IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1400 OF 2014

Bakhtawar Construction Co. Pvt. Ltd.)
1st floor, Meher House, 15 Cawasji Patel,)
Street, Fort, Mumbai 400 001) ..Petitioner

Versus

1. The Deputy Commissioner of Income Tax)
Income Tax, Circle 2(1) Mumbai,)
Aayakar Bhavan, M. K. Road,)
Mumbai 400 020)

2. The Commissioner of Income Tax)
City-2, Mumbai, Aayajar Bhavan,)
M. K.Road, Mumbai 400 020)

3. The Union of India)
Through the Secretary, Department of)
Revenue, Ministry of Finance,)
Government of India North Block,)
New Delhi 110 001) ..Respondents

Mr. P. J. Pardiwalla, Senior Advocate a/w Mr. Madhur Agarwal, Mr. Fenil Bhatt and Mr. Atul Jasani for Petitioner.
Mr. P. C. Chhotaray for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
NEELA GOKHALE, JJ
DATED : 6th OCTOBER 2023

ORAL JUDGMENT (PER K. R. SHRIRAM J.) :

1 Petitioner is challenging the notice dated 30th March 2013 issued under Section 148 of the Income Tax Act 1961 (the Act) by respondent no.1 to re-open the assessment for A.Y.2008-2009 and the impugned order dated 6th February 2014 passed by respondent no.1 rejecting the objections of petitioner challenging the validity of the impugned notice.

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2 Petitioner is a closely held company and was incorporated on 22nd July 1958. One of the founder directors of petitioner company Mrs. Mehroo Irani along with her two daughters Ms. Zinia Lawyer and Ms. Bakhtawar Chenoy, were the directors as well as shareholders of petitioner company. Remaining shareholders were the children of the said two daughters.

3 The said Mehroo Irani died on 17th February 2005 and as per her last Will and Testament dated 30th September 2002, most of her assets were to be bequeathed to her two daughters. The said Will that was probated on 10th May 2007 included certain directions with respect to one particular immoveable property belonging to petitioner which was part of the rent free accommodation of Mehroo Irani.

4 There were certain disputes between the two daughters which came to be settled upon entering of a Memorandum recording family arrangement dated 7th January 2008. A per the Memorandum recording family arrangement, the said two daughters achieved a complete separation of all their business assets from each other including the assets they were to inherit from their mother Late Mehroo Irani.

5 Petitioner was one of the signatories of the Memorandum recording the family arrangement. Before the family arrangement was entered into, petitioner gifted a residential flat (the said property) owned by petitioner being Flat No. 141 in El-Cid Building in Mumbai to Mr. Bezan Chenoy, who was the husband of Mrs. Bakhtawar Chenoy. A gift deed dated 28th December 2007 was executed. The flat was originally acquired by petitioner

in the year 1971 for Rs.3,47,570/-. The written-down value of the said property, as on 1st April 2007 was Rs.83,438/-.

6 On 28th July 2009, petitioner filed its original return of income for A.Y.-2008-09 declaring a total income of Rs.125,31,779/-. In the computation of income a note was also appended which read as under:

> *"Long-term Capital Loss of Rs.83,438/- represents the written down value of the residential flat no. 141 in El-cid Building at the beginning of the year written off in the books of accounts. The transfer was by way of a registered gift deed executed by the company in favour of one Mr. Bezen Chenoy. There was no consideration received by the company for the said transfer. The company does not claim carry forward and set-off of the said loss to the next assessment year."*

Petitioner's case was selected for scrutiny assessment. During the course of the assessment proceedings, respondent no.1 had raised a specific query as to why the gift of residential flat by petitioner to Mr. Bezan Chenoy should not be taxed under section 50C of the Act.

7 By its letter dated 16th July 2010 petitioner replied and explained why the provisions of section 50C of the Act were not applicable on the transaction of gift of the said flat by petitioner.

