**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 2437 of 2022**

=====

**GTPL HATHWAY LIMITED****Versus****DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 2(1)(1) & ANR.**

=====

**Appearance:****MR TUSHAR HEMANI, SENIOR ADVOCATE WITH****MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1****MR.VARUN K.PATEL(3802) for the Respondent(s) No. 1,2**

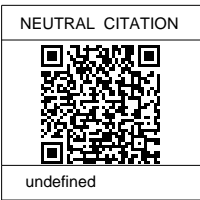
=====

**CORAM:HONOURABLE MR. JUSTICE BHARGAV D. KARIA****and****HONOURABLE MR.JUSTICE D.N.RAY****Date : 03/02/2025****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)**

1. Heard learned Senior Advocate Mr. Tushar Hemani with learned Advocate Ms. V.K. Parikh for the petitioner and learned Senior Standing Counsel Mr. Varun K. Patel for the respondents.

2. Rule returnable forthwith. Mr. Varun K. Patel, learned Senior Standing Counsel waives service of notice of rule on behalf of the respondents.

3. With the consent of learned advocates for both the sides, the matter is taking up for hearing as the issue of jurisdiction of the respondent is raised for issuance of notice dated 27.03.2021



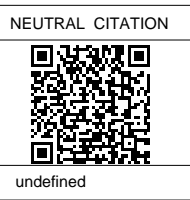
under section 148 of the Income Tax Act, 1961 (for short 'the Act') for re-opening of the assessment for Assessment Year 2017-18.

4. The brief case of the facts are as under:

4.1 The petitioner filed return of income for AY 2017-18 declaring total income of Rs.39,69,64,650/- on 31.10.2017 and thereafter filed revised return of income on 09.02.2019 declaring total income of Rs.83,33,75,590/-.

4.2 The case of the petitioner was selected for scrutiny and after considering the reply of the petitioner in response to the notice issued under section 142(1) of the Act; the assessment order under section 143(a) of the Act was passed on 09.12.2019, except in the return income of Rs.2,96,81,980/- as per the computation of income submitted by the petitioner.

4.3 The petitioner thereafter was served with the impugned notice dated 27.03.2021 for re-opening of the assessment. The petitioner filed return of income in response to the said impugned notice on 21.04.2021 and requested for reasons recorded for re-opening.



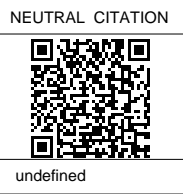
4.4 The respondent submitted the reasons recorded on 19.05.2021 which reads as under:

*"2. Brief details of information collected/received by the AO: From the Statement of Total Income, it is seen that the assessee has claimed Rs.17,37,80,816/- on account of "Any other amount allowable as deduction". Further, the assessee has made lease payment towards principal plus interest of Rs.17,37,80,816/- on loan taken from CISCO and claimed the same as revenue expenditure. The amount of repayment of Rs.17,37,80,816/- as principal amount of any loan is not a revenue expenditure and is not allowable under any of the provisions of the Act from income of an assessee.*

*2.1 It is seen from Note No.25 "Financial Charges" of the Annual Report that the assessee company has debited Rs.37,80,000/- on account of applicable net gain/loss on Foreign Currency Transaction and Translation and claimed Rs.6,90,80,060/- being unrealized profit & loss from foreign exchange in its computation of income.*

*2.2 It is seen from Note No.3 of the Annual report that the assessee company has created goodwill of Rs.11,00,000/- on slump sale and claimed depreciation on the same in its ITR and Tax Audit Report. The Tax Auditor has reported in tax audit report that the assessee has made addition in block of intangible assets to the tune of Rs.4,29,94,061/- which is inclusive of amount of goodwill of Rs.11,02,868/-.*

*3. Analysis of information collected/received: From the detailed discussion made in Para-2 above, it can be seen that the assessee has claimed an amount of Rs.17,37,80,816/-*

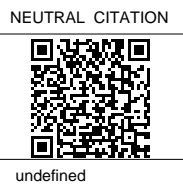


*under the head any other amount allowable as deduction. On further verification of the details and breakup of the said amount, it is seen that the said amount intends repayment of lease payment of loan taken from CISCO and interest.*

*3.1 From the statement of income and as stated above, the assessee has claimed an amount of Rs.37,80,00,000/- on account of foreign currency transactions and also claimed an amount of Rs.6,90,80,060/- being unrealized profit and loss from foreign exchange.*

*3.2 The assessee has made addition in block of intangible assets to the tune of Rs.4,29,94,061/- which is inclusive of amount of goodwill of Rs.11,02,868/-. The depreciation on goodwill is not allowable in view of sixth proviso to section 32(1) and section 43(6)(c) of the Act.”*

