IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITIONS NO. 678 & 679 OF 2013

Prashant M. Timblo,
a Citizen of Canada, a permanent
resident of Dubai, residing at
Flat No.610, Block B, Sky Towers,
Dubai Land, U.A.E. through its duly
authorised representative
Mr. Pradyumna Pai Raikar,
aged 38 years, Indian National, resident
of "Kameshwari", Sebastian D'Cunha
Road, Aquem Alto, Margao, Goa 403601. …..... Petitioner.

V/s.

1. Chief Commissioner of Income-tax,
Panaji, Goa.

2. Commissioner of Income-tax,
Panaji, Goa.

3. Dy. Director of Income-tax,
International Taxation, Circle 2(1),
Bangalore having their Office at
Rashtrothana Bhavan, No.14/3,
6th Floor, Nrupathunga Road,
Bangalore-560 001.

4. Assistant Commissioner of Income-tax,
Circle 2, Margao, Goa.

5. Union of India,
Through Secretary to
Government of India,
Ministry of Finance, New Delhi. ….... Respondents.

Mr. J. Mistry, Senior Advocate with Mr. S. Karpe, Mr. Nishant Thakker and Ms. Asmita Tirodkar, Advocates for the petitioner.

Ms. Susan Linhares, Junior Central Govt. Standing Counsel for the respondents. No.1 to 4.

CORAM :- F.M. REIS &
NUTAN D. SARDESSAI, JJ.

Date : - 25 JULY 2017

ORAL JUDGMENT : (PER F.M. REIS, J.)

Heard Mr. J. Mistry, learned Senior Counsel appearing for the petitioner and Ms. Susan Linhares, learned Counsel appearing for the respondents No.1 to 4.

2. The petitioner in the above petitions prays for a writ of certiorari or any other writ or appropriate orders, to set aside the Notices dated 28th March, 2012 and 29th March, 2012 and also to quash and set side the impugned Order dated 27/09/2013.

3. It is the case of the petitioner that the petitioner is a citizen of Canada from 1992 and a permanent resident of Dubai, since 2001 and he is a Non-Resident Indian. Under the Income Tax Act, 1961

("Act" for short) for the Assessment Year 2005-06, the petitioner is entitled to the benefit of the Double Tax Avoidance Agreement (DTAA) between India and UAE. The respondent No.3 issued the impugned Notice under Section 148 of the said Act dated 28/3/2012. The petitioner challenged the validity of the said notice whereby the respondent No.3 has proposed to reopen the assessment of the petitioner for the Assessment Year 2005-06 as the respondent No.3 is of the belief that the petitioner's income chargeable to tax has escaped assessment. It is the contention of the petitioner that respondent No.3 has no jurisdiction to issue such notice and that it is well settled law that before proceeding to issue such notice under Section 148 of the said Act, certain conditions, including the condition of assuming proper jurisdiction has to be satisfied. It is further contention of the petitioner that as such, the petitioner is governed by the Authority located in Goa. The petitioner also contends that on 26/7/2005, the petitioner filed his return of income for the Assessment Year 2005-06 with the Asst. Commissioner of Income-tax, declaring a total income of Rs.55,37,400/-. The returns of the petitioner were processed under Section 143(1)(a) by the Asst. Commissioner of Income-tax and thereafter, issued a notice calling upon the petitioner to explain the difference in interest income shown in the returns. The petitioner, who appeared before the Assistant Commissioner of Income-tax was, thereafter, asked to file copies of his passport and a computation of the number of days he was abroad, in addition to the interest reconciliation was carried out. Table giving total number of days spent by him outside the Country was submitted by the petitioner. In the meanwhile, the Asst. Commissioner of Income-tax, issued another show cause notice under Section 143(2) of the Act, calling upon the petitioner to appear before him on 18/7/2006. Accordingly, necessary details were submitted by the petitioner. Thereafter, by another show cause notice issued under Section 143(2) of the said Act, respondent No.3 once again called upon the petitioner to appear before him. Subsequently, in view of the change of jurisdiction, an opportunity was given to appear before the respondent No.4 and an explanation was called for. It is further contended that on 24.12.2007, after thorough investigation and after being satisfied with the explanation given by the petitioner, the assessment of the petitioner was concluded by an order dated 24.12.2007 under Section 143(3) of the said Act, making no addition to the income declared by the petitioner. But, however, on 29/03/2012, the petitioner received a notice under Section 148 of the said Act for escapement of income and more so, from the respondent No.3. The petitioner responded to the said notice and requested the respondent No.3 to consider the original returns filed by him on 26/07/2005, as returns in response to the impugned notice and further requested the respondent No.3 to furnish the reasons for re-opening the assessment. After a lapse of 9 months, the petitioner was surprised to receive a notice under Section 142(1) of the said Act from the respondent No.3, disclosing reasons recorded and called upon the petitioner to produce copies of his passport and substantiate his claim for the benefit under the DTAA. But, however, no reasons were in fact enclosed along with such notice. Thereafter, the petitioner, through his Chartered Accountant, once again requested the respondent No.3 to furnish to him the reasons recorded by him prior to issuance of the notice dated 28/2/2013, so as to enable the petitioner to make proper submissions. But, however, the respondent No.3 called upon the petitioner to reply to the notices dated 8/2/2013 and 28/2/2013, failing which best judgment assessment would be carried out. A writ petition was thereafter filed raising objections to such exercise by the respondent No.3. But, however, on the date of filing of such petition, reasons were given to the petitioner. Objections were accordingly filed by the petitioner before the respondent No.3, challenging the legality of assumption of jurisdiction. The writ petition was disposed of by an order dated 16/9/2013, directing the respondent No.3 to dispose of the objections filed by the petitioner. Thereafter, by an order dated 27/09/2013, the objections filed by the petitioner were disposed of by the respondent No.3. Being aggrieved by the notices, as well as the impugned order, the petitioner has filed the present writ petitions.

