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IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 321 of 2015**

M/s. V. M. Salgaoncar Sales
International, a Partnership Firm
formed under the Indian Partnership
Act, 1932, having its Registered
Office at Salgaocar House,
Off Dr. Francisco Luis Gomes Road,
Vasco-Da-Gama, Goa, by Mr. Z. A.
Braganca, major in age, Constituted
Attorney.

... Petitioner.

Versus

1. Assistant Commissioner of Income-Tax,
Circle-2, Margao,
having his office at 3rd Floor,
Blessing Pioneer Commercial Complex,
Opposite District & Sessions Court,
Margao-Goa 403 601.
2. Joint Commissioner of Income-Tax,
Margao Range, Margao,
having his office at 3rd Floor,
Blessing Pioneer Commercial Complex,
Opposite District & Sessions Court,
Margao-Goa 403 601.
3. Commissioner of Income-Tax, Goa,
having his office at Aayakar Bhavan,
Patto, Panaji, Goa 403 001.
4. The Union of India,
Through the Secretary (Finance),
Ministry of Finance, New Delhi.

... Respondents

Mr. P. J. Pardiwala, Senior Advocate with Mr. D. J. Pangam,
Advocate for the petitioner.

Ms. Asha Dessai, Advocate for the respondents.

CORAM :- F. M. REIS &

M. S. SANKLECHA, J.

DATE : 7th May, 2015

ORAL JUDGMENT : (Per M. S. Sanklecha, J.)

Rule; returnable forthwith. The respondents waive service. At the request of the Counsel, the petition is taken up for final disposal.

2. This petition under Article 226 of the Constitution of India challenges the notice dated 28/10/2014 issued under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice seeks to reopen the assessment for the Assessment Year 2008-2009.

3. The reasons recorded in support of the impugned notice dated 28/10/2014 for reopening of assessment are on the following two grounds :

- (i) Under invoicing of the exports on the basis of Justice M. B. Shah Commission's Report; and
- (ii) Income arising out of mining is an illegal income, in view of the Supreme Court order dated 21/04/2014 in Writ Petition C. No.435/2012 which had held that the mining

leases in Goa had expired on 22/11/2007. Consequently, the income accrued for the Assessment year 2008-2009 cannot be said to be legitimate business income chargeable as income from profits and gains of business but under Income from other sources.

4. The petitioner, by letter dated 09/02/2015 objected to the reasons recorded in support of the notice. Amongst various contentions raised by the petitioner was the fact that they were not holding any mining leases. Thus, the second reason recorded would not apply. This is so as they were only in the business of buying of Iron ore, processing it and exporting the processed Iron ore. Besides, various other contentions were also urged with regard to reopening not being sustainable on grounds of under invoicing of exports.

5. The Assessing Officer, by an order dated 20/02/2015, disposed of the petitioner's objections contained in the letter dated 09/02/2015. In the order dated 20/02/2015 disposing of the objections, the Assessing Officer, did not deal with the petitioner's objection that no income is earned from mining leases as they do not hold any mining leases, consequently, the question of illegal mining would not arise in their case. The Assessing Officer in the

order dated 20/02/2015 has on the contrary recorded the following as the submission/ objection of the petitioner as under :

“However vide your reply dated 09/02/2015 you have brought to my notice that the Government of India has amended The Mines & Minerals (Development and Regulation) Act [MMDR Act] vide The Mines & Minerals (Development and Regulation) Amendment Ordinance, 2015, dated 12/01/2015 and hence the decision of the Hon'ble Supreme Court is no more applicable. Moreover, you have stated that the Government of Goa has renewed a number of leases of the iron ore lessees with effect from 22.11.2007 for another 20 years. The facts pointed out by you need analysis and understanding of the entire scheme of the mining activities and the consequential actions taken by various authorities in pursuance of the Hon'ble Supreme Court order. This process will be undertaken during the course of the reassessment proceedings u/s 147 read with Section 143(2) of the I. T. Act, 1961.”

(emphasis supplied)

We searched in vain for the aforesaid stand of the petitioner in its objection dated 09/02/2015, nor was the Revenue able to point out the source from where the aforesaid stand is attributed to the petitioner.

6. In the aforesaid facts, we were of the view that the order dated 20/02/2015 of the Assessing Officer does not appear to be sustainable and may require reconsideration at the hands of the Assessing Officer. However, the same was opposed to by the Revenue and in support, reliance was placed upon an affidavit dated 06/05/2015 of the Deputy Commissioner of Income Tax, seeking to justify the order dated 20/02/2015 and in particular, paragraphs 8 and 10, which state as under :

"8. I say that the assessee may be only in trading however, during his assessment he was assessed as a company involved in mining etc. which was accepted by the assessee and it is at this belated stage that he has pointed out that he is only into trading only to get out of this situation. In any case assuming that the assessee is only into trading the contents of the notice with regard to the trading i.e. under invoicing issue would still stand.

9.

10. I say that the objections raised by the assessee have been dealt with and rejected vide speaking order dated 20/02/2015. I say that since the procedure adopted is completely legal, it is humbly prayed that the petition filed by the petitioner be dismissed with costs."