4.5 The petitioner, in response to the reasons recorded, filed the objections before the respondent explaining each of the three issues referred to in the reasons recorded on 12.07.2021 contending that so far as the issue of deduction of Rs.17,37,80,816/- in respect of lease payment to CISCO, the same was considered during the regular course of assessment and with regard to the issue of claim on depreciation of goodwill of Rs.11,02,862/- was also part of the details submitted by the assessee and during the course of regular assessment. With regard to the issue on claim of expenditure of Rs.37,80,000/-

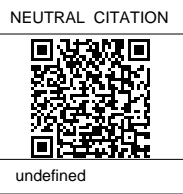


and the foreign exchange fluctuation gain of Rs.6,90,80,060/-, it was contended as under:

*“4.3 NO ESCAPEMENT OF INCOME CHARGEABLE TO TAX:*

*4.3.1 The assessee further submits that the condition precedent for the purpose of resorting to reopening proceedings under section 147 of the Act is that there must be “escapement of any income chargeable to tax”. In absence of escapement of any income chargeable to tax, it is not open for the Department to reopen the case of an assessee under section 147 of the Act by issuance of statutory notice under section 148 of the Act.*

*4.3.2 In the present case, your good self has not appreciated the effect of notional foreign exchange gain and loss. The assessee had claimed net foreign exchange loss of Rs.37,78,154/- which was worked after considering various items including “Realized loss of Rs.6,81,93,099/-” and “Unrealized gain of Rs.6,90,80,060/-”. Since gain is notional, Realized loss of Rs.6,81,93,099/- was added back while filing return of income due to the fact that it relates to capital asset (part of Rs.57,85,98,525/- added back in computation of income) and the gain of Rs.6,90,80,060/- was reduced. Thus,*



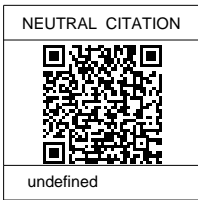
*there is no effect of such gain or loss on the income chargeable to tax in the hands of the assessee for the year under consideration. Thus, it cannot be said that there is escapement of any income chargeable to tax on account of the same.*

*4.3.3 For ready reference detailed break-up of the above referred sum of Rs.57,85,98,525/- is as follows:*

<i>Realized forex loss</i>	<i>:</i>	<i>Rs. 6,81,93,099/-</i>
<i>Loss from IV</i>	<i>:</i>	<i>Rs. 2,20,15,190/-</i>
<i>Activation income</i>	<i>:</i>	<i>Rs.35,75,87,284/-</i>
<i>Provision from doubtful debts</i>	<i>:</i>	<i>Rs.13,07,90,952/-</i>
<i>Membership fees</i>	<i>:</i>	<i>Rs. 12,000/-</i>
<i>Total</i>		<i>Rs.57,85,98,525/-</i>

*For your ready reference, bifurcation of Rs.37,78,154/- being “application net gain / loss on foreign currency transactions and translation” appearing in Note 25 of Annual Accounts w.r.t. “Financial charges” is as follows:*

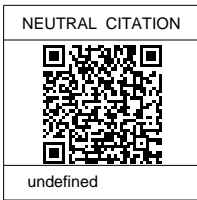
<i>Realized forex loss</i>	<i>:</i>	<i>Rs. 6,81,93,099/-</i>
<i>Bank charges for Hedging in Foreign Currency</i>	<i>:</i>	<i>Rs. 46,65,115/-</i>
<i>Less: Unrealized Foreign exchange gain</i>	<i>:</i>	<i>(Rs.6,90,80,060/-)</i>
<i>Net expenses</i>	<i>:</i>	<i>Rs. 37,78,154/-”</i>



4.6 The respondent, after considering the reply, disposed of the objections by order dated 07.01.2022. Being aggrieved, the petitioner has preferred this petition challenging the notice under section 148 of the Act for want of prosecution.

5. Learned Senior Advocate Mr. Tushar Hemani for the petitioner submitted that the impugned notice for re-opening is based on mere change of opinion as the case of the petitioner was selected for scrutiny and issues on hand were examined at the original assessment stage by the then Assessing Officer and relied upon the reply filed by the petitioner in response to the notice under sections 143(2) and 142(1) of the Act.

5.1 It was submitted that there is no new tangible material which has come in possession of the respondent after framing of the regular assessment which is evident from the reasons recorded in para 2, 2.1, 2.2 and 2.4 and highlighted that “from the statement of total income, it is seen that ... .. (para 2); it is seen from Note No.25 “Financial Charges” of the Annual Report that ... .. (para 2.1); it is seen from Note No.3 of the Annual Report that the ... .. (para 2.2); and the facts enumerated above



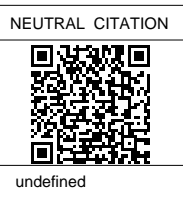
have been found out on examination of the case records of the assessee and are self explanatory ... .. (para 4).