4. The respondents have filed their reply, *inter alia,* contending that the petitions are premature as the petitioner has agitated all the issues during the course of assessment. It is further pointed out that though the assessee was a Non-Resident for the previous year relevant to the assessment year, applicability of the DTAA will only arise when the assessee proves his tax residence status with any other country which is a DTAA partner of India. It is further pointed out that unless the claimant was tax resident of such country, the benefit cannot be made applicable to such claimants. It is further pointed out that for claiming the benefit of the Indo-UAE DTAA, the assessee was required to prove his residential status in the form of 'e card' (an identity card issued by the UAE Government to foreigners as

residency proof), Tax Residency Certificate or any other document issued by the Government of UAE to substantiate his claim. It is further pointed out that the criteria to claim non-residency status is different from claiming the benefit under the DTAA between India and UAE. It is further pointed out that there is administrative arrangement to centralize groups of cases of particular types under certain circulars. It is further pointed out that the contention that the reassessment proceedings started without giving reasons is incorrect, as the records reveal that the reasons were provided to the petitioner. It is further stated that the reasons have been communicated at several instances vide letter dated 18th March, 2013 and also on 22/3/2013. It is further pointed out that the contention that the change of opinion cannot be accepted as no opinion itself was formed by the Assessing Officer regarding the petitioner's residency status in UAE. It is further contended that the first notice dated 28/3/2012 was issued to the petitioner on Marine Drive, Mumbai address which was available with the respondents. Thereafter, another notice dated 29th March, 2012 was addressed to the petitioner at his Margao address which was served on 2/4/2012. The relevant provisions under the DTAA have been pointed out in the reply filed by the respondents. It was further pointed out that reopening of the assessment has been made on sound reasonings and not on mere suspicion as contended. The respondents, accordingly prayed that the petitions be rejected.

5. The petitioner, thereafter, filed rejoinder disputing the allegations made in the affidavit-in-reply filed by the respondents.