7. It is a settled position that reopening of assessment is not to be lightly done. In fact, it leads to unsettling settled positions. Therefore, it can only be done by the Revenue subject to strictly satisfying the jurisdictional requirement of Section 147 and 148 of the Act. It was in the light of the above, that the Supreme Court in ***GKN Driveshafts (I) Ltd Vs. I.T.O., reported in 259 ITR 19***, has laid down a procedure/ method to be followed before reassessing an assessee under Section 147 of the Act. The Apex Court has formulated the procedure to the effect that whenever a notice to reopen an assessment under Section 148 of the Act is issued to an Assessee, the reasons recorded in support of the same must be furnished to the Assessee on his furnishing the return of income. The Assessee would then have an opportunity to object to the reasons in support of the notice for reopening an assessment and the Assessing Officer on consideration of the objections would dispose of the objections by a speaking order. The above procedure is being consistently followed in all cases of notices issued under Section 148 of the Act seeking to reopen assessments. The procedure laid down by the Apex Court is a very salutary provision as it ensures that an Assessee is not dragged into a reassessment proceedings unnecessarily. Therefore, before commencing the reassessment proceedings, an

Assessing Officer can have a second look at his reasons in the context of the objections of the Assessee. To ensure that there is due application of mind, the Apex Court has directed that the objections be disposed of by a speaking order. Thus, the basis of the entire above procedure is an honest and objective second look at the reasons for reopening the assessment in the context of the objections.

8. In the present facts, we find that it has been the petitioner's case at all times (including during the assessment proceedings) and in its objections that it does not own any mining leases. It is purely in the business of purchasing iron ore, processing the same and exporting the processed iron ore. In fact, the reasons recorded in support of the impugned notice also commence by introducing the assessee as a Partnership Firm engaged in buying iron ore, processing the same and exporting it. The objection filed by the petitioner to the reasons recorded in support of the impugned notice, also very categorically states that they do not hold any mining leases as they are only in the business of buying ores, processing it and exporting the processed iron ore. Thus, the second ground/ reason recorded in support of the notice viz. illegal mining does not apply. However, order dated 20/02/2015, while disposing of the objections, does

not deal with the above objection. On the contrary, the order dated 20/02/2015 disposes of an imaginary objection, not taken by the petitioner, by a reasoned order. The least that is expected of Assessing officer while disposing of the objections filed by the Assessee is some application of mind to the objections raised by the Assessee and in that context, take a relook at the reasons recorded in support of the reopening notice.

9. On such a fundamental lapse on the part of the Assessing Officer in disposing of the objections was pointed out to us, we expected the State-Revenue would withdraw the order and crave liberty to pass a fresh order dealing with the objections of the petitioner. However, to our dismay, the Revenue is still attempting to justify its order disposing of the petitioner's objections even though it is clear as daylight that the objection was chalk and the order disposing of the objections, was dealing with an imaginary ground of cheese. In fact, paragraph 8 and 10 of the Affidavit dated 06/05/2015 supporting the impugned order indicates the attitude of the Revenue that right or wrong, the impugned notice for reopening is sustainable. The entire procedure laid down by the Apex Court to ensure that unwarranted reopening of assessments do not take place, is being frustrated by this attitude. The Officers of the Revenue should

realise that they are not mere revenue collectors, but Officers administering the Act and in that process must ensure that not only the Assessee complies with the law but even the Officers do not act *dehors* the law. In view of this attitude of the Revenue, at one stage, we were contemplating that we admit the petition and deal with the challenge to the impugned notice. However, on further consideration, we felt that it would send a wrong signal and the Officers of the Revenue, who would continue to pass orders without application of mind, on imaginary objections with impunity. Therefore, we decided to set aside the order dated 20/02/2015 of the Assessing Officer disposing of the objections to the impugned notice. However, looking at the manner in which the Assessing Officer has passed the order dated 20/02/2015 and also the affidavit dated 06/05/2015 filed in support of the order, we are of the view that the petitioner's objection would not be objectively dealt with by the Assessing Officer, who authored the order dated 20/02/2015 and the deponent of the affidavit dated 06/05/2015 resisting the petition.

10. However, before closing we may point out that the affidavit filed by the Deputy Commissioner of Income Tax dated 06/05/2015, particularly paragraph 8 thereof, indicates that the stand of the Revenue is that even if the Assessee is only engaged

in a trading activity, the impugned notice for reopening is sustainable on account of under invoicing, which is the other ground stated in the reasons in support of the impugned notice. This can hardly be an explanation for not having dealt with the objection as filed by the petitioner and in fact dealing with an imaginary objection in the order disposing of the objections. In other words, the Revenue contends that even if the Assessing Officer has not dealt with the petitioner's objection properly, yet the notice for reopening is sustainable on some other grounds. This is not what is expected of the Assessing Officer while dealing with the objections. In any case, the manner in which the objection of the petitioner that they do not own any mining leases has been dealt with by the order dated 20/02/2015, casts a doubt on the entire order disposing of the objections dated 20/02/2015 as to what has been the application of mind while disposing of other objections.

11. In the above circumstances, we set aside the entire order dated 20/02/2015 disposing of the petitioner's objection and restore the petitioner's objection dated 09/02/2015 to the impugned notice before the respondent-Revenue. However, the respondents will assign this issue of objections raised by the petitioner to the impugned notice to an officer other than the

Assessing Officer, who authored the order dated 20/02/2015 and the deponent of the affidavit dated 06/05/2015 filed in the Court.

12. The Officer appointed by the respondent-Revenue to dispose of the objections of the petitioner's would do so expeditiously and in any case before the expiry of 10 weeks from today. Needless to state the the Revenue will not take any proceedings for a period of four weeks from the date the objections are disposed of, as held by this Court in ***Asian Paints Vs. Dy. CIT, reported in 296 ITR 90.***

13. Rule made absolute in aforesaid terms.

M. S. SANKLECHA, J.

F. M. REIS, J.

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