5.2 It was submitted that thus, the respondent Assessing Officer could not have assumed the jurisdiction in absence of any tangible material coming in his possession and accordingly, the impugned notice is liable to be quashed and set aside as it is evident that re-opening is merely based on change of opinion and the same is not permissible in the eyes of law.

5.3 It was submitted that the reasons recorded by the respondent Assessing Officer referring to the amount of Rs.6,90,80,060/- being unrealized profit & loss from foreign exchange is concerned, at the same time, the petitioner has also not claimed the unrealized loss of foreign exchange of Rs.6,81,93,099/- by giving effect in the computation of income.

5.4 Learned Senior Advocate Mr. Tushar Hemani referred to the objections filed by the petitioner which are available at page 72 in relation to the issue of addition of foreign exchange loss and submitted that the petitioner has added the loss to the income and reduced the gain and thereby the petitioner has

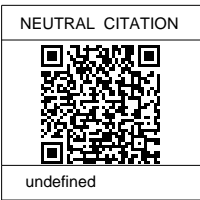




claimed about Rs.9,00,000/- which was reduced from the bank charges for hedging on foreign currency of Rs.46,65,115/- and the petitioner had offered Rs.37,78,154/- as net expenses after giving net effect to the unrealized profit and loss on the foreign exchange. It was submitted that it makes no difference whether such loss is on capital or count basis or revenue as the same would not have any effect on the profit for the year under consideration. It was submitted that the petitioner in fact has claimed bank charges of Rs.46,65,115/- as expenditure for the year under consideration after considering the profit and loss account and Note No.25 thereto with the computation of income together.

5.5 It was submitted that there is no escape income shown by the Assessing Officer as the Assessing Officer has failed to show that there is escapement of any income for the year under consideration and therefore, the respondent could not have assumed the jurisdiction.

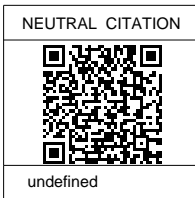
5.6 In support of his submissions, learned Senior Advocate Mr.Tushar Hemani for the petitioner relied upon the following



decisions:

- (i) AIM Fincon Pvt. Ltd. vs. ACIT (SCA 16299 of 2019);
- (ii) Kalptaru Sthapatya Private Limited vs. ITO [(2013) 29 taxmann.com 218 (Gujarat)];
- (iii) Gruh Finance Ltd. vs. JCIT [(2002) 243 ITR 482];
- (iv) Ball Aerosol Packaging India (P.) Ltd. vs. ACIT [(2023) 146 taxmann.com 193 (Gujarat)].

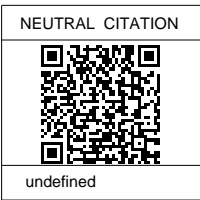
6. On the other hand, learned Senior Standing Counsel Mr. Varun K. Patel for the respondent submitted that the Assessing Officer on the basis of the material available on record has *prima facie* come to the conclusion that there is escapement of income as the issue of foreign profit/loss was not at all considered by the then Assessing Officer. It was submitted that it is also recorded in the reasons to the effect that the foreign exchange profit / loss pertains to the revenue expenses or capital expenses is also not at all processed during the regular course of assessment nor any inquiry was even made by issuing notice and therefore, it cannot be said that there is change of opinion for the reasons recorded. It was submitted that the Assessing Officer in the reasons for re-opening has categorically observed that escapement of income is mainly on



three counts viz., (i) repayment of principal amount of loan wrongly claimed as revenue expenditure; (ii) claim with respect to foreign currency transaction and unrealized profit and loss from foreign exchange; and (iii) wrong claim of depreciation on goodwill. It was submitted that while framing the scrutiny assessment under section 143(3), neither of the three items was examined nor any opinion was found on any of the three items mentioned in the reasons and therefore, the impugned notice cannot be said to be without jurisdiction.

6.1 It was submitted that on perusal of the notice issued under section 142(1) and from the assessment order passed under section 143(3), there is no reference to the taxability of income qua three issues as the same were not examined during the scrutiny of the assessment and therefore, it is not open for the petitioner to refer the general question raised in the notice issued under section 142(1) and the reply submitted in response to such notice in the absence of any inquiry by the Assessing Officer at that stage.

6.2 It was submitted that there is nothing on record to show

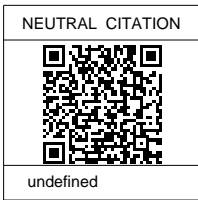


that the notice issued under section 142(1) has any reference to the claim with respect to the foreign currency transaction and unrealized profit and loss from real estate and in the absence of any submission regarding change of opinion by issue No.2, the notice under section 148 deserves to be upheld.