8 Subsequently, additional issue was raised by respondent no.1, i.e., the assessing officer, during the original assessment proceedings as to why the gift of the said flat by petitioner should not be treated as deemed dividend in the hands of petitioner under Section 2(22)(a) of the Act and dividend distribution tax should not be levied under section 115-O of the Act. It is

petitioner's case that the additional issue was raised because apparently respondent no.1 was satisfied with reply given by petitioner vide its letter dated 16th July 2010 that the provisions of section 50C was not applicable to the facts of the case.

9 To the additional issue raised as noted above, petitioner filed a detailed reply dated 26th July 2010, inter alia, explaining that the provision of section 2 (22)(a) of the Act was not applicable on the facts of the present case and the gift cannot be treated as deemed dividend income in the hands of petitioner.

10 Thereafter, respondent no.1 passed assessment order dated 30th September 2010 under section 143 (3) of the Act holding that the gift made by petitioner to Bezan Chenoy is considered as distribution of asset by petitioner on behalf of existing shareholders. Respondent no.1 held that petitioner has undertaken the distribution of the asset to fulfill the obligation of the existing shareholders and hence, the same is to be treated as deemed dividend as per the provisions of section 2 (22) (a) of the Act. Respondent no.1 levied additional income tax on account of dividend distribution tax of Rs.53,70,896/- under section 115-O of the Act. It is necessary to note that the assessment order does contain a reference to the letter dated 16th July 2010 by which, petitioner explained as to why the provision of Section 50C of the Act was not applicable.

11 Aggrieved by the assessment order petitioner preferred an appeal before the Commissioner of Income Tax (Appeals), who by an order 16th

August 2011 allowed the appeal of petitioner. The CIT(A) held that the gift of the said property by petitioner to Bezan Chenoy cannot be charged as dividend under Section 2 (22) (a) of the Act as the conditions specified in the said Section are not fulfilled. Against this order, revenue preferred an appeal before Income Tax Appellate Tribunal (ITAT) which appeal, we are informed, after the petition was filed came to be dismissed. It does not appear that either before CIT(A) or before the ITAT revenue has agitated the applicability of Section 50C of the Act.

12 As there were certain refunds due to petitioner, when petitioner started making enquiry regarding the issue of refund and giving effect to the order passed by CIT(A), petitioner was informed that there was an audit objection for not imposing tax as per Section 50 C of the Act on the gift of the said property by petitioner.

13 Petitioner by its letters dated 11th June 2012 and 21st August 2012 explained that the provision of Section 50C of the Act was not applicable and there was no question of reopening the assessment. Thereafter, petitioner received the impugned notice dated 30th March 2013 under Section 148 of the Act. The reasons to believe why there was an escapement of income was made available to petitioner on 9th April 2013. The reasons to believe read as under:

> *"In this case the scrutiny assessment was completed u/s 143(3) dtd. 30.09.2010. It is seen that the assessee company had gifted a flat to Mr. Bejan Chenoy (husband of Mrs. Bhaktawar Chenoy) as per a memorandum of family arrangement. Assessee company had resorted to colorable device by way of gift of the said property to avoid tax liability. Therefore, this is a fit case for invoking provisions of Sec. 50C*

and value as per Stamp Duty-authority at Rs. 4,29,03,292/- was required to be considered as sale consideration and taxed as short term capital gain."

14 Therefore, the reasons only state that petitioner has gifted a flat to Bezan Chenoy as per the Memorandum of family arrangement and thereby, petitioner has resorted to colorable device by way of gift of the said property to avoid tax liability. Therefore, this was a fit case for invoking provisions of Sec. 50C and value as per Stamp Duty-authority at Rs. 4,29,03,292/- was required to be considered as sale consideration and taxed as short term capital gain.

15 Petitioner filed it's objection to reopening vide its letter dated 2nd September 2013. Petitioner's basic objection was that the issue of applicability of Section 50C of the Act has been considered during the assessment proceedings and hence reopening of the assessment to apply very same Section 50C on the same transaction is not permissible as it will tantamount to change of opinion by respondent no.1 which is not permissible under section 147 of the Act. These objections were rejected by an order dated 6th February 2014, which is also impugned in this petition. After the said impugned order was passed, this petition came to be lodged and rule was issued on 28th July 2014. Respondent No.3 was also restrained from taking any steps pursuant to the impugned order and impugned notice.

