IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.4574 OF 2022

Hasmukh Estates Pvt. Ltd.
A Company registered under the Companies Act, 1956/2013,
Having its registered office at First Floor, Haroon House, 294 Perin Nariman Street, Fort,
Mumbai – 400 001,
PAN No. AAACH0993A ...Petitioner

~ Versus ~

1. Assistant Commissioner of Income-tax 1(1)(1), Mumbai, R. No. 533, 5th Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai – 400 020.

2. Principal Chief Commissioner of Income-tax, Mumbai, Room No. 321, 3rd Floor, Aayakar Bhavan, Maharishi Karve Road, Mumbai – 400 020.

3. The Central Board of Direct Taxes, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi – 110 001.

4. Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi – 110 001. ...Respondents

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Dr. K. Shivaram, Sr. Advocate i/b Mr. Rahul Hakani for the Petitioner
Mr. Suresh Kumar for the Respondents-Revenue Department.

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CORAM: K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
RESERVED ON: 31st October 2023
PRONOUNCED ON: 8th November 2023

JUDGMENT (*Per Dr. Neela Gokhale J*):-

1. **Rule**. Rule made returnable forthwith. By consent, Petition is taken up for final hearing at the admission stage.

2. Petitioner assails notice dated 30th July 2022 issued under Section 148 of the Income Tax Act, 1961 ("**Act**"), approval under Section 151 of the Act granted by the Principal Chief Commissioner of the Income Tax ("**PCCIT**"), Mumbai, communication/letter dated 28th May 2022 seeking explanation and details from Petitioner to facilitate the Jurisdictional Assessing Officer ("**JAO**") to pass an order under Section 148A(d) of the Act, Order dated 29th July 2022 passed under Section 148A(d) of the Act for Assessment Year ("**AY**") 2015-16, notice dated 31st May 2021 under Section 148A(b) of the Act, notice dated 21st April 2021 for AY 2015-16 under Section 148 of the Act.

3. Facts giving rise to the present Petition are that Petitioner, a private company engaged in the business of undertaking real estate projects, sold a plot of land situated at Raigad District to one Regency Nirman Limited by a registered agreement to sell dated 7th October

2011 for a consideration of Rs.18 Crores. The property was valued at Rs.16.50 Crores for the purpose of stamp duty. It was agreed between Petitioner and the purchaser that in case Petitioner was unable to discharge any obligation under the agreement, damages shall be settled. Thus, on non-fulfilment of some obligations on the part of Petitioner, the consideration was reduced by Rs.6 Crores making the consideration payable for the land at Rs.12 Crores. Petitioner e-filed its return of income on 31st March 2017 declaring income of Rs.8,43,58,620/- and booked profits under Section 115JB of the Act at Rs.9,72,27,472/-. An assessment order came to be passed on 26th December 2017 accepting Petitioner's figure of Rs.12 Crores. In the assessment order, the sale of this property and resultant Capital Gains has been elaborately discussed. The submission of Petitioner to the AO in the original assessment proceedings in respect of the sale of land was that Section 50C of the Act was not applicable as the sale consideration of Rs.18 Crores was higher than stamp valuation of Rs.16.50 Crores.

4. Petitioner received notice dated 31st March 2001 under Section 148 of the Act from the Assessing Officer ("**AO**") and Petitioner filed return of income in response to the said notice. Petitioner received a copy of recorded reasons and filed its objections to the re-opening. By orders dated 18th November 2021 and 4th January 2022, the objections were disposed by the AO. The AO issued

notice dated 10th March 2021 under Section 142(1) of the Act which was responded to by Petitioner on 17th March 2022. Thereafter, Petitioner received a communication dated 28th May 2022 from the AO conveying that pursuant to the order of the Apex Court in the matter of *Union of India v. Ashish Agarwal,* a copy of the approval under Section 151 of the Act and the reasons recorded prior to the issuance of notice under Section 148 of the Act were being forwarded to it. Petitioner was called upon to respond in support of its claim to enable Respondent to pass an order under Section 148A(d) of the Act.

