INCOME TAX : Where company HCL was amalgamated with assessee company and reopening notice was issued against assessee in name of HCL on ground that as per ITS Data assessee had not reflected purchase of units of mutual funds in its return of income, since offices of both amalgamating company HCL and assessee were on same premises and, further, assessee had duly acknowledged said reopening notice, same could not be set aside on ground that amalgamating company HCL was not in existence

[2021] 128 taxmann.com 239 (Madras)

HIGH COURT OF MADRAS

Vama Sundari Investments (Delhi) (P.) Ltd.

v.

Assistant Commissioner of Income Tax, Company Circle II(2), Chennai*

S.M. SUBRAMANIAM, J.
W.P. NO. 3413 OF 2013
APRIL 26, 2021

Section 170, read with section 147, of the Income-Tax Act, 1961 - Succession to business otherwise than on death (Reassessment) - Assessment year 2005-06 - Company HCL was amalgamated with assessee company - Assessee filed its return of income which was accepted and an assessment order was passed - Subsequently, Assessing Officer issued reopening notice against assessee in name of HCL on ground that as per ITS Data assessee had purchased units of mutual funds of certain amount, however, same was not reflected in return of income filed by assessee - Assessee contended that HCL was not existing and an amalgamation was done and company was merged, therefore, impugned reopening notice issued in name of HCL after amalgamation was null and void - It was noted that HCL merged with assessee and both offices were running in same premises - Further, acknowledgement of reopening notice was issued by assessee - Therefore, section 170 would be applicable and entire reassessment proceedings initiated against assessee could not be quashed on ground that HCL was not in existence - Even on merits, revenue was able to establish that there was a 'reason to believe' about escapement of income in view of certain new materials noticed about purchase of units of mutual funds - Whether, on facts, impugned reopening notice issued against asssessee was justified - Held, yes [Para 14] [In favour of revenue]

CASE REVIEW

CIT v. *T.V. Sundaram Iyengar & Sons* (*P.*) *Ltd.* [1999] 238 ITR 328 (Mad.) (para 10) *followed*.

CASES REFERRED TO

CIT v. *T.V. Sundaram Iyengar & Sons* (*P.*) *Ltd.* [1999] 238 ITR 328 (Mad.) (para 10).

Ajay Vohra, Sr. Counsel and **Srinath Sridevan** *for the Appellant.* **A.P. Srinivas**, Sr. Standing Counsel *for the Respondent.*

JUDGMENT

1. The impugned proceedings dated 17-7-2012 issued under section 147 of the Income-tax Act, 1961 for the assessment year 2005-06 is under challenge in the present writ petition.

2. The petitioner is Vama Sundari Investments (Delhi) Private Limited [as the successor of erstwhile M/s.HCL Corporation Ltd., HCL Peripherals Limited and Slocum Investments (Delhi) Private Limited].

3. The learned Senior counsel appearing for the writ petitioner mainly contended that the notice impugned under section 147 of the Act was issued on a dead person. Therefore, it is liable to be scrapped. To substantiate the said contention, it is reiterated that the notice cannot be issued to a non-existing entity and such a notice is invalid. Therefore, service of notice as contemplated under the Statue has not been complied with. Therefore, the writ petition is to be allowed. As on 30-3-2012, the HCL Peripherals Limited was not existing and an amalgamation was done and the company was merged with effect from 1-4-2009. However, the impugned order was issued on 17-7-2012 after amalgamation. Therefore, the impugned order is null and void.

4. The learned Senior counsel for the petitioner solicited the attention of this Court with reference to the letters sent by the HCL Peripherals Limited to the Assistant Commissioner of Income-tax on 4-5-2011, so as to establish that the change of address has been communicated to the respondent/Assistant Commissioner of Income Tax. Inspite of that, they have served notice to the Company, which was not existing during the relevant point of time, when the impugned order was issued. It is contended that on 19-2-2010, the Hon'ble Delhi High Court's Order sanctioning Amalgamation and Scheme of Amalgamation of HCL Peripherals Limited with HCL Corporation Limited. Thereafter, on 28-2-2011, the Hon'ble Delhi High Court's order sanctioning Amalgamation and Scheme of Amalgamation of HCL Corporation Limited and Slocum Investments (Delhi) Private Limited and Guddu Investments (Pondi) Private Limited. Thereafter, Slocum Investments (Delhi) Private Limited filed the return of income for the assessment year 2011-12 on 29-9-2011. Subsequently, on 4-5-2011 as stated above, HCL Peripherals Limited communicated the fact regarding the merger of HCL Peripherals Limited with HCL Corporation Limited with effect from 1-4-2009 and the copy of the order of merger passed by the High Court of Delhi was enclosed in the letter and the return of income filed for the Assessment year 2009-10 with the DCIT, Company Circle 12(1), New Delhi was also informed. Citing all these facts and circumstances, the learned Senior Counsel for the petitioner reiterated that the notice impugned was served on a dead person, since the Company was not existing during the relevant point of time. Thus, the order impugned is to be set aside.