6.3 In support of his submissions, learned Senior Standing Counsel Mr.Varun K. Patel for the respondent relied upon the following decisions:

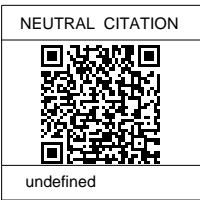
- (i) Gala Gymkhan (P) Ltd. vs. ACIT Circle-4 [(2012) 27 taxmann.com 294 (Guj)];
- (ii) Gruh Finance Ltd. vs. Joint Commissioner of Income Tax [(2000) 243 ITR 482];
- (iii) Gujarat Power Corporation Ltd. vs. ACIT [350 ITR 266 (Guj)];
- (iv) Phool Chand Bajranglal vs. ITO [(1993) 203 ITR 456];
- (v) ACIT vs. Rajesh Jhaveri / Brokers Pvt. Ltd. [(2007) 291 ITR 500].

7. Having heard learned advocates for the respective parties and considering the reasons recorded for re-opening of the assessment for AY 2017-18, on perusal of the records, the following aspects emerge:



7.1 The Assessing Officer has considered the material already filed at the time of the regular assessment in form of balance-sheet, return of income, computation of income, audit report, etc. and on the basis of such material has found and reasoned to believe that the income has escaped in the absence of any fresh tangible material having access with formation of such belief. Therefore, it was necessary for the respondent Assessing Officer to form a reason to believe that the escapement of the income on the material which was made available at the time of regular assessment.

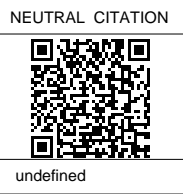
8. In light of the above observations, if the reasons recorded are perused, it appears with regard to the issue of claim of lease rent which is stated to be principal plus interest amounting Rs.17,37,80,816/- is concerned, the petitioner has explained the same in the objections raised in response to the impugned notice and submitted that the same is in form of the financed lease transactions entered into by the petitioner with CISCO and such transactions are accepted by the Revenue as the petitioner has taken equipment on financial lease since 2012-13. The petitioner has also placed on record the notices issued



during the regular course of assessment for AY 2012-13, 2013-14 and 2014-15 and assessment orders for earlier years accepting the same as expenditure.

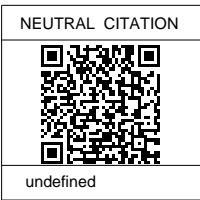
9. Thus, the Assessing Officer ought to have taken into consideration the nature of repetitive nature of transactions in form of the lease rent which is claimed by the assessee from year to year from 2012-13 onwards and no addition was made since then.

10. With regard to the claim of Rs.37,80,000/- on account of the applicable gain / loss on foreign currency transactions, the petitioner has explained in detail in the objections with regard to the nature of claim by making as reproduced hereinabove from pages 71 and 72 of the paper book to the effect that the petitioner had unrealized loss of Rs.6,81,93,099/- which was added as income and on the other hand, the petitioner has deducted the unrealized gain of Rs.6,90,80,060/- and also claimed net expenses of Rs.37,78,154/- in the profit and loss for computation of the book profit and it cannot be disputed that the petitioner has explained that the claim of the assessee for



bank charges for raising foreign currency Rs.46,65,115/- is required to be considered as a part of the revenue expenditure. Thus, in effect, the petitioner has claimed Rs.46,45,115/-, i.e. Rs.37,78,154 plus Rs.8,86,961 (Rs.6,90,80,060 – Rs.6,81,93,099) by giving effect to the said amount in the computation of income. Thus, it cannot be said that there is escapement of income on the part of the petitioner as the petitioner has neither claimed profit / gain or loss of unrealized foreign exchange and therefore, the reasons recorded by the respondent Assessing Officer to form *prima facie* conclusion that there is likelihood of any gain on account of revenue expenses incurred by the petitioner is also without any basis in the absence of any fresh tangible material available with the respondent Assessing Officer as the fact remains that the petitioner has unrealized gain and unrealized loss which is not claimed and duly reflected in the computation income as the petitioner has claimed only bank charges expenditure for hedging of foreign currency.

11. In view of such fact, it cannot be said that the Assessing Officer has formed reason to believe with regard to the income which had escaped the assessment.



12. With regard to issue of depreciation on goodwill, the provision of section 43(6)(c) of the Act was not amended at the relevant point of time for AY 2017-18 and therefore, the amended provision denying the depreciation on goodwill which came into effect from 01.04.2021 could not have formed the basis for re-opening to come to the conclusion that there is escapement of income by claiming of depreciation on goodwill.

13. In view of the foregoing reasons, the respondent Assessing Officer could not have assumed the jurisdiction to re-open the assessment. Therefore, this petition succeeds and is accordingly allowed. The impugned notice dated 27.03.2021 for AY 2017-18 issued under section 148 of the Income Tax Act, 1961 is hereby quashed and set aside. Order disposing of objections is also consequently quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

**(BHARGAV D. KARIA, J)**

**(D.N.RAY,J)**

Bharat

