Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1000 OF 2017

Zuari Foods and Farms Pvt. Ltd.,
373, D B Marg, Miramar, Panaji
Goa 403 001. ..... Petitioner.

V/s.

1. Asst. Commissioner of Income-tax,
Circle 1(1), Panaji, Goa.

2. Commissioner of Income-tax,
having his office at
Patto, Panaji-Goa. ..... Respondents.

Mr. K. Gopal with Mr. Shivan Desai, Advocates for the Petitioner.

Ms. Susan Linhares, Junior Central Govt. Standing Counsel for the Respondents.

Coram : N .M. Jamdar &
Prithviraj K. Chavan, JJ.

Date : 13 March 2018.

ORAL JUDGMENT : (Per N.M. Jamdar, J.)

Rule. Rule made returnable forthwith. The respondents waive service. Taken up for final disposal.

2. The Petitioner-Assessee has challenged the notice under Section 148 of the Income Tax Act, 1961 issued by Respondent No.1

-Assistant Commissioner of Income-tax, dated 17 October 2016 and the order passed on 3 October 2017, disposing of the objections raised by the Petitioner.

3. The Petitioner filed its return of income for the Assessment Year 2011-12, declaring its total income as Nil, after claiming exemption under Section 10(1) of the Act. The date of the assessment order was 31 March 2012. Scrutiny assessment proceedings were initiated and a notice was issued on 22 February 2013. The Petitioner filed its response on 13 July 2013. Thereafter, the explanation given by the Petitioner was accepted and the scrutiny assessment proceedings were closed by an order dated 30 December 2013.

4. A notice under Section 148(1) of the Act was issued to the Petitioner on 17 October 2016. The Petitioner made a representation seeking reasons. The Petitioner received the reasons supplied by Respondent No.1 for reassessment and the Petitioner filed its objections on 14 September 2017. Thereafter, Respondent No.1 passed an order rejecting the objections, on 3 October 2017. The Petitioner has challenged the reassessment proceedings.

5. In a series of decisions of the Apex Court and of this Court, have explained contours of the jurisdictional requirement

under Sections 147, 148 of the Act. Some of these are, *CIT vs. Benoy Kumar Sahas Roy*,[1] *Praful Patel vs. ACIT*,[2] *Dr. Amin's Pathology Lab. v.s, JCIT*,[3] *Kalyanji Mavji vs. CIT*,[4] *S. Narayanappa vs. CIT*[5], *Revathy CP Equipment Ltd. vs. DCIT*[6], *Rakesh Aggarwal vs. ACIT*,[7] *Income Tax Officer vs. Biju Patnaik*[8], *CIT Vs. Mahaliram Ramjidas*,[9].

6. In the case of *Godrej Industries Ltd. vs. B.S. Singh, Deputy Commissioner of Income-tax and ors.*[10], the Division Bench (Sanklecha and Jamdar, JJ) has summarised the position of law as regards the jurisdiction under Sections 147, 148 of the Act, as under :

> *"9 We have considered the rival submissions. The law with regard to reopening of assessment is fairly settled. An assessment can be reopened under section 147 and section 148 of the Act only on the jurisdictional requirement for reopening of an assessment being strictly satisfied. This is for the reason that a reopening of an assessment would disturb an settled position by reopening a completed*

1 1975 (0) Supreme (SC) 66

2 [1999] 236 ITR 832

3 [2001] 252 ITR 673

4 1976 ITR 0287

5 [1967] 63 ITR 219

6 [2000] 108 Taxman 279

7 [1996] 87 Taxman 306 (Del)

8 [1991] 56 Taxman 165 (SC)

9 [1940] 8 ITR 442 (PC)

10 [2015] 377 ITR 1 (Bom)

proceeding. Normally, the jurisdictional requirements to be satisfied for issuing of an reopening notice are as under:

(a) the Assessing Officer must record his reasons/grounds for issuing a reopening notice before issuing the same;

(b) the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment and the same must be recorded/revealed in his reasons/grounds;

