

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.735 OF 2015
AND
WRIT PETITION (L) NO.736 OF 2015

M/s. Alliance Space Pvt. Ltd.

..Petitioner.

V/s.

The Income Tax Officer 6(1)(1), Mumbai & Ors.

..Respondents.

Mr.J.D.Mistri, Senior Advocate with Mr.Madhur Agarwal and Mr.Atul Jasani for the petitioner.
Mr.A.R.Malhotra with Mr.N.A.Kazi for the respondents.

**CORAM : S.C.DHARMADHIKARI AND
A.K. MENON, JJ.**

DATED : 27TH MARCH, 2015

ORAL JUDGMENT (PER A.K.MENON, J.)

1. Rule, made returnable forthwith. By consent of the parties taken up for final hearing .

2. By this order, we dispose of both the writ petitions which are on a similar set of facts. Writ Petition (L) No.735 of 2015 pertains to assessment year 2008-09 whereas Writ Petition (L) No.736 of 2015 pertains to assessment year 2009-10. The challenge in the petition is to two notices dated 24th March, 2015 and 29th March, 2014 respectively issued by the Income Tax Officer

6(1)-2, Mumbai under section 148 of the Income Tax Act, 1961 (the Act).

3. We will briefly advert to the facts in Writ Petition (L) No.735 of 2015.

The Petitioner is a company engaged in the business of property development and constructing residential complexes inter alia at Pune. Respondent No.1 is the Assessing Officer in-charge of the Petitioner's assessment. Respondent No.2 is the earlier Assessing Officer who handled the Petitioner's assessment before transfer of the jurisdiction to Respondent No.1. Respondent No.2 has completed the assessment in respect of the Petitioner. Respondent No.2 has issued notice on 29th March, 2014 under section 148 of the Act in respect of the assessment year 2008-09 for reopening of the assessment for the assessment year 2008-09. Respondent No.3 the Additional Commissioner of Income Tax had granted approval under Section 151 of the Act for reopening of the assessment.

4. The Petitioner was originally registered as a company in the financial year 2006-07 with a nominal share capital of Rs.1 lac divided into 10,000 equity shares of face value of Rs.10/- each. Subsequently, a Share Subscription Agreement dated 16th November, 2007 was entered into between the Petitioner and

various entities who were to subscribe to the shares of the Petitioner under the Share Subscription Agreement dated 16th November, 2007 ('SSA'). Pursuant to the SSA during the financial year 2007-08 (relevant to the assessment year 2008-09), shares of the Petitioner were allotted to subscribers as detailed below:-

Sr. No.	Name of the Company	Allotted shares	Total consideration Rs. P	Date
1.	K2A Hospitality Ltd.	1,39,860	9,99,99,900	14-03-2008
2.	Edelweiss Trustee Services Pvt. Ltd.	60,000	4,30,00,000	24-03-2008
3.	Sharyans Resources Ltd.	1,20,000	4,60,00,000	04-09-2008
4.	Atlas Hospitality Co. Pvt. Ltd.	10,90,000	11,99,00,000	04-09-2008
5.	Fulda River Ltd.	2,91,200	45,13,60,000	22-12-2008
6.	K2A Hospitality Ltd.	2,60,140	18,60,00,100	22-12-2008

4. For the assessment year 2008-09, the Petitioner filed a return of income on 28th September, 2008 declaring Nil income. The return of income was accepted under Section 143(1) of the Act. For the assessment year 2009-10, the Petitioner filed return of income on 29th September, 2009 declaring the total loss of Rs.4,39,504/- under the provisions of the Act. The matter was taken up for scrutiny.

5. In the course of the scrutiny, the Petitioner vide letter

dated 11th October, 2010 filed a copy of the return of income, annual report along with audited profit and loss account, balance sheet and all its annexures and also a copy of audited report in Form No.3CD. A further show cause notice dated 14th June, 2011 came to be issued asking the Petitioner to submit certain details. On 29th August, 2011 the Petitioner supplied, inter alia, details of secured and unsecured loans taken by the Petitioner, details of share application amount received by the Petitioner, details of capital introduced during the financial year 2008-09 and the name and complete addresses of all the Directors and shareholders of the companies along with their PAN and shareholding.

6. During the course of the assessment proceedings for the assessment year 2009-10, Respondent No.2 issued notices under section 133(6) of the Act to Phoenix Hospitality Co. Pvt. Ltd. and Sharyans Resources Ltd. asking them to furnish details of the return of income for assessment year 2009-10, permanent account number along with details of the assessing officer, copy of the bank statement and copy of final accounts. Phoenix Hospitality Co. Pvt. Ltd. vide letter dated 17th August, 2011 filed a reply to the said notice. Sharyans Resources Ltd. also filed reply dated letter dated 17th August, 2011.

