THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 14.02.2013

\+ **W.P.(C) 4507/2012**

E.I. DUPONT INDIA PVT. LTD. AND ANR. ..... Petitioner

versus

THE DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent

Advocates who appeared in this case:
For the Petitioner : Ms Kavita Jha with Mr Vaibhav Kulkarni, Advocates.
For the Respondent : Mr Abhishek Maratha, Sr. Standing Counsel.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

C.M. APPL. No.9341/2012 (for exemption)

Exemption allowed subject to all just exceptions.

The application stands disposed of.

W.P. (C) No.4507/2012 & C.M. APPL. 9340/2012

Mr Maratha, Sr. Standing Counsel seeks another opportunity to file the counter affidavit. However, we have given sufficient opportunity to the respondent to file the counter affidavit in this matter. Mr Maratha

states that he is handicapped because he has not received any comments from the department.

2. We, therefore, close the right of the respondent to file the counter affidavit in this matter.

3. This writ petition is directed against the notice dated 27.03.2012 issued under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') proposing to reopen the assessment for the assessment year 2005-06. After the receipt of the said notice dated 27.03.2012, the purported reasons behind the issuance of the said notice were also supplied to the petitioner. Those purported reasons read as under:

> "**Reasons for Notice u/s 148 of the IT Act, 1961**
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> The assessment u/s 143(3) of the IT Act in the above mentioned case for A.Y. 2005-06 was completed in December 2008 determining total income of ₹66,47,07,190/-. On the perusal of the record that pursuant to the scheme of amalgamation with Ms Liqui Box Liabilities, duties and obligations Etc. would be transferred and the deficit arising on account of excess of fair value of net assets taken over as a part of amalgamation over the face value of shares issued under the scheme should be treated as Goodwill/ Capital Reserve in accordance with the scheme of amalgamation. Accordingly ₹2,87,90,431/- being the difference between consideration and the net value of identifiable assets

> acquired, after adjustments was treated as Reserve. As, the assessee had received the benefit of ₹2,87,90,431/- from the scheme of amalgamation, the same would be offered for tax as business Income. By doing so, the assessee has not disclosed the total income correctly to the extent of ₹2,87,90,431/-.
>
> Based on the above facts, I have reason to believe that the income of the assessee chargeable to tax to the extent of ₹2,37,90,431/- has escaped assessment."

4. In response to the said notice and purported reasons, the petitioner submitted its objections by virtue of its letter dated 08.05.2012. An opportunity of hearing was also granted to the petitioner whereupon the assessing officer passed an order on 31.05.2012 rejecting the objections.

5. In the reply submitted by the petitioner it had been categorically stated that the proposed proceedings were hit by the first proviso to section 147 of the said Act which specifically laid down that, in case an assessment has already been made under section 143(3) of the said Act, in order to reopen the said assessment after the expiration of four years the assessing officer has to necessarily demonstrate that there was failure on the part of the assessee to disclose the facts and particulars necessary for the assessment. However, this contention of the petitioner was

brushed aside by the assessing officer in the order dated 31.05.2012 by simply stating as under: -

> "The objection raised by the assessee has been considered but are found to be not tenable. The assessment in the case of assessee has been completed u/s 143(3) of the Act at total income of ₹66,47,07,190/- on December 2008. However, on perusal of records it was observed that assessee has failed to disclose its income fully and truly resulting in under assessment. Accordingly notice u/s 148 was issued on 27.03.2012 after obtaining prior approval of Ld. CIT vide dated 15.03.2012."

6. We have heard the learned counsel for the parties and we feel that since this was a case of proposed reopening of assessment after four years from the end of the relevant assessment year it was incumbent upon the assessing officer to demonstrate that there was failure on the part of the assessee to fully and truly disclose all material facts necessary for its assessment. The purported reasons which we have extracted above do not even allege that there has been a failure on the part of the assessee to disclose any material fact. In fact, even in the impugned order dated 31.05.2012 there is no mention of what fact the assessee had failed to disclose which was necessary for the assessment in the original round of assessment. Failure to disclose all material facts necessary for assessment is a condition precedent for reopening of an assessment

beyond the period of four years from the date of assessment. This is a pre-condition set out in the statute itself.

7. In view of the fact that this pre-condition has not been satisfied, we feel that the impugned notice dated 07.03.2012 as also the order dated 31.05.2012 ought to be set-aside. It is ordered accordingly. All the proceedings pursuant to the notice dated 27.03.2012 are quashed. The writ petition is allowed. There shall be no order as to costs. Consequently, all the pending applications also stand disposed of.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

FEBRUARY 14, 2013
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