5. In proceedings dated 2-11-2012, the Deputy Commissioner of Income-tax furnished the reasons recorded for initiation of proceedings under section 147 of the Income-tax Act. The said proceedings would reveal that "as per the ITS Data, the assessee company has purchased units of mutual funds to the extent of Rs. 52,39,18,310/-. However, the same has not been reflected in the return of income filed by the assessee company. Hence, I have reason to believe that income chargeable to tax has escaped assessment".

6. The learned Senior Counsel appearing for the petitioner contended that the informations regarding the purchased units of mutual funds were provided to the Assessing Officer and the reasons stated are factually incorrect. In reply dated 2-1-2013, the petitioner/assessee has furnished the factual incorrectness regarding the reasons furnished for initiation of proceedings under section 147 of the Act. It is contended that there was no escapement of income. Therefore, the proceedings under section 147 are to be dropped. However, the respondent rejected the said contention and validated the proceedings for reopening of assessment initiated under section 147 of the Act.

7. The learned Senior Standing Counsel appearing for the respondent disputed the contentions raised on

behalf of the petitioner by stating that the provisions of the Income-tax Act are clear in respect of preliminary objections raised by the petitioners. *Explanation 1* to Section 147 states that "Production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso".

8. Relying on the said *Explanation*-1, the learned Senior Standing Counsel reiterated that the case of the petitioner falling under the sub-clause and the reason furnished for reopening of the assessment was made clear in this regard by the respondent. Thus, the petitioner has to cooperate for the assessment by producing all relevant facts, documents and information, in order to defend his case.

9. The learned Senior Standing Counsel appearing for the respondent relied on *Explanation*-2, Sub-clause (*c*)(*i*) to Section 147 which stipulates that " income chargeable to tax has been under assessed".

10. The learned Senior Standing Counsel in order to substantiate the contention cited the judgment of the Hon'ble Division Bench of this Court in the case of *CIT* v. *T.V. Sundaram Iyengar & Sons* (*P.*) *Ltd.* [1999] 238 ITR 328 (Mad.), wherein it is held as follows:

> 9. It is not open to the amalgamated company which has taken over all the assets and liabilities of the amalgamating company to claim that it is not in any way liable for the tax payable by the amalgamating company, even though the order under section 104 came to be made after the order of amalgamation and after the dissolution of the amalgamating company, but on account of acts of omission and commission committed by the amalgamating company, and its failure to carry out the obligations which were required to be carried out, The fact that the liability had not crystallised and the charge had not been created would not entitle the amalgamated company to avoid the payment of the tax under section 104 that would have been payable if the amalgamating company had continued to exist.
>
> 13. The provisions of the Companies Act should be read harmoniously with those of the Income-tax Act. After the transfer of all assets and liabilities, debts and obligations of the amalgamating company to the amalgamated company in terms of the sanction accorded by the company court under section 394 of the Companies Act, the striking out of the name of the amalgamating company from the register does not wipe out the obligation to comply with an order made by the Income-tax Officer under section 104, and the order is capable of being enforced against the amalgamated company.

11. Regarding the ground raised by the petitioner that the impugned order was served on non-existing company, it is relevant to consider section 170 of the Act which stipulates "succession to business otherwise than on death". Section 170 Sub-clause (*ii*) reads as under:

Notwithstanding anything contained in sub- section (1), when the predecessor cannot be found, the assessment of the income of the previous year in which the succession took place up to the date of succession and of the previous year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor, and all the provisions of this Act shall, so far as may be, apply accordingly.

12. The above provision unambiguously contemplates that "all the provisions of this Act shall, so far as may be, apply accordingly, when the predecessor cannot be found and the successor shall be made accountable". When section 170(*ii*) contemplates that the successor Company is liable and responsible, mere service of notice in respect of company, which was not existing cannot be a ground to assail the proceedings instituted for reopening of assessment under section 147 of the Act. Interestingly, the letter

dated 4-5-2011 submitted by the HCL Peripherals Limited reveals that the changed address is also one and the same. The address of the sender reads as under:

From

HCL Peripherals Limited

E-4,5,6, Sector 11,

Noida-201301,

UP India

13. The contents of the letter reveals that "we request you to kindly note the change of address to

E-4,5,6, Sector 11,

Noida-201301, Uttar Pradesh."

14. On perusal of the said letter reveals that the address of the sender as well as the change of the address is one and the same. HCL Peripherals Limited merged with HCL Corporation Limited with effect from 1-4-2009 and both the offices are running in the same premise. Further, acknowledgement of the notice issued by the respondent has not been disputed by the petitioner. Therefore, Section 170(*ii*) would be applicable in the present case and the said ground cannot be considered for the purpose of quashing the entire proceedings initiated under section 147 of the Act. Even on merits, the respondent could able to establish that there is a "reason to believe" in view of certain new materials noticed in the matter of purchased units of mutual funds to the extent of Rs. 52,39,18,310/-.

15. This being the facts and circumstances established, the petitioner has to participate in the reassessment proceedings by submitting their documents, evidences to establish their case. Thus, the respondents have to proceed with reopening of the assessment already made and the proceed with the assessment by following the procedures as contemplated under the Act and by affording opportunity to the assessee. In view of the fact that the petitioner has not established any acceptable reason for the purpose of assailing the impugned order, the writ petition stands dismissed. No costs.

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*In favour of revenue.