15. **Submissions of Mr. Pardiwalla:.**

(a) The reopening of the assessment is purely on the basis of change of opinion which is not permissible and that cannot be a tangible material.

(b) During the course of assessment proceedings specific queries were raised with regard to the gift of the flat on the applicability of Section 50C of the Act and also as to why it should not be treated as deemed dividend income.

(c) On the issue of Section 50C, petitioner by its letter lettered 16th July 2010 filed a copy of the gift deed with all annexures and also explained why section 50C cannot come into play.

(d) By a letter dated 26th July 2010 petitioner once again explained as to why Section 50C was not applicable.

(e) During the hearing on 16th July 2010, petitioner was called upon to explain as to why the market value of the said property gifted to Bezan Chenoy should not be treated as deemed dividend under Section 2 (22) (a) of the Act and as recorded in petitioner's letter dated 26th July 2010, petitioner explained as to why the value of the flat should not be treated as deemed dividend.

(f) Thereafter, the assessment order has been passed in which the assessing officer has rejected the submissions of petitioner and treated the market value of the said flat as deemed dividend under Section 2(22)(a) of the Act.

(g) Therefore once a query is raised during the assessment proceeding and assessee has replied to it, it follows that the query raised was a subject of consideration of the assessing officer while completing the assessment and it is not necessary that an assessment order should contain reference

and or discussion to disclose his satisfaction in respect of the query raised.

(h) The fact that a query on the applicability of Section 50C of the Act was raised and after the reply dated 16th July 2010, the assessing officer did not pursue that query and has made reference in the assessment order, it is rather obvious that the assessing officer was satisfied in respect of the query raised.

(i) The reopening could not have been on the basis of audit objection which was informed to petitioner when petitioner went to enquire about the refund. It is not even mentioned in the reasons for reopening. The reopening based on audit objection is not permissible unless new facts came to notice through the audit objection. The expression 'opinion' used in Section 147(b) of the Act could only mean factual material and cannot include any opinion on point of law as held in judgment of the Apex Court in ***Indian & Eastern Newspapers Society Vs. Commissioner of Income Tax***[1]

16 **Submissions of Mr Chhotaray**:-

(a) The audit objections received by the assessing officer was the tangible material and what the assessing officer seeks is to reopen the assessment as original assessing officer has been careless in not bringing to fact a particular amount which was chargeable to tax and revenue should not be precluded from issuing notice under section 148 of the Act.

(b) Oversight in passing the assessment order, will not affect assessing officer's jurisdiction to issue notice and for this, as held in judgment of the

1. (1979) 2 Taxman 197 (SC)

apex court in ***A.L.A. Firm Vs. Commissioner of Income Tax***[2]

(c) ***Kalyanji Mavji & Co. Vs. CIT***[3] which has been referred to and relied upon in *A.L.A. Firm* (Supra), permits reopening in the following categories of cases: 1) where the information is as to the true and correct state of the law derived from relevant judicial decisions; (2) where the information is derived from an external source of any kind and such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment; (3) where the information may be obtained even from the record of the original assessment from the investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law; (4) Where the Income Tax Officer derives information from the record on an investigation or an inquiry into facts not originally undertaken and such information is received from the audit objection, it will be permissible to reopen the assessment.

(d) ***Phoolchand Bajrang Lal & Anr Vs. Income Tax Officer & Anr.***[4], has held one of the purposes of Section 147 is to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude.

(e) Certainly, there is no bar to reopening based on audit objection. The

2. (1991) 189 ITR 285 (SC)
3. (1976) 102 ITR 287 (SC)
4. 1993(203) ITR 456

audit is an important organ of the department and its objective is to point out the errors committed by the assessing officer after examining the assessment order after completion of the assessment. The assessing officer applies his mind to the audit observations and takes appropriate action. The whole objective of the audit is to prevent loss of revenue to department due to errors or omissions on the part of the assessing officer and this is because revenue cannot file appeal against the assessment order.