7. After considering the submissions of the Petitioner and the details submitted by Phoenix Hospitality Ltd. and Sharyans Resources Ltd., Respondent No.2 completed the assessment for the assessment year 2009-10 under Section 143(3) of the Act on 29th December, 2011 without making any adjustment on account of share premium received by the Petitioner. During the course of the assessment proceedings for the assessment year 2011-12, Respondent No.2 enquired about share premium and asked the Petitioner to explain and furnish the working of the share premium received by the Petitioner in the relevant year.

8. The Petitioner vide letters dated 13th January, 2014, 20th January, 2013, 3rd March, 2014 and 13th March, 2014, provided the information. Respondent No.3 passed an order on 22nd March, 2014 under Section 143(3) of the Act for the assessment year 2011-12. He accepted the submissions of the Petitioner and did not make any addition with respect to the share premium received by the Petitioner. Thereafter, Respondent No.2 issued notice under section 148 of the Act dated 29th March, 2014 stating that the Petitioner's income chargeable to tax for the assessment year 2008-09 had escaped assessment within the meaning of section 147 of the Act.

9. Vide letter dated 25th April, 2014, the Petitioner submitted that the return of income filed on 28th September, 2008

should be treated as its response in compliance of the impugned notice and further requested for a copy of the reasons recorded by Respondent No.2 for reopening the assessment. Vide letter dated 16th July, 2014, Respondent No.2 provided an extract of the reasons as recorded by him. For ready reference, the extract of the reasons is reproduced below :-

“

2. *From the records, it is seen that the assessee is in receipt of huge share premium amounting to Rs.14,10,01,300/- during the financial year 2007-08 relevant to A.Y. 2008-09. As scrutiny assessment u/s. 143(3) of the Income-tax Act, 1961 has not been done in this case for this year, huge share premium having been received by the assessee has not been examined. The assessee is an unlisted company and the nature of share application money received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated by any cogent evidence as could be noticed from records...*

3.

4.

5. *In view of the above stated facts and the judicial decisions I have reason to believe that the true and correct income of assessee has escaped assessment in terms of provisions of section 147 of the I.T. Act. Thus, it is a fit case for re-opening of the assessment u/s.147 of the Income Tax Act, 1961. Notice u/s.148 is therefore, required to be issued in this case.*

6. ”

10. On or about 21st August, 2014, the Petitioner filed objections challenging the validity of the reassessment proceedings for the assessment year 2008-09 and inter alia submitted that :-

- (a) The reasons did not quantify the income which escaped assessment and, therefore, the notice was invalid in view of section 149 of the Act;
- (b) The impugned notice amounted to change of opinion;
- (c) The impugned notice amounted to review which is not permissible;
- (d) There was no tangible material which came into the possession of Respondent No.2 on the basis of which reopening can be supported;
- (e) The reopening was invalid as no reasons were disclosed;

11. Subsequently, the impugned order dated 10th February, 2015 was passed rejecting the objections of the Petitioner challenging the validity of reassessment inter alia observing that under Section 147 of the Act, the Assessing Officer can invoke the provisions of the section for bringing to tax escaped income by reopening the assessment within a period of four years and the proviso to Section 147 of the Act is not applicable. According to the A.O., the quantum of escaped income was equivalent to quantum of share premium amounting to Rs.14,10,01,300/- which is more than

the ceiling of Rs.1 lac prescribed under the Act and prior sanction of the Additional Commissioner of Income Tax was obtained on 28th March, 2014, prior to issuance of notice.

12. The Petitioner, being aggrieved by the proposed reopening, filed the above two writ petitions.

13. Having perused the aforesaid correspondence and documents, we have heard Mr.Mistri, learned senior counsel appearing on behalf of the Petitioner and Mr.Malhotra, learned counsel appearing on behalf for the Respondents. At the outset, Mr.Mistri submitted that the share premium does not and cannot form the part of income of the Company. He made a quick reference to the pronouncement of the this Court in the case of **Vodafone India Services Pvt. Ltd. V/s. Union of India & Ors.** reported in **[2014] 368 ITR 1 (Bom)** in this behalf. He submitted that the revenue had in fact accepted this judgment and the Central Board of Direct Taxes issued a circular F.No..500/15/2014/APA-1 dated 29th January, 2015. The circular is crisply worded and records as follows:-

" Subject Acceptance of the order of the Hon'ble High Court of Bombay in the case of Vodafone India Services Pvt. Ltd. - reg.

