

W.P.No.25229 of 2019

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**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

Dated: 19.07.2022

CORAM

**THE HONOURABLE DR. JUSTICE ANITA SUMANTH**

**W.P.No.25229 of 2019**

**and**

**W.M.P.Nos.8537 of 2020 and 24799 & 24802 of 2019**

M/s.EIH Associated Hotels Ltd.,  
Represented by Power of Attorney  
Holder Mr.J.Suresh,  
1/24, GST Road,  
Meenambakkam,  
Chennai – 600 017.

...Petitioner.

Vs.

The Assistant Commissioner of Income Tax,  
Corp Circle 2(1)- Chennai, 5th Floor,  
Chennai – 600 034.

...Respondent.

**Prayer:** Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the entire records of the Respondent contained in impugned Notice No.ITBA/AST/F/17/2018-19/1015381247(1) dated 21.03.2019 issued under Section 148 of the Income Tax Act, 1961 [hereinafter referred to as the Act] for PAN:AAACE2125M for Assessment Year 2012-13 along with all consequential orders issued thereto, including the order dated 31.07.2019, dismissing the objections of the petitioner for re-opening the assessment under Section 147 of the Act, and to quash the same, as arbitrary, unjust and illegal, and to consequently forbear the respondent or any of its superiors, subordinates, agents or any other person claiming under or above the respondent, form in any manner re-assessing the petitioner's income for the assessment year 2012-13 under Section 147 of the Income Tax Act, 1961.



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For Petitioner : Mr.R.V.Easwar  
Senior Counsel  
for Mr.Suhrith Parthasarathy  
For Respondent : Mr.Prabhu Mukund Arun Kumar  
Junior Standing Counsel

### **ORDER**

The petitioner is a company assessed to income tax on the file of the sole respondent in terms of the provisions of Income Tax Act, 1961 (in short 'Act'). In respect of assessment year (AY) 2012-13 a return of income had been filed disclosing income both under the regular provisions as well as under the provisions of Minimum Alternate Tax (in short 'MAT').

2. Proceedings for amalgamation had been ongoing at that particular juncture, in Company Petition Nos.190 and 191 of 2012 for amalgamation of the petitioner with one, Island Hotel Maharaj Limited. By order dated 06.02.2013 the scheme of amalgamation had been approved by this Court, merging the aforesaid two entities. The appointed date was fixed as 01.04.2011.

3. The scheme provided for the merging of the assets and liabilities as well as the method of accounting to be followed in respect of the merged assets. The accounting was to be under the pooling of interest method adopting accounting standard (AS 14) that provided for the methodology for accounting for amalgamations, issued by the Institute of Chartered Accountants of India.

4. Post-amalgamation, a revised return had come to be filed by the



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petitioner, once again computing the income both under regular provisions as

well the under the provisions of Minimum Alternate Tax (MAT). The brought

forward loss in the hands of the petitioner (amalgamated entity) is as follows:-

<i>Surplus in Statement of Profit and Loss</i>	
<i>As per last Account</i>	<i>198,699,821</i>
<i>Less: Adjustment of Debit balance of Profit &amp; Loss Account of Transferor Company pursuant to Scheme of Amalgamation (Note 28)</i>	<i>505,251,912</i>
<i>Add: Profit/(Loss) during the year</i>	<i>(306, 552, 091)</i>
	<i>192,811,674</i>
	<i>.....</i>
	<i>(113,740,471)</i>

5. Thus and admittedly, the amount of brought forward loss is a sum of Rs.30,65,52,091/- and the amount of brought forward depreciation is a sum of Rs.18,05,97,492/-. There is no dispute with regard to the aforesaid two figures. The petitioner, in computing the income under the provisions of MAT, applied the provisions of Section 115JB of the Act and, inter alia, the upward and downward adjustments set out under the Explanations thereunder.

6. As per the methodology of computation prescribed, the lower of either book depreciation or loss of the transferor company, was to be set off against the adjusted book profit. Applying the aforesaid methodology, the adjusted book profit arrived at in the present case was 'nil'. Since the amount of book depreciation constituted the lower of the two figures, the same was taken into



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the reckoning for arriving at the adjusted book profit. This procedure followed

WEB COPY aligns with the prescription and the methodology set out under Section 115JB.

