowledge of the Assessing Officer subsequent to the original assessment proceedings, the reopening could not have been done on the same materials. In fact, when we perused the reasons for reopening, it is evidently clear that all the materials have been culled out from the return of income filed by the assessee and the Annexure thereto. Thus, the impugned reassessment proceedings, having been done with the same set of facts which were available during the regular assessment, is to be held to be a clear case of change of opinion.

17.One other issue which the assessee had pointed out is with regard to the non-furnishing of reasons within reasonable time. In this regard, the assessee placed reliance on the decision of the High Court of Gujarat in the case of ***Sahkari Khand Udyog Mandal Limited v. Assistant Commissioner of Income Tax [370 ITR 107]***. In the said decision, it had been pointed out that the Assessing Officer has to provide reasons recorded for initiating

reopening proceedings within 30 days of the filing of the return of income by the taxpayer and without waiting for the taxpayer to demand such reasons. The Assessing Officer brushed aside the said decision, stating that the decision will not bind him as it is not a decision of the jurisdictional High Court.

18.As pointed out earlier, the notice under Section 148 of the Act was issued on 29.03.2018. The assessee within 30 days by their letter dated 27.04.2018 had sought for reasons for initiating the reopening proceedings. The Assessing Officer did not furnish the reasons nor responded to the said letter, but proceeded to issue the notice under Section 143(2) dated 21.08.2018. Therefore, the assessee submitted another letter dated 27.08.2018, requesting for furnishing the reasons for reopening. It is only thereafter, the reasons for reopening were furnished vide letter dated 30.08.2018. It is not clear as to why there was such a delay in furnishing the reasons. It may be true that no time limit has been prescribed for furnishing the reasons, but the Hon'ble Supreme Court, in the case of ***GKN Driveshafts (India) Limited v. Income-Tax Officer*** reported in ***(2003) 259 ITR 19 (SC),***

has held that the reasons shall be furnished within a reasonable time by the Assessing Officer, upon receiving the request for the same from the assessee. There is an enormous delay in furnishing the reasons for reopening and we are of the opinion that the reasons were not furnished to the assessee within a reasonable time. However, since we are fully convinced that the reopening proceedings is a clear case of change of opinion, we do not wish to render any finding on the legal issue as to what would be the reasonable time within which the assessee should be informed about the reasons for reopening, upon the request received from the assessee in that regard, and we leave the said legal issue open for consideration in an appropriate proceedings at the appropriate time.

In the result, the Writ Appeal is allowed and the order passed in the writ petition is set aside. Consequently, the writ petition is allowed and the reopening proceedings are quashed. No costs. Consequently, connected Miscellaneous Petitions are closed.

(T.S.S., J.)(S.S.K., J.)

mkn **05.10.2021**

Internet : Yes
Index : Yes / No
Speaking order / Nonspeaking order

To

1.The Assistant Commissioner of Income Tax,
Large Taxpayer Unit- I,
7th Floor, Room No 712,
121 Nungambakkam High Road,
Chennai – 600 034.

2.The Joint Commissioner of Income Tax,
Large Taxpayer Unit- I,
7th Floor, Room No 712,
121 Nungambakkam High Road,
Chennai – 600 034.

T.S. SIVAGNANAM, J.
and
SATHI KUMAR SUKUMARA KURUP,

J. mkn

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