In reference to the above cited subject, I am directed to draw your attention to the decision of the High Court of

Bombay in the case of Vodafone India Services Pvt. Ltd. for AY 2009-10 (WP No.871/2014), wherein the Court has held, inter-alia, that the premium on share issue was on account of capital account transaction and does not give rise to income and, hence, not liable to transfer pricing adjustment.

2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this DRPs and CsIT (Appeals).

3. This issues with the approval of Chairperson CBDT. "

14. Mr.Mistri then submitted that in any event, the amount of share premium amount cannot be added to the income of the company. He referred to the balance-sheet of the Petitioner for the period 2009-10 forming part of the Auditor's Report of the company. A perusal of the balance-sheet reveals that the source and the details of the shareholders had been provided. Mr.Mistri submitted that the share capital stood at ₹28,98,600/-. He then referred to the balance sheet of 31st March, 2009 which shows share capital of ₹1,97,97,000. Thus, Mr.Mistri pointed out that the surplus had increased. He then drew our attention to Schedule B under which the securities premium had increased from Rs.14,10,01,200/- to Rs.78,56,48,000/-. Thus, according to him, the money having been raised by issue of shares at a premium, this should not in any way

included in the income and taxed. He referred to a notice issued by the assessing officer on 14th June, 2011 in respect of the assessment year 2009-10 whereby the assessing officer required the assessee to remain present for the assessment on 21st June, 2011 along with the details and records. He submitted that all the records demanded were produced before the assessing officer.

15. Vide letter dated 29th August, 2011 the Chartered Accountants of the assessee provided to the assessing officer the following:-

- 1) Party-wise details of CWIP;
- 2) Details of loans and Advances;
- 3) To explain as to why interest received be not brought to tax under the head "income from other sources";
- 4) Balance-sheet of K2A Hospitality Ltd;
- 5) Confirmation of accounts of K2A Hospitality Ltd.;
- 6) Balance sheet of M/s.Fulda River Ltd.

After the receipt of the same, on 22nd March, 2014, the Assessing Officer accepted the assessment under section 143(3) of the Act, the total sum of Rs.1,46,206/- to the total income under the head of Income Tax from other sources and continued investigation under the penalty proceedings under section 271(1)(c) of the Act for having furnished inaccurate particulars of income.

Surprisingly, he issued notice under section 148 of the Act stating that he has reasons to believe that the income chargeable to tax has escaped assessment for the assessment year 2008-09 and he proposed to reassess the income. Mr.Mistri pointed out that Respondent No.2 merely relied upon the huge share premium amounting to Rs.14,10,01,300/- during the financial year 2007-08 relevant to assessment year 2008-09 and that in fact the scrutiny assessment had not been done. Apropos, Respondent No.2's contention that he had the authority to reassess the income chargeable to tax which he believed had escaped assessment, Mr.Mistri submits that in fact such communication is entirely bereft of any real reasons.

16. Vide letter dated 21st August, 2014 the assessee clarified that the reasons cited were in fact no reasons at all and objected to the reopening of the assessment. Mr.Mistri pointed out the decision of the Hon'ble Supreme Court in the case of **Assistant Commissioner of Income-Tax V/s. Rajesh Jhaveri Stock Brokers P. Ltd.** reported in **[2007] 291 ITR 500 (SC)** relied upon by the Assessing Officer was not applicable to the present case, while highlighting the fact that in Rajesh Jhaveri (supra), the reopening was within four years of the relevant assessment year, whereas in the present case, it is proposed to be done after four years. Mr.Mistri, therefore, submitted that there was no factual

basis in the claim that the assessing officer had reasons to believe that income had escaped assessment. According to Mr. Mistri, there was no real reason that could be cited for reopening of the assessment.

17. Mr.Mistri then relied upon the decision of this Court in the case of **Hindustan Lever Ltd. V/s. R.K. Wadkar, Assistant Commissioner of Income Tax & Ors.** reported in **[2004] 268 I.T.R. 332** and submitted that a notice under Section 148 of the Act after four years should clearly specify the materials that were not disclosed earlier, the notice itself must specify reason, that it is not possible that the reasons be supplied later on. In that case, the Division Bench of this Court held that the notice was clearly beyond the period of four years and the reasons recorded by the assessing officer did not state that there was a failure on the part of the assessee to disclose fully and truly all particulars necessary for assessment for that assessment year. This Court found that the assessing officer had no jurisdiction to reopen the assessment proceedings and the notice was held to be invalid and was quashed.

18. Mr.Mistri relied upon the ratio of the judgment and submitted that in the present case, also notice is issued beyond the period of four years and did not disclose any material which the

assessee had failed to disclose. The Assessing Officer had no reason to believe that income had escaped assessment for the relevant year. He then relied upon the decision of this Court in the case of **Aroni Commercials Ltd. V/s. Assistant Commissioner of Income-Tax & Anr.** reported in **[2014] 367 ITR 405 (Bom)** in which it is held that if the notice notice under Section 148 of the Act provides identical reasons for reopening of the assessment for a second consecutive assessment year and the earlier year notice had been held to be invalid, the notice for re-assessment for the subsequent year should also be held to be invalid.