17 Mr. Pardiwalla in rejoinder submitted that *ALA Firm* (Supra) would not be applicable to the facts of this case, in as much as there the court has held that the proposition clearly envisages a formation of opinion by the ITO on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which the ITO had not earlier been conscious of. In the case at hand, the ITO was certainly conscious of provision of Section 50C of the Act and its possible applicability to the facts of the case because a query was raised during the assessment proceedings which was responded to vide letter dated 16th July 2010 and that explanation has been accepted because that was not even discussed in subsequent query or even in the assessment order. Relying on *Indian & Eastern Newspaper* (Supra), Mr. Pardiwalla submitted that if the audit party had pointed out a fact which has been overlooked by the ITO for the assessment, the notice could have been issued but in this case the audit party has expressed the opinion on a question of law it is not permissible.

FINDINGS

18 This court in *Commissioner of Income Tax-II Vs. Jet Speed Audio (P) Ltd.*[5] has held that during the original assessment proceedings, once a query was made with regard to the same issue which was responded to by the assessee and on satisfaction of the same, the assessing officer has passed an assessment order, reopening would be purely on the basis of change of opinion. Moreover, the court has held that the tangible material urged should emanate from the reasons recorded for issuing reopening notice under Section 148 of the Act. The tangible material as stated in the affidavit in reply and by counsel for revenue are the audit objections received by the assessing officer. But there is no mention of this in the reasons recorded for issuing reopening notice under Section 148 of the Act. Therefore, the audit objection cannot be termed as tangible material.

19 The only basis the notice under Section 148 of the Act was issued is that petitioner had gifted a flat to Bezan Chenoy as per the Memorandum of Family arrangement and, therefore, has resorted to colorable device by way of gift of the said property to avoid tax liability. Therefore, this is a fit case for invoking provisions of Sec. 50C and value as per Stamp Duty-authority at Rs. 4,29,03,292/- was required to be considered as sale consideration and taxed as short term capital gain. The invoking of provision of Section 50C of the Act was a subject of consideration during the original assessment proceedings. In its reply dated 16th July 2010, in paragraph 4 petitioner has

5. (2015) 55 taxmann

explained why Section 50C cannot come into play and it reads as under:

> *"4. As disclosed by way of a foot note to the computation of income during the year the company made a gift of a residential flat in favour of one Mr. Bezan Chenoy. We are enclosing herewith a copy of Index II in respect of the said transaction as per your request. A zerox copy of the registered Deed of Gift with all annexures etc is also enclosed herewith. We respectfully submit that there cannot be any issue about Long Term Capital Gains in this transaction because the transfer was by way of gift and no consideration whatsoever was received by the company from the donee. The main reasons for the same are as under:*
> *a) Where any capital asset is transferred as a Gift, then such a transaction is not regarded as a transfer u/s 47(iii).*
> *b) Computation section 48 also contemplates full value of consideration received or accruing as a result of transfer as the starting point for computation of capital gains. If no consideration has been received or accruing as a result of transfer there can be no question of any computation of capital gain u/s 48.*
> *c) Even u/s 50C what is contemplated is a positive figure of consideration received or accruing as a result of a transfer being less than the value adopted by the stamp valuation authority. If consideration figure is zero or NIL, deeming fiction u/s 50C cannot come in to play especially when Gifts are categorically not considered as transfers u/s 47 referred above."*

20 In the letter dated 26th July 2010 also when petitioner explained about the non-applicability of Section 2(22)(a) of the Act, the concluding paragraph reads as under:

> *"For the relevant assessment year under consideration although section 50C is on the statute book it cannot be attracted for the reasons explained in our last letter dated 16th July 2010 and Gift Tax Act has been done away with. Gift of property is also not covered u/s 56 for A. Y. 2008-09 and therefore the transaction does not attract any tax in anybody's hands."*

Therefore, it is apparent that the applicability of Section 50C was a subject of consideration of the assessing officer while completing the assessment. A Division Bench of this court in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax-2(1)*** [6] has held that once a query is

6. (2014) 44 taxmann.com 304 (Bombay)

raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act.