(c) the Assessing Officer should not have considered the issue on which the reopening is sought during the regular assessment proceedings. In case the issue has been considered even if evidenced by asking questions then such an attempt to reconsider would not be permitted on ground of being a mere change of opinion;

(d) the reopening of an assessment must be on tangible material and the grounds/reasons for reopening must be recorded before the issuing of notice for reopening of an assessment;

(e) these grounds/reasons recorded for reopening of an assessment must disclose a live link between the tangible material and the reason to believe that income chargeable to tax has escaped assessment;

(f) in case of assessments sought to be reopened are beyond a period of four, years from the end of the relevant assessment year then there should have been a failure on the part of the assessee to truly and fully disclose all material facts necessary for assessment; and

(g) sanction of a superior officer to the reasons recorded, where required, in terms of section 151 of the Act should have been obtained before issuing of the impugned notice.

> *10. Therefore, the reasons recorded at the time of issuing notice is the only evidence of the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment. These reasons cannot be added to, deleted from or supplemented. Besides when a notice for reassessment is challenged, the burden is on the Revenue to establish that the jurisdictional requirement stands satisfied. So far as the reason to believe on the part of the Assessing Officer is concerned, at the stage of issuing the notice only a prima facie and not a conclusive case of income escaping assessment should be established to turn down a challenge to the reopening notice."*

7. In *Tao Publishing Pvt. Ltd. vs. Deputy Commissioner of Income-tax and anr.*[11], the Division Bench of this Court (Sanklecha and Jamdar, JJ) has observed thus :

> "***9.*** *The learned counsel for the petitioner rightly pointed out that the ground that the petitioner had failed to disclose all the relevant material was not incorporated in the reasons supplied to the petitioner. The object of furnishing reasons for reopening, is to put the assessee to notice as to why the Assessing Officer has reason to believe that income has escaped assessment. Apart from this position, in the present case, the reasons supplied do not state that there was any failure on the part of the petitioner to provide material particulars. That an assessee has not made a full and true disclosure of facts, is one of the jurisdictional requirement for proceeding with reassessment after a period of four years. In the case of Hindustan Lever Ltd. v. R.B. Wadkar, Asst. CIT (No. 1)reported in [2004] 268 ITR 332 (Bom), this court had held that the notices for reassessment would stand or fall on the basis of reasons and the reasons cannot be improved upon, substituted or supplemented. This view has been followed by this court in several other*

11 [2015] 370 ITR 135 (Bom)

cases.

> *10. As stated above, the reasons supplied to the petitioner do not disclose that there was any failure on the part of the petitioner to provide all the material facts. That being the position, this ground could not have been taken up against the petitioner at the time of disposing of the objections. Once this was not the basis for issuance of notice for reassessment, it cannot be held against the petitioner that the petitioner had failed to make a true and full disclosure. It will have to be held that the petitioner did not fail to make full and true disclosure of all material facts. The jurisdictional requirement for carrying out the reassessment, after the expiry of the period of four years, is not fulfilled in the present case."*

8. Thus Section 147 of the Act empowers the Assessing Officer, if he has a reason to believe that any income chargeable to tax has escaped assessment, to reassess the income. Section 147, however, contains a proviso that no action under section 147 will be taken after a period of expiry of four years of the end of the relevant assessment year, unless the assessee had failed to disclose fully and truly all material facts necessary for his assessment for that assessment year. It is settled law that the conditions specified in section 147 are jurisdictional requirements and unless they are fulfilled no proceeding under these sections can be taken. It is open for the assessee to challenge the initiation of the reassessment proceedings, if the assessee is able to show that the jurisdictional requirements are not met. The Assessing Officer must disclose reasons why

reassessment proceedings are being taken out. The Assessing Officer is not permitted to improve upon the reasons so furnished to the assessee. The validity of the initiation of the assessment proceedings will be determined only by the reasons furnished by the Assessing Officer to the assessee. If the reassessment proceedings are to be initiated after a period of four years on the ground that the assessee failed to make full and true disclosure of all necessary facts, then the Assessing Officer must state so in the reasons and the action must be founded on such reasons.