19. Mr.Mistri submitted that in Writ Petition (L) No.736 of 2015 also an identical notice had been issued bereft of any reasons or material justifying the issuance of notice in respect of assessment year 2009-10. He submitted relying upon these decisions that the impugned orders as well as the notices in both the above petitions are liable to be set aside.

20. Referring to the decision of this Court in Writ Petition (L) No.2885 of 2014 [M/s. Rockstar Real Estate Pvt. Ltd. V/s. Income Tax Officer 10(1)(4)], Mr.Mistri submitted that this Court found that reasons furnished to the Petitioner-assessee were identical as in the present case. The Court was prima facie of the view that from the share premium and share application money, no income arises as

the receipt is on capital account. However, we find that the said order was at an ad-interim stage and it need not continue to engage our attention.

21. Mr.Malhotra, learned counsel for the Respondents has vehemently supported the issuance of the notices. He contended that such large premium being paid is suspect, especially if the company has no track record and its earning per share were negligible, in fact it was a loss making company. Referring to the balance-sheet and profit and loss account, he submitted that they were not a hugely profiteering company so as to command such high share premium. According to him, the matter needs to be investigated further, notwithstanding the fact that some public companies are stated to have invested in the assessee company and have subscribed to the share premium. He submitted that there is total absence of business acumen if such high premium had been paid. This itself raises serious doubts about bonafides of the assessee company and justifies the reopening of the assessment in the interest of the revenue. He supported the impugned notices and the orders and refuted the contentions of Mr.Mistri.

22. We have given our anxious consideration to the factual background and we are of the view that Mr.Mistri's contentions

deserve to be accepted in the facts of the present case. The transaction seems to be entirely an Arms-length transaction. The subscribers are limited companies who are reportedly stated to be public limited companies. The Petitioner is a company in the hospitality sector and we do not see how the amount of premium that has been charged from the subscribers can be questioned without the revenue provided valid reasons. We have not entered into the merits of the controversy. Suffice it to say that apart from being public limited companies, the subscribers include other infrastructure hospitality companies. Having come to this conclusion, we are constrained to hold that there is no justification in issuing of notice under section 148 of the Act in the given facts of the case. There is no lack of disclosure or suppression of any material facts. All queries of Respondent No.2 have been answered by the assessee or the subscribers in question especially when all questionnaires addressed to subscribers were duly answered by the subscribers.

23. The Assessing Officer thereafter proceeded to complete the assessment order and issued an assessment order but did issued a volte face the and a fresh notice under section 148 of the Act just one week after the issuance of the assessment order. This does not augur well for the revenue and particularly in view of the fact that the notice under Section 148 of the Act (Exhibit-Q to the

petition) dated 29th March, 2014. It does not contain any tangible reasons for reopening of the assessment. In fact, as rightly appointed by Mr.Mistri, during his submissions, Respondent No.2 has completed the assessment and issued an assessment order on 22nd March, 2014, yet the very same Assessing Officer has proceeded to issue a notice under Section 148 of the Act, seven days of the assessment order.

24. We may add a word of caution here. Although the Petitioner has relied upon the decision of this Court in the case of Vodafone and the department has accepted the said decision and decided against challenging it by issuing a circular, we would not equate all cases of share premium as being covered by the said judgment and circular. In a given case and the given fact situation, assessees may be required to be probed for valid reasons.

25. In the case at hand, however, we find that there is no justification for reopening of the assessment and accordingly, we are of the view that both the Petitions must succeed. We accordingly pass the following order.

26. In Writ Petition (L) No.735 of 2015, the impugned notice Exhibit-Q dated 29th March, 2014 issued by the Income Tax Officer 6(1)-2, Mumbai under section 148 of the Income Tax Act, 1961 and

the impugned order Exhibit-U dated 10th February, 2015 by the Income Tax Officer 6(1)-1, Mumbai in respect of assessment year 2008-09 are hereby set aside.

27. In Writ Petition (L) No.736 of 2015, the impugned notice Exhibit-Q dated 24th March, 2014 issued by the Income Tax Officer 6(1)-2, Mumbai under section 148 of the Income Tax Act and the impugned order Exhibit-U dated 10th February, 2015 in respect of assessment year 2009-10 by the Income Tax Officer 6(1)-1, Mumbai are hereby set aside. There will be no order as to costs.

(A.K. MENON, J.)

(S.C.DHARMADHIKARI, J.)