5. Petitioner filed its objections to the letter dated 28th May 2022 and explained its stand on the sale of the plot of land to Regency Nirman Limited. However, Respondent No.1-Assessing Officer passed an order dated 29th July 2022 under Section 148A(d) of the Act holding that sale consideration offered was Rs.12 Crores was lesser than the stamp duty valuation of Rs.16.50 Crores, inviting applicability of Section 50C of the Act. The order was passed with prior approval of the PCCIT, Mumbai, followed by notice dated 30th July 2022 under Section 148 of the Act. It is this order, approval and consequent notice, which are assailed in the present Petition.

6. Dr. K. Shivaram, Senior Advocate, contends that the AO, in the original assessment order had dealt with in detail the taxability of

transaction of sale of the plot of land. In paragraph 5 of the order, the AO has recorded his finding on the issue of long term capital gains including the fact of deduction of compensation of Rs.6 Crores. Thereafter an audit memo dated 29th March 2019 was received by the AO raising an objection that Petitioner has shown lower amount of sale consideration than value adopted by the Stamp Duty Authority thus, inviting the applicability of Section 50C of the Act to the transaction. Dr. Shivaram points out that a reply to the audit memo was given by the AO namely, one Mr. Rajesh Meshram explaining that Rs.6 Crores was reduced from the gross sale consideration of Rs.18 Crores under Section 48 of the Act and hence, the sale consideration was higher than the stamp valuation. Relying on this reply, Dr. Shivaram contends that since this finding was already arrived at by the AO while passing the original assessment order as well as in the reply to the audit objection, Petitioner's income is not open to re-assessment on the basis of a change of opinion. Dr. Shivaram further contends that thus, approval given by the PCCIT, Mumbai is not tenable. He further draws our attention to the detailed objections filed by Petitioner to the notice dated 28th May 2022 that the AO had already considered the issue in original assessment proceedings.

7. Another important contention raised by Dr. Shivaram is the meaning of 'information' which comprises of information with the

AO which suggests that income chargeable to tax has escaped assessment. The First Explanation to Clause (ii) of Section 148 of the Act which was in force for the relevant AY, reads thus:

> *"S.148.Issue of notice where income has escaped assessment.-(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:*
>
> *Provided that in a case-.....*
> *Provided further that in a case.....*
>
> *Explanation 1.-For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means.-*
>
> *(i).....*
>
> *"(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act."*

Dr. Shivaram submitted that the re-opening is bad in law as the change of opinion by the AO is based on information in the form of an objection raised by the internal auditors, i.e., the Additional Commissioner of Income Tax (Audit)-1, Mumbai ("**ACIT**") and not by the Comptroller and Auditor General of India ("**CAG**"). Hence, that cannot be the basis of re-opening of assessment and tantamounts to a change of opinion.

8. Dr. Shivaram has placed reliance on the following decisions:

1) Commissioner of Income-tax v. Narcissus Investments P. Ltd.[1]

2) Commissioner of Income-tax v. Rajan N. Aswani[2]

3) Bakhtawar Construction Co. Pvt. Ltd. v. The Deputy Commissioner of Income in Writ Petition No.1400 of 2014.

4) Malini Ayyappa Naicker (Now Dead) through I.R. and Ors. v. Seth Manghraj Udhavadas Firm by Managing Partner Chathurthuj Chhabildas (Dead) thereafter by I.Ss. and Ors.[3]

5) Chandrika Prasad (D) Thr. Lrs. and Ors. v. Umesh Kumar Verma and Ors.[4]

6) Commissioner of Income-tax v. Kelvinator of India Ltd.[5]

7) Siemens Financial Services (P.) Ltd. v. Deputy Commissioner of Income-tax[6]

8) Union of India v. Ashish Agarwal[7]

Accordingly, Dr. Shivaram urges the Court to quash the impugned order and the consequent notice issued by the Department.

9. Mr. Suresh Kumar relies upon the affidavit in reply filed by the Department and narrates the facts of the case. He says that while the AO had already dealt with the issue of long term capital gains relating to the sale of the plot of land and the consideration involved, an audit objection was raised which was also rebutted by the AO. However, ultimately in view of the remarks of the ACIT, the AO on

1 [2019]417 ITR 512 (Bom)
2 [2018]403 ITR 30 (Bom)
3 (1969) 1 SCC 688
4 (2002) 1 SCC 531
5 [2010] 320 ITR 561(SC)
6 [2023]154 taxmann.com 159 (Bom)
7 [2022]138 taxmann.com 64 (SC)

the basis of re-verification has reviewed its earlier decision and accepted the audit objection raised in the case of Petitioner. He contends that if an audit objection is raised that the finding/decision of an AO is not in consonance with the provisions of the Act, assessment can be re-opened on this very ground. While stoutly opposing the arguments advanced by Petitioner, he fairly concedes that the Department has not dealt with the contentions of Petitioner pertaining to the audit objections being raised by an internal audit of the Department and not by the CAG as is required under the provisions of the Act. He also fairly accepts that he is unable to go beyond the documents and the fact remains that the audit objection was raised by an internal audit and not the CAG as required by law in force at the relevant time.