9. Turning now to the facts of the case, when the case was taken up for scrutiny, the Petitioner was confronted with the query as regards the agricultural income from the mushroom farming and the Petitioner had relied upon certain certificates. The Assistant Commissioner disposed of these scrutiny proceedings observing thus:

> *"3. The assessee Zuari Foods and Farms Pvt. Ltd. is engaged in Mushroom farming activities in Cancona, Goa. Mushroom grows from long fine white grey threads called mycelium which ultimately develop fruiting bodies when treated under specific/controlled conditions. Mushrooms are grown in a closed chamber and various other aspects of cultivation of Mushroom are discussed with Shri Verlekar, CA & AR of the assessee. Shri Verlekar also produces various Certificates/Letters issued by different Govt. Authorities in support of assessee disclosing its income from Mushroom Cultivation as*

Agricultural Income. These include -

a) Certificate from Directorate of Agriculture certifying that Mushroom growing is agricultural activity.

b) Registration Certificate from Ministry of Civil Supplies, Consumer Affairs and Public Distribution (Weight and Measures) stating the product to be fresh mushrooms (vegetable).

c) VAT assessment order confirming that the assessee is dealing in mushroom and that gross turnover is exempt from tax as per entry no.23 (fresh vegetables and fruits) of Schedule D of VAT Act, 2005 being Agricultural Sale/Income.

d) Letter from Goa State Pollution Control Board stating that since growing and processing of tropical mushrooms is an agricultural activity, clearance from Board is not required.

*4. Hence from a perusal of details filed by the assessee in the course of hearing as well as facts of the case, it is inferred that the assessee is deriving Agricultural Income. Hence the total income assesse*d for income tax purpose is assessed at NIL."

10. Thereafter, the reassessment proceedings have been initiated after a period of four years. The first requirement is that there must be failure on the part of the assessee to disclose fully and truly, all material facts. The reasons supplied to the Petitioner do not contain even the usual formal statement that there has been failure to disclose material information by the Petitioner. The legal position is settled that even if such a statement is made, it is only a

reproduction of the section and does not necessarily show the existence of this fact. But in the present case, even that statement is missing. Therefore, the Petitioner was not put to notice as to which information the Petitioner had failed to disclose which led to invocation of Sections 147, 148 of the Act. Thereafter, when the order was passed on 3 October 2017, it only refers to the decision which treated the mushroom farming as not an agricultural income.

11. The learned Standing Counsel submitted that it is a legal position that mushroom farming is not an agricultural activity and consequently, the Petitioner is not entitled to any exemption. That, however, is on the merits of the reassessment proceedings. The Respondents will have to first show whether the Respondent is entitled to invoke jurisdiction under Sections 147, 148 of the Act. In the order disposing of the objections, after referring to some decisions, many of them relate to the reopening of assessment prior to four years, the respondent No.1 has observed in two lines thus :

> *"Further, the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee, on account of not disclosing fully and truly all material facts necessary for the assessment year. Hence, such omission on your part tantamounts to failure due to non-disclosure of full & true material facts by you. Re-opening proceedings were initiated with approval of higher authorities."*

12. By only stating in one line that these omissions on the part of the Petitioner tantamount to failure on the part of the Petitioner to disclose fully and truly all material facts, the jurisdictional requirement is not satisfied. The Petitioner had placed all the primary facts before the Assessing Authority in the scrutiny assessment proceedings and the Authority had taken a particular view of the matter. It is only by change of opinion that the reassessment proceedings are sought to be initiated. In view of the settled law, we hold that the Respondent-Authority had no jurisdiction to proceed under Sections 147, 148 of the Act.

13. In these circumstances, the Petitioner is entitled to succeed. The petition is accordingly allowed. Rule is made absolute in terms of prayer clause (a). No costs.

14. Before parting, we have to note that we have come across series of orders passed by the same Assistant Commissioner wherein reassessment proceedings are initiated after the period of four years and the reasons supplied and the actions taken are not in consonance with the settled law. We request the learned Standing Counsel to supply compilation of the above referred judgments to the concerned Commissioner.

Prithviraj K. Chavan, J. ***N.M. Jamdar, J.***