6. We have heard the learned Senior Counsel appearing for the petitioner, as well as the learned Counsel appearing for the respondents. The learned Senior Counsel appearing for the petitioner has raised different contentions, essentially submitting that the respondent No.3 had no jurisdiction to issue the impugned notices, as well as to pass the impugned order under Section 148 of the said Act. The learned Senior Counsel further points out that in terms of Section 153(2) of the said Act, the assessment ought to have been completed within one year from the end of the financial year in which the notice under Section 148 was served. It is further pointed out that the notice dated 28/3/2012 was served on the petitioner on 31.3.2012, which was the financial year 2011-12, which expired on 31.3.2012. It is further contended that the time limit to complete the assessment expired on

31.3.2013 and, in the present case as no assessment was carried out in the financial year 2011-12, which expired on 31.3.2012, the proceedings have become time-barred. It is further pointed out that the respondent No.3 has no jurisdiction over the petitioner, as he was governed by the jurisdiction of the Officers in the State of Goa at Margao Goa. The learned Senior Counsel further points out that the reasons recorded in the impugned notice dated 28/3/2012 have been essentially issued on account of failure to produce Tax Residency Certificate. The learned Senior Counsel further points out that such requirement was introduced by the Finance Act, 2012 w.e.f. 1.4.2013 and, as such, on the date of filing of the returns such requirement was not in place. The learned Senior Counsel further points out that the contention that the petitioner has failed to establish that he was resident of UAE is totally erroneous as, according to him, the passport was furnished by the petitioner before the respondent No.4 at the stage of his original assessment. It is further pointed out that it is only after verifying the correct facts, the benefit of DTAA between India and UAE was granted to the petitioner. It is further pointed out that the respondents sought to initiated proceedings for reassessment for the year 2005-06 after the expiry of four years of the end of the assessment year. It is further pointed out that beyond the period of four years, such reassessment can be carried out only if there has been failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. It is further submitted that there is no failure on the part of the petitioner to disclose such material to avail of the benefit of DTAA between India and UAE. The learned Senior Counsel further submits that the requirement to furnish the Tax Residency Certificate was introduced w.e.f. 01/04/2013 which has no application to the assessment year under consideration 2005-06. In support of the contention that there was no failure to fully and truly disclose the primary facts, the learned Senior Counsel has relied upon a Judgment reported in **294 ITR 101**, in the case of **Sesa Goa vs. JCIT & Ors.**. It is further pointed out that the records clearly disclose that the petitioner has been frequently moving to Dubai and other places and, as such, meets the requirement to avail of the benefit.

7. On the other hand, the learned Counsel for the respondents-Revenue has pointed out that the petitioner during the course of regular assessment had only disclosed details of his stay abroad, but did not provide the material facts of being a resident of

UAE and, as such, there was failure to disclose fully and truthfully all the material facts which are required for reopening the assessment. It is further pointed out that in terms of Article 1 of the DTAA, the concerned Government has to issue a formal document to the foreigners clarifying their identity, purpose and period of their stay which was also not disclosed by the petitioner. It is further pointed out the resident permit issued by the UAE becomes invalid if the bearer resides out of UAE for more than six months. It is further pointed out that as such, this itself would show that there was failure to disclose truthfully all the materials at the time of filing of the returns. The learned Counsel thereafter has taken us through the provisions of Section 147 of the said Act to point out that there was failure to disclose the material facts which entitle the respondents-Revenue to reopen the assessment. The learned Counsel has also pointed out that the contention that action is time barred is misconceived considering the notice which was served on the petitioner on the addresses available with the respondents. The learned Counsel has also disputed the contention of the petitioner on jurisdiction as, according to the respondents, the concerned Officer had jurisdiction to issue the notices on the petitioner. The learned Counsel further submits that as such, the petitioner has failed to show that the ingredients required for reopening of assessment have not been complied with and consequently, there is no case made out for interference by this Court in the impugned order. The learned Counsel, as such, submits that the petition be accordingly, rejected.

8. We have duly considered the submissions of the learned Counsel and we have also gone through the records. The reasons, as reflected in the communication dated 28/03/2012, read thus :

> "1. The income chargeable to tax has escaped the assessment and reopening of assessment u/s 148 of IT Act, 1961 is valid as per the law.
>
> 2. In the Return of income filed, you have claimed the benefits of DTAA with UAE, without providing details regarding your residential status of UAE and you have failed to make full and true disclosure of facts necessary for your assessment. In the order passed by the A.O. u/s 143(3) of IT Act, 1961, dated 24.12.2007, this opinion was never formed that you are a resident of U.A.E. During the assessment proceedings you provided details of your stay abroad of 185 days in F.Y. 2004-05 but never provided details of your residency status in U.A.E.
>
> Since A.O. did not give any specific opinion on your

> residency in UAE, the reopening of assessment cannot be considered as "change of opinion".