7. An order of assessment came to be passed thereafter on 26.03.2015, the Assessing Authority computing income both under regular provisions as well as under the provisions of MAT. As far as the latter is concerned the computation is as follows:-

**Computation of book profit u/s 115JB.**

<i>Book Profit (As per Memo)</i>	<i>18,05,97,492</i>
<i>Add: Expenses attributable to income exempt</i>	<i>22,66,356</i>
<i>Taxable Book Profit</i>	<i>18,28,63,848</i>
<i>Set off of brought forward loss</i>	<i>18,28,63,848</i>
<i>Assessed book profit</i>	<i>Nil</i>
<i>Income Computation statement enclosed.</i>	

8. The Assessing Authority has neither mechanically adopted the figures supplied by the petitioner nor the methodology for computation of book profit as he adds expenses attributable to exempt income, increasing the taxable book profit for the purposes of Section 115JB. Thus the order of assessment passed under scrutiny is a reasoned order passed after the application of mind upon the computation furnished by the petitioner.

9. The impugned proceedings for re-assessment have to be seen in this context. Notice under Section 148 of the Act was issued on 21.03.2019, barely 10 days prior to the expiry of the six year period which places an absolute bar



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upon reassessment, except in certain stipulated situations, that do not arise in the

WEB COPY present case.

10. The petitioner complied with the notice reiterating its computation made at the original instance (by way of revised return) and sought the reasons for re-opening of the assessment. The reasons supplied are as follows:-

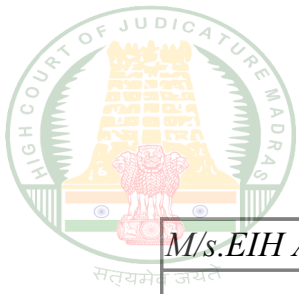
*“2.1 . The assessee's subsidiary M/s. Island Hotel Maharaj Limited amalgamated with the effective from 28.02.2013 (effective date) vide Madras High Court Orders.*

*2.2 The assessee filed its revised return of income on 28.03.2013 declaring NIL income after setting - off the total income of Rs.14,58,76,516/- against unabsorbed depreciation loss/brought forward business loss . The assessee offered NIL book profit u/s 115JB after reducing book loss of transferor Company amounting to Rs . 18,05,97,492/-*

*2.3 . During the scrutiny assessment u/s 143 (3), an addition of Rs. 55,25,821/- was made amounting to Rs.15,14,02,337/- under normal computation. However, the assessed income has become NIL after setting-off with the brought forward business loss/ unabsorbed depreciation loss. An addition of Rs.22,66,356/- was made to the book profit u/ s 115JB totalling to 18,28,63,848/ - . However, the assessment was completed with NIL book profit after setting - off with the brought forward book loss of the transferor company (M / s. Island Maharaj Limited).*

*2.4 . It is seen from the ' Post Amalgamation Annual A/Cs for the year ending 31.03.2012 under Schedule ' Reserves of Surplus ' that the assessee company had Rs . 50.00 crores opening balance in the general reserve and Rs. 19.87 crores in Surplus Statement of Profit & Loss a / c . thereby totalling to Rs . 69.87 crores , before amalgamation . The loss available in the books of the transferor company was Rs.50.52 crores as on 31.03.2011 (i.e.,) before amalgamation . Thus, it is seen that no book loss or depreciation is available to be deducted u / s 115JB as detailed below :”*

**Before amalgamation as on 31.03.2011**



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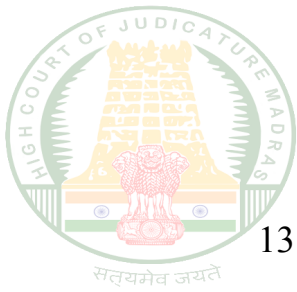
<i>M/s.EIH Associated Hotels Ltd:</i>	<i>General Reserve</i>	<i>50,00,00,000</i>
	<i>Surplus in P&amp;L a/c</i>	<i>19,86,99,821</i>
		<b><i>69,86,99,821</i></b>
<b><i>Less: Loss of the transferor company (M/s.Island Hotel Maharaj Ltd.)</i></b>		<i>(50,52,51,912)</i>
<b><i>Accumulated book profit as on 31.03.2011</i></b>		<b><i>19,34,47,909</i></b>

*“2.5 It is evident from the above that there is no book loss or depreciation available, rather there is a book profit of Rs.19,34,47,909/- . Therefore, the set - off of Rs.18,28,63,848/- as brought forward book loss against the book profit is required to be disallowed and brought to tax u / s 115JB .*

*2.6. In these circumstances , I have reasons to believe that the income has escaped assessment in the case of the assessee for AY 2012-13 within the meaning of Section 147 of the Income Tax Act,1961.”*

11. The premise upon which the assessment has been re-opened is that the loss available was a sum of Rs.50.52 Crores and no book loss or depreciation was available to be deducted under Section 115 JB.However the computation accompanying the revised return reveals depreciation of a sum of Rs.18.05 crores.

