

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.3110 OF 2019

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Kandoi Fabrics P. Ltd. }
406, 4th Floor, 33A, Lotus House, }
New Marine Lines, }
Mumbai-400 020 } ... Petitioner

Versus

1. The Assistant Commissioner of }
Income-tax, Circle-4(2)(2), }
having office at }
Room No.640, 6th Floor, }
Aayakar Bhavan, M.K. Road, }
New Marine Lines, }
Mumbai-400 020 }

2. The Pr. Commissioner of }
Income-4, having office at }
Room No.629, 6th Floor, }
Aayakar Bhavan, }
M.K. Road, }
Mumbai-400 020. }

3. Union of India }
having its office at }
2nd Floor, Aayakar Bhavan }
Annexe, New Marine Lines, }
Mumbai-400 020. }

... Respondents

* * *

Mr. Vipul Joshi a/w Ms. Dinkle Hariya i/b Ms. Rashmi Vyas for the
Petitioner.

Mr. Suresh Kumar for the Respondents.

* * *

**CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.**

DATE : 9 FEBRUARY 2023

: O R D E R :

Per DHIRAJ SINGH THAKUR, J.

. The Petitioner challenges the notice dated 29 March 2019 issued under Section 148 of the Income Tax Act, 1961 (“the Act”) seeking to reopen the assessment on the ground that income chargeable to tax for the assessment year 2012-13 had escaped assessment within the meaning of Section 147 of the Act.

2 Briefly stated the material facts are as under :

The Petitioner states that it is engaged in the business of manufacturing HDPE/PP woven sacks, bags, laminated, unlaminated fabrics etc. On 25 March 2010, the Petitioner claims that it subscribed to 7,50,000 redeemable preference shares of GR Infratech Private Limited (“GRIPL”) having face value of Rs.10 each, for a total consideration of Rs.75,00,000/-. The payment done is stated to be shown through banking channel.

3 During the relevant assessment year, on 10 August 2011, the Petitioner states that it sold these 7,50,000 redeemable preference shares to M/s Janitor Distributors Pvt. Ltd (“JDPL”). An amount of

Rs.75,00,000/- was received on account of such sale on 11 August 2011 through the banking channel. The Petitioner states that this transaction was duly reflected by the Petitioner in its books and also in the financial statements and tax audit report for the assessment year 2012-13.

4 A return of income came to be filed by the Petitioner for the said assessment year on 2 September 2012, declaring a total income of Rs.7,36,85,670/-. The Petitioner's case was selected for scrutiny. It is stated that the assessing officer during the scrutiny assessment issued a notice under Section 147(1) dated 10 September 2014, requiring the Petitioner to produce *inter alia* the following :

“Details of other income, particulars/nature of income and amount. In case, the other income includes profit on sale of investments/shares/capital assets, details and working of capital gain or such income along with the evidences are to be submitted.”

5 The Petitioner claimed that it sent a reply to the said notice, in which among others, the factum of redemption of preference shares of GR Infratech Pvt. Ltd. was shown. Finally an Order under Section 143(3) came to be passed on 2 January 2015.

6 A notice under Section 148 of the Act dated 29th March 2019 came to be issued by the assessing officer seeking to reopen the

assessment for the assessment year 2012-13 on the ground that he had 'reason to believe' that income chargeable to tax for the said assessment year had escaped assessment within the meaning of Section 147 of the Act.

7 The reasons recorded for reopening are as under :

Reasons for reopening

As per the information received in this office, it is seen that high value cash was deposited in the bank accounts to several individual/proprietorship concern like Das Brother, Utsav Trader, Maa Kali Enterprises, Blossom Traders etc. which further transfer immediately to M/s Stylo Mania Fashion Pvt. Ltd., M/s Ishwari Fashion Suppliers Pvt. Ltd., M/s Life Fashionwear Suppliers Pvt. Ltd. and subsequently the accounts were closed in very short span of time (Opened of June, 2011 and closed on June, 2011) followed by immediate transfer to several other bank accounts. These appear to be as pooling accounts for layering and routing funds.