Perusal of the said reasons clearly show that the only reason which led to reopening of the assessment is because the Tax Residency Certificate or any other details were not supplied by the petitioner. It is to be noted that the requirement to produce the Tax Residency Certificate was introduced in the Finance Act, 2012 with effect from 1st April, 2013. The present proceedings are in connection with the Assessment Year 2005-06 and there was no need of producing such certificate as on that date. Besides that, the requirement of stay in UAE for a period of six months, has been introduced in Article 4(b) of the amended DTAA between Indian and UAE which came into effect only from 28/11/2007. As already pointed out herein above, the subject Assessment Year is 2005-06 and, as such, the question of applying the said requirement for the subject assessment would not at all arise. In fact, it was pointed out that the details of residence were being sought to examine whether the petitioner would meet the requirement as provided in the DTAA between India and UAE.

9. Apart from that, on perusal of the original Returns filed by the petitioner, it is seen that there is Note (1), which reads thus :

> "1) The assessee is a tax resident of the UAE and accordingly the DTAA between UAE & India is applicable. Tax on interest has been computed under Article 11 of the DTAA."

10. In the Assessment Order dated 24.12.2007 passed in the proceedings for scrutiny, Clause (1) and (3) read thus :

> "1. The assessee filed return of income (ROI) on 26/07/2005 declaring total income of Rs.55,37,400/-. The assessee is Non-Resident and is governed by DTAA with UAE.
>
> 3. In response to the notices issued, assessee's authorized representative (A.R.) Mr. Suresh Pai attended from time to time and the case was discussed with him. The details called for have been furnished which are placed on record. From the passport submitted it is found that the assessee had stayed 185 days abroad and hence, he qualifies as a Non-Resident."

The said observations clearly reveal that the petitioner had disclosed that he was governed by the DTAA with UAE. It further discloses that details called for have been furnished and placed on record. The passport also was produced to establish the number of days the petitioner was abroad to qualify to be a Non-Resident. In such circumstances, it cannot be said that the petitioner had not disclosed the fact to show that he was entitled for the benefits of DTAA with UAE and that for such qualification, the Assessing Officer had called upon to produce the passport.

11. In the Judgment reported in [2016] 382 ITR 93 (Bom)., in the case of ***Nirmal Bang Securities Pvt. Ltd., vs. Assistant Commissioner of Income-tax and ors.,*** the Division Bench of this Court, relying upon the Judgments of the Apex Court, has observed thus :

> "22. It is now well settled that the reasons which are recorded by the Assessing Officer for re-opening an assessment are the only reasons which could be considered. No substitution or deletion is permissible. No addition can be made to those reasons and no inference can be allowed to be drawn based on reasons not recorded. The reasons which are recorded by the Assessing Officer for re-opening the assessment are the only reasons which could be considered when the formation of the belief is impugned. The requirement of recording reasons is a check against arbitrary exercise of power, for it is on the basis of the reasons recorded and those reasons alone that the validity of the notice for re-opening an assessment can be sustained. The

reasons cannot be allowed to grow with age and ingenuity by devising and/or supplementing additional reasons in replies and affidavits not envisaged in the reasons recorded for re-opening the assessment. To put it simply, the validity of a notice under section 148 of the Act has to be tested on the basis of the reasons recorded for initiating the re-assessment proceedings. The reasons recorded cannot be supplemented by affidavits and other material. In this regard, Mr. Murlidharan's reliance upon the judgment of this Court in the case of *Hindustan Lever Ltd. v. R.B. Wadkar, Asst. CIT (No.1)* (2004) 268 ITR 332 is well founded. At pages 337 and 338, this Court held as under:-

> "The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing officer to form his opinion. It is for him to put his opinion on record in black and white. 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. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, whereas, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced."

23. In fact, after relying upon the judgment of this Court in Hindustan Lever Ltd. (supra), another Division Bench of this Court in the case of Prashant S. Joshi v. Income Tax Officer and another : (2010) 324 ITR 154, held thus (page 158):--

" Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The first proviso to section 147 has no application in the facts of this case. The basic postulate which underlies section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under section 147. The reasons which are recorded by the Assessing officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under section 148." (emphasis supplied)

24. In view of the aforesaid well settled legal position and there admittedly being not even an allegation in the reasons recorded that there was any failure on the part of the Petitioner to disclose truly and fully any material fact necessary for assessment, let alone the details

thereof, the impugned notice dated 30th March, 2007 and the impugned order dated 5th December, 2007 are liable to be quashed and set aside on this ground alone.