10. We have heard learned counsel appearing for the parties and have perused the documents with their assistance. The factual and admitted position is as follows:

(a) The AO has dealt with the entire issue of long term capital gains during the course of original assessment proceedings including the fact of deduction of compensation/damages of an amount of Rs.6 Crores from the agreed consideration of Rs.18 Crores and the stamp valuation shown to be Rs.16.50 Crores.

(b) The AO clearly accepted the non-applicability of Section 50C of the Act to the transaction of sale while issuing the

original assessment order.

(c) An audit memo dated 29th March 2019 raised an objection regarding applicability of Section 50C of the Act.

(d) The audit memo was raised by an internal audit of the Department and not by CAG as required by the provision which was, in effect prior to the amendment which came into force w.e.f. 1st April 2022, and applicable to the present case.

(e) The AO namely, Mr. Rajesh Meshram conveyed his objections to the audit memo maintaining that the original assessment order was correct.

(f) The ACIT once again maintained its objections. This time the said Mr. Rajesh Meshram accepted that the AO did not properly examine the allowability of Rs.6 Crore expense under the long term capital gains head. Hence, the audit objection was accepted leading to re-opening of the assessment of the income of Petitioner.

(g) Relying upon the decision of the Apex Court in the matter of *Union of India v. Ashish Agarwal*, the notice under Section 148 of the Act dated 21st April 2021 issued under the old law was treated as notice under Section 148A(b) of the Act.

11. The admitted facts clearly indicate that the basis of which the AO issued notice alleging that there was "information" that suggests escapement of income was an internal audit objection. What is information is explained in Section 148 of the Act to mean "any objection raised by the Comptroller and Auditor General of

India....." and no one else. This itself makes the re-opening of assessment in the present case impermissible.

12. Consequently, *de-hors* any audit objection raised by the CAG, a view deviating from that which was already taken during the course of issuing the original assessment order is nothing but a 'change of opinion' which is impermissible under the provisions of the Act.

13. In a decision of this Court itself in the matter of *Bakhtawar (Supra)* we have already held as follows:

> *18 This court in* ***Commissioner of Income Tax-II Vs. Jet Speed Audio (P) Ltd****.*[8] *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.*
>
> *20.....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)*** [9] *has held that once a query is 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*

8 . (2015) 55 taxmann
9 . (2014) 44 taxmann.com 304 (Bombay)

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."

In the matter of *Kelvinator of India (Supra),* the Apex Court held as under:

" On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se

> *reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer".*

14. Considering the admitted factual position and the settled legal position, we find it unnecessary to go into the merits of the case in respect of other submissions advanced by the parties since we are convinced that *prima-facie* the information which formed the basis of re-opening itself does not fall within the meaning of the term 'information' under the 1st Explanation to Section 148 of the Act and hence, the re-opening is not permissible as it clearly falls within the purview of a 'change of opinion' which is impermissible in law.

15. In view of the above discussion, the Writ Petition is allowed. Rule is made absolute in terms of prayer clause (a), which reads as thus;

> *"(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or Writ in the nature of Certiorari or any other appropriate Writ, order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside (i) Notice u/s 148 dated July 30, 2022 issued by the Respondent No.1 for AY 2015-16[Ex-Q], (ii) Approval u/s 151 dated 29/7/2022 [Ex-R] (iii) the impugned order dated July 29, 2022 passed under section 148A(d) by the Respondent No.1 for A.Y. 2015-16 [Ex-P], (iv) Notice under section 148A(b) being the Notice u/s 148 dated May 31, 2021/April 21, 2021 for AY 2015-16 [Ex-A], and (v) the communication/letter dated May 28, 2022 [Ex-J]"*

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16. There shall be no order as to costs.

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

SHAMBHAVI NILESH SHIVGAN

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