21 Therefore, there can be no doubt in the facts of this case that the reopening of the assessment by the impugned notice is merely on the basis of change of opinion of the assessing officer from that held earlier during the course of assessment proceedings leading to the assessment order dated 30th September 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

22 The fact that the notice was issued based on audit objections received by the assessing officer also does not find mention in the impugned notice. The assessing officer does not even mention in the impugned notice what was the information that he had received. The assessing officer has, as recorded in the notice, formed an opinion that because the assessee had gifted to Bezan Chenoy as per the Memorandum recording family arrangement, petitioner had resorted to colorable device by way of gift of

the said property to avoid tax liability. Therefore, this was a fit case for invoking provisions of Section 50C of the Act. This does not indicate about any opinion having been received by the assessing officer by way of audit objections. Therefore, we will also have to hold that there can be no tangible material mentioned in the reasons recorded by the revenue which would want a different opinion being taken than which was taken when the original assessment order was passed. As held by this court in *Jet Speed Audio (P) Ltd.* (Supra) it is settled law that the reopening notice can be sustained only on the basis of the ground mentioned in the reasons recorded. It is not open to the revenue to add and/or supplement later the reasons recorded at the time of reopening notice.

23 Mr. Chhotaray spent lot of time on making submission on judgment of *A.L.A. Firm* (Supra). As correctly submitted by Mr. Pardiwalla, this judgment is not applicable to the facts of this case. The first reason for us to take this view is because the reason to believe does not mention about any opinion from the audit party. Moreover, as held by the Apex Court in ***Commissioner of Income Tax Vs. PVS. Beedies (P) Ltd.***[7] which has been relied upon by the Revenue in the affidavit in reply, the information passed on by the audit party can be only as regards the factual error or omission in the assessment. Reopening of the case on the basis of factual error pointed out by the audit party is permissible under law. As in the case of *PVS Beedies* (Supra) the audit party, as stated in the affidavit in reply, has not pointed out the fact

7. (1999) 103 Taxman 294 (SC)

which has been over looked by the ITO in the assessment but has only given information on a question of law, i.e., applicability of Section 50C, which is not permissible. Moreover, the Apex Court in *A.L.A. firm* (Supra) has held that the formation of opinion by ITO on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which ITO had not earlier been conscious of. Therefore, where ITO derives information from the record on an investigation into facts not originally undertaken then reopening was permissible. That is not the case in the matter at hand because the issue of Section 50C of the Act, as noted earlier, was a subject of consideration during the assessment proceedings, the query having been raised and petitioner responded to the query and the assessing officer not taking that issue forward. During the course of assessment proceedings a specific question was raised by the assessing officer as to why the transaction should not be taxed under Section 50C of the Act. This was replied to by petitioner vide its letter dated 16th July 2010 where petitioner has explained why the gift be not regarded as transfer under Section 47(iii) of the Act and the transaction cannot be regarded as transfer for the purposes of the Act. Petitioner has explained under Section 50C of the Act what is contemplated is a positive figure of consideration received or accruing as a result of a transfer being less than the value adopted by the stamp valuation authority. If consideration figure is zero or NIL, deeming fiction under Section 50C of the Act cannot come into play especially when

gifts are categorically not considered as transfers under Section 47 of the Act. After considering the submissions, the assessing officer has consciously dropped in the issue of Section 50C or not to levied any tax under Section 50C in respect of the said transaction. For the same reasons *Phoolchand Bajrang Lal* (Supra) will not be applicable to the facts of this case because the Apex Court has held that the assessing officer may start reassessment proceedings either because of some fresh facts come to light which where not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information.

24 In the circumstances, in our view, respondent no.1 was not justified in reopening the assessment. Rule is therefore, made absolute. The impugned notice dated 30th March 2012 and the impugned order dated 6th February 2014 are hereby quashed and set aside.

25 Petition disposed.

(NEELA GOKHALE, J.) (K.R. SHRIRAM, J.)

Meera Jadhav