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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1060 OF 2017

Dempo Brothers Private Limited
Dempo House,
DB Bandodkar Marg, Campal,
Panaji, Goa 403 001, represented
through its Director,
Ms.Sharmila Prabhu.

... Petitioner.

Versus

1. Assistant Commissioner of Income Tax
Circle 1 (1)
Aaykar Bhavan, 1st Floor, EDC,
Patto Plaza,
Panaji, Goa.

2. Union of India
Through the Secretary (Revenue),
Ministry of Finance,
North Block, New Delhi 110001. ... Respondents.

Mr.Mihir Naniwadekar with Ms.Vinita V.Palyekar,
Advocates for the Petitioner.
Ms.Susan Linhares, Junior Central Government Standing
Counsel for the Respondents.

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

Date : 6 March 2018.

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

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for disposal.

2. The Petitioner, by this petition, has prayed for a declaration that the notice issued under Section 148 of the Income Tax Act dated 29 March 2017 and the order passed rejecting the objections raised by the Petitioner on 9 November 2017 and the reassessment proceedings for the Assessment Year 2010-11, be quashed and set aside.

3. The Petitioner is a Company incorporated under the Companies Act. The petition concerns the Assessment Year 2010-11. The Petitioner had filed its return of income for the Assessment Year 2010-11. The case was selected for scrutiny. Notices under Sections 143(2) and 142 (1) of the Act were served on the Petitioner. The Petitioner was also served with a questionnaire on 19 February 2013, which the Petitioner replied on 22 February 2013, giving certain particulars. The Petitioner gave response to the query raised in the questionnaire as regards the sale of shares of Goa Carbon Limited, which according to the Petitioner, was a wholly owned subsidiary of Esmeralda Investments Private Limited. The Assessing Officer called

for further particulars by a letter dated 1 March 2013 and after considering the explanation of the Petitioner, passed the scrutiny assessment order on 22 March 2013.

4. After lapse of four years, on 29 March 2017, notice was issued to the Petitioner under Section 148 of the Act. The Petitioner sought reasons for reopening of the assessment by letter dated 4 April 2017. Respondent no.1 furnished reasons by letter dated 5 October 2017. In the letter, it was stated that the Petitioner did not produce requisite Form under Rule 29B and the profit from sale of shares of Goa Carbon Limited to Esmeralda Investments Private Limited was not brought to tax. The Petitioner gave his reply to the objections on 13 October 2017, which were rejected by the impugned order dated 9 November 2017. The Petitioner has thereafter filed this present writ petition challenging the reassessment proceedings. Reply-affidavit has been filed by the Respondents. By order dated 21 February 2018, we had directed that petition will be taken for disposal.

5. We have heard Mr. Naniwadekar, the learned counsel for the the Petitioner and Ms. Linhares, learned Junior Central Government Standing Counsel for the Respondents.

6. Section 147 of the Act deals with the income escaping assessment and states that if the Assessing Officer has reason to believe that any income has chargeable to tax has escaped assessment, is he empowered to reopen the assessment as per the conditions laid down. The proviso to Section 147, however, mandates that the reassessment shall not be initiated after the expiry of four years from the end of the relevant assessment year, unless there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. Through various decisions of the Apex Court as well as this Court, the legal position is settled that the failure on the part of the assessee fully and truly to disclose all material facts, is jurisdictional requirement for the purpose of proceeding to reassess the income. It is also an established position unless this jurisdictional requirement is met, the Assessing Officer cannot proceed to reopen the assessment. If this jurisdictional requirement is not met, the assessee is entitled to invoke the writ jurisdiction of this Court. It is further settled that the reasons are the foundation for the invocation of Sections 147 and 148 of the Act. It is not open to the Assessing Officer to add to the reasons and the reasons given must speak for themselves. By merely stating that 'there is failure on the part of assessee to disclose fully and truly all material facts' in the order does not satisfy the requirement of this

Section, as it would amount to merely reproducing the language of the section.

7. Mr. Naniwadekar submitted that not only the reasons supplied to the Petitioner do not elaborate and disclose in what manner the Petitioner has not furnished the relevant material facts so that the power of reassessment can be exercised, there has been no withholding of the relevant material and the Petitioner has produced all the necessary information when the case was taken for scrutiny. Ms. Linhares submitted that the Petitioner did not produce Form 29B as per Rule 40B of Income Tax Rules, 1962, which has led to escapement of income of substantial amount. Learned Counsel submitted that there is no error in the impugned order as there was failure on the part of the Petitioner to disclose all the material facts.

8. When the Petitioner's case was taken up for the scrutiny, the Petitioner was specifically confronted with the questions as regarding the transaction in respect of the sale of shares of Goa Carbon Limited. The Petitioner was specifically asked why the profits from sale should not be taxed. The Petitioner replied to this question and explained that the Petitioner is a wholly owned subsidiary of Esmeralda Investments Private Limited and transfer of capital asset to Esmeralda Investments Private Limited is not regarded

as a transfer. It was not the case of the Petitioner that the transfer is exempted under the provisions of Section 10 (38) of the Act but, it was the contention of the Petitioner that it is not a transfer at all. The contention based on Section 10 (38) was invoked for the purpose of sale of shares of HDFC Bank. This explanation of the Petitioner was accepted by the Assessing Officer.

9. In the reason supplied to the Petitioner, it has been stated by the Assessing Officer, which is also the contention of Ms. Linhares that the Form 29B was not furnished by the Petitioner. Mr. Naniwadekar has drawn our attention to Section 115JB, which deals with special provision for payment of tax by certain Companies. Sub-section (4) of Section 115JB reads thus:

(4) Every company to which this section applies, shall furnish a report in the prescribed form from an accountant as defined in the Explanation below sub-section (2) of section 288, certifying that the book profit has been computed in accordance with the provisions of this section along with the return of income filed under sub-section (1) of section 139 or along with the return of income furnished in response to a notice under clause (i) of sub-section (1) of section 142”.

As rightly contended by Mr.Naniwadekar, the Section refers to

production of the Form from an accountant along with the original assessment. This requirement, therefore, is at the time of original assessment. But the matter of the Petitioner had travelled much further than that stage. The Petitioner's case was taken in scrutiny and the Petitioner was specifically called upon to respond to the certain queries, which the Petitioner did.

10. Mr. Naniwadekar is right in contending that the Petitioner has placed all the primary facts before the Assessing Authority namely that the concerned Company was a wholly owned subsidiary Company and the transfer share does not amount to transfer. After disclosing this