25. In the facts of the present case, even otherwise from the record we find that the Petitioner had disclosed fully and truly all material facts relating to the dividend income received by it. This is clear firstly from the return of income filed by the Petitioner on 27th November, 2000 where in the computation annexed to the return, the Petitioner had stated that it had earned dividend income of Rs. 3,38,45,293/- which was fully exempt from tax under section 10(33) of the Act. Secondly, in the profit and loss account, the Petitioner had disclosed by way of Schedule 'M' that it had earned dividend income of the aforesaid amount. Thus there being a full and true disclosure of all material facts relating to earning of dividend income from units of mutual funds and the claim for exemption under section 10(33) of the Act, the impugned notice is without jurisdiction as it fails to satisfy the criteria as set out in the first proviso to section 147 of the Act.

26. We further find that during the assessment proceedings under section 143(3) of the Act, the Assessing officer called for particulars and sought explanations from the Petitioner specifically on the issue of the dividend income earned by the Petitioner from mutual funds. By its letters dated 22nd November,

2002 and 18th December 2002, the Petitioner furnished all the information and complied with the requisitions of the Assessing Officer. As can be seen from the letter dated 22nd November, 2002 (at page 70, read with page 134 of the paper-book), the dividend income received by the Petitioner from the aforesaid three mutual funds was clearly disclosed and specifically brought to the attention of the Assessing Officer. After taking these disclosures into account, the Assessing Officer passed his assessment order under section 143(3) of the Act on 31st March, 2003 and which can be found at page 147 of the paper-book. In this assessment order, the Assessing Officer specifically refers to the names of the aforesaid three mutual funds, the number of units purchased by the Petitioner and the dividend received therefrom. In the computation of income, the Assessing Officer has specifically recorded that the dividend income of Rs. 3,38,45,293/- is exempt from tax. It is on this basis that the total income computed by the Assessing Officer came to Rs. 6,81,54,960/-. All this material would clearly show that the Assessing Officer, during the regular assessment proceedings under section 143(3) of the Act, had specifically applied his mind to the dividend income earned by the Petitioner during the A.Y. 2000-2001 and on due consideration of these facts, he passed his assessment order under section 143(3) of the Act forming an opinion that the dividend income earned by the Petitioner was exempt from tax. This would clearly establish that there was due application of mind to all relevant facts and thereafter an opinion was formed that dividend income earned from the aforesaid three mutual funds are exempt from tax under section 10(33) of the Act. We have therefore no hesitation in holding that the initiation of reassessment proceedings has been undertaken merely on the basis of a change of opinion. Thus, the impugned notice is not sustainable also on the ground that it proceeds on a mere change of opinion."

12. Taking note of the said observations, in the present case whilst taking the impugned action, we find that there are no specific reasons recorded what was the material which was not truthfully disclosed. As pointed out herein above, the fact that the petitioner was claiming the benefit of the DTAA between India and UAE would clearly disclose that at the relevant time the requirement of period of residence in UAE was not necessary. Whilst completing the regular assessment the queries sought by the Assessing Officer were answered by the petitioner and accordingly, being satisfied, the regular assessment came to be completed. In this background, whilst the

action on the part of the respondents-Revenue is a change of opinion, it cannot be the reason for reopening the assessment under Section 148 of the said Act.

13. In such circumstances, we find that the question of reopening the assessment under Section 148 of the said Act would not at all be justified. Considering the view that we have taken on the aforesaid aspect, the contention of the learned Senior Counsel that the respondent No.3 had no jurisdiction or that the proceedings itself are barred by limitation need not be gone into in the present petition.

14. In view of the above, we pass the following :

O R D E R

(I) The impugned Notices dated 28th March, 2012 and 29th March, 2012, as well as the impugned Order dated 27/09/2013 are quashed and set aside.

(II) Rule is made absolute in the above terms.

(III) No costs.

NUTAN D. SARDESSAI, J. **F.M. REIS, J.**

ssm.