12. That apart, the challenge is on the assumption of jurisdiction by the Assessing Officer, seeing as the provisions of Section 147 of the Act impose a pre-condition that, for the department to proceed for reassessment beyond a period of 4 years, the burden was upon it to establish that the assessee concerned had made an incomplete and untrue disclosure at the first instance. In the present proceedings the reopening is beyond the period of four years from the end of relevant assessment year.



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13. The officer considered the objections raised by the petitioner and rejects the same vide the impugned order dated 31.07.2019. Incidentally, the officer erroneously states therein, that the reassessment had been initiated within four years from the end of the relevant assessment year. However this factual error has been rectified in the counter.

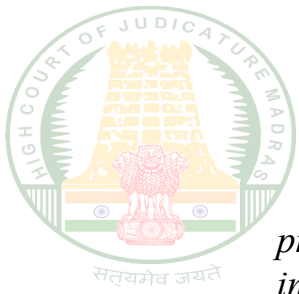
14. A perusal of the impugned order leaves me in no doubt that the Officer has proceeded entirely on the mistaken assumption that the re-assessment was within a period of four years. It is in this context that he refers to explanation 1 to Section 147, that reads as follows:

*“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 proviso to Sec.147 of the IT Act.”*

15. However the proviso to Section 147, which is extracted below is a statutory pre-condition that has to be complied with by the Assessing Officer and places a significant burden upon the Officer that must be discharged, prior to proceeding with the re-assessment beyond the period of four years from the end of the relevant assessment year. The provision and proviso thereunder read as under:

**Income escaping assessment.**

*“147. If the 73[Assessing] Officer 74[has reason to believe75] that any income chargeable to tax has escaped assessment75 for any assessment year, he may, subject to the*



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*provisions of sections 148 to 153, assess or reassess<sup>75</sup> such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*

***Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure<sup>76</sup> on the part of the assessee to make a return under section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:***

16. It is a well settled position that in cases of reopening beyond the period of four years from the end of the relevant assessment year, the statutory pre-condition set out in the proviso to Section 147 of the Act must first be complied with prior to invoking the benefit under the Explanations.

17. It is an equally well settled rule of construction that the interpretation of a statutory provision, must be in the sequence in which the sub-sections and clauses are arranged. Thus the construction of Section 147 is relevant and must be appreciated and applied in seriatim. The proviso is placed at the first instance and the Explanations thereafter and this would mean that the statutory condition and burden cast upon the Department by virtue of the first proviso





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must first be discharged by the officer, before he proceeds to avail benefit of

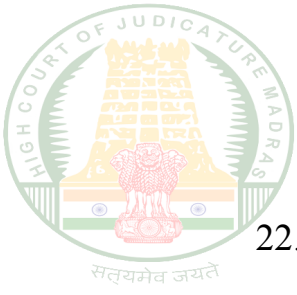
WEB the deeming explanations that follow thereafter.

18. The test would thus be as to whether the disclosure made by the petitioner at the time of original assessment was full and complete. There is no dispute in this regard and all material in regard to the computation of tax under the provisions of MAT were available before the Assessing Authority.

19. The reasons proceed on the basis that the methodology for computation is erroneous which premise, as noticed earlier, does not appear to be correct as the financials disclose the availability of depreciation. In such circumstances, the assumption of jurisdiction under Section 147 is held to be bad in law.

20. That apart, I also find force in the submission that there is no allegation in the reason itself to the effect that there has been any incomplete disclosure or false statement made at the time of assessment that would justify the assumption of jurisdiction beyond the period of four years.

21. The petitioner also raises the argument that the impugned proceedings are based on an audit objection though none of the documents on record would evidence this position. However, there is an averment in the affidavit to this effect and the counter filed by the respondent does not specifically deny this.



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22. Thus even on this score and following the settled position that an audit objection does not satisfy the requirement of the Assessing Officer having an independent 'reason to believe' that income has escaped assessment, that too after the elapse of nearly six years from the end of the relevant assessment year, the impugned proceedings are vitiated.

23. In light of the discussions above, this writ petition is allowed and the impugned proceedings are quashed. Connected writ miscellaneous petitions are closed. No costs.

**19.07.2022**

*nst/vs*

Index : Yes / No  
Speaking Order / Non Speaking Order  
To  
The Assistant Commissioner of Income Tax,  
Corp Circle 2(1)- Chennai, 5th Floor,  
Chennai – 600 034.



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**Dr.ANITA SUMANTH, J.**

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