2. In order to examine nature and creditworthiness of transactions, summons was issued to the principal officer of the above concerns. However, the summons was returned un-served by the department of post. An inspector was also deputed to conduct spot enquiry about existence and business activity of the above entity/companies. Summons was also issued to other intermediary companies but no reply against the same has been received.

3. On perusal of return filed by above entities/companies and intermediate companies, it is learnt that most are either non-filer or filled his ITR showing meager income. Apparently the above companies were running on papers only and their

bank accounts were used for layering of funds. Accordingly, Cash Trail/Money Train was prepared.

4. On perusal of list of the beneficiaries, it is seen that during A.Y. 2012-13 (FY 2011-12) M/s Kandoi Fabrics Pvt. Ltd (AAACK3305M) is also a beneficiary of this Cash Trail/Money Trail; the details of which are given below.

Sr.No.	Transferee Company	Name of the Beneficiary	Amount (In Rs.)
1	M/s Janitor Distributors Pvt. Ltd.	M/s Kandoi Fabrics Pvt. Ltd. (AAACK3305M)	75,00,000

8 Objections were filed to the reopening, in which it was urged that the assessing officer had issued the notice mechanically and that the reasons did not reflect what was the information that was not disclosed by the assessee, which, thus, made the proceedings unsustainable in law. It was also stated in the objections that the issue pertaining to Rs.75,00,000/- received by the Petitioner from transferee company, namely, M/s Janitor Distributors Pvt. Ltd. had been gone into in the assessment proceedings under Section 143(3) and, therefore, it was urged that reopening of the assessment on a similar ground would be nothing but a 'change of opinion', which was impermissible in view of the judgment of the Apex Court in the case of **Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.**¹

1 [2010] 187 Taxman 312 (SC)

10 The reopening is challenged by the Petitioner primarily on the ground that the jurisdictional requirement for reassessment as prescribed under Section 147 had not been met with by the assessing officer. It was urged that the reasons recorded did not at all reflect that there has been any failure to disclose fully and truly any material facts necessary for assessment during original assessment proceedings. Secondly, it was urged that there was no basis for the assessing officer for his 'reason to believe' that income had escaped assessment inasmuch as there was no tangible material with the assessing officer and that the reopening was nothing but a change of opinion.

11 In the reply filed by the revenue, it has not been denied at all that the Petitioner had sold 7,50,000 redeemable preference shares to JDPL as can be seen from a reply para 3.3 of the reply affidavit. Equally so, para 3.4 of the reply affidavit does not in any manner contradict the fact that audited financial statements and tax audit report of the Petitioner along with computation of income for the assessment year 2012-13 were on record and that the transactions were duly recorded in its books. What is stated in reply is that "These facts are as per the return of income filed by the assessee and based on facts available on record. Therefore, no comments are

offered.”

12 Section 147 of the Act authorizes the assessing officer to reopen the assessment, which falls broadly under two categories i.e. reopening within a period of four years from the end of the relevant assessment year and a reopening after four years from the end of the relevant assessment year. In so far as the reopening within a period of four years from the end of the relevant assessment year is concerned, the A.O. can reopen if he has reason to believe that income chargeable to tax has escaped assessment. Beyond the period of four years, where an assessment under Section 143(3) of the Act has taken place the A.O. has to additionally be satisfied that the assessee had failed to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings.

13 In the present case, admittedly the assessment is sought to be reopened beyond the period of four years from the end of the relevant assessment year, i.e. 2012-13. Therefore, both jurisdictional conditions had to be satisfied by the assessing officer.

14 It is settled law that the validity of the reassessment

proceedings have to be decided at the touchstone of the reasons recorded, which can be neither added to nor substituted subsequently by way of reply affidavit.

15 On a reading of the reasons recorded, it is clear that not even a murmur has been made by the assessing officer regarding any failure on the part of the Petitioner to disclose fully and truly any material facts necessary for assessment, which if disclosed, would prevent the escapement of income. In **Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income-Tax²**, it has held as under :

“.....The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment.

16 In the aforementioned case, the assessing officer had not mentioned in the reasons recorded the fact that there was any failure to disclose fully and truly any material facts by the assessee

2 2004 ITR 332 Vol. 268

and the Court without touching upon any other ground, proceeded to allow the Petition and set aside the notice impugned therein holding that the jurisdictional requirement of proviso to Section 147 of the Act had not been complied with by the assessing officer.

17 In the present case also, the assessing officer has not recorded that there was any failure on the part of the assessee to disclose fully and truly the material facts, which were otherwise necessary for assessment. Therefore, the jurisdictional conditions for exercise of power of reassessment under Section 147 of the Act beyond the period of four year had not been satisfied by the assessing officer. The proceedings impugned are, therefore, liable to be set aside on this ground alone.

18 Notwithstanding the above, the assessing officer could have proceeded to reopen the assessment proceedings only if he had 'reason to believe' that income had escaped assessment. In **Commissioner of Income-tax Vs. Kelvinator of India Ltd³**, the Supreme Court held that while the assessing officer has power to reopen, he had no power to review and that the reassessment has to be based on fulfillment of certain pre-conditions and that if concept

3 [2010] 320 ITR 561 (SC)

of 'change of opinion' is removed, then in the garb of reopening of the assessment, review would take place. It was further held that the assessing officer has the power to reopen, provided there was a tangible material to come to the conclusion that income had escaped assessment and further that reasons must have live link with the formation of the belief.

19 Since an Order under Section 143(3) had been passed, pursuant to a query raised, which was responded to, it must be presumed that the Order under Section 143(3) had considered all issues notwithstanding the fact that no specific mention is made in that regard in the Order of assessment.

20 In **Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-tax-2(1)**⁴, it was held :

“14.....We are of the view 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 contained reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him 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

4 [2014] 44 Taxmann.com 304 (Bombay)

Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.”

21 Testing the facts of the present case on the touchstone of the law as discussed hereinabove, it can be seen that during the course of the earlier proceedings under Section 143(3), the Petitioner in its Note 10 annexed with the Auditor's report dated 24 August 2012, had shown Rs.75,00,000/- on account of redemption of preference shares of G.R. Infratech Pvt. Ltd.

22 The assessing officer in his notice issued under Section 142(1) dated 10 September 2014 required the Petitioner to submit various

details, which included profit on sale of investments/shares/capital assets, details and working of capital gain or such income along with the evidences. In response to the said notice, the Petitioner submitted its reply giving details of the investments and stated therein that during the year, there was no purchase and sale of the shares, except redemption of preference shares of M/s G.R. Infratech Pvt. Ltd. It, thus, appears to be clear that the issue pertaining to redemption of preference shares must be deemed to have been considered while passing the Order of assessment under Section 143(3) by the assessing officer.

23 In fact, the Supreme Court in **Kelvinator of India Ltd** (*supra*) had upheld the Full Bench decision of Delhi High Court in **Commissioner of Income-tax Vs. Kelvinator of India Ltd.**⁵. In the said judgment, the Full Bench of Delhi High Court held :

“ We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under Section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind.”

5 [2002] 256 ITR-1

24 Be that as it may, the issue with regard to source of Rs.75,00,000/- having been explained as redemption of preference shares and having been considered at the time of scrutiny assessment under Section 143(3) of the Act, the reassessment proceedings in the present case would be nothing but a change of opinion, and, therefore, without jurisdiction.

25 For the reasons mentioned above, the Petition is allowed. Notice dated 29 March 2019 issued by Respondent No.1 under Section 148 of the Act, as also the Order dated 4 October 2019 and further communication dated 5 November 2019 are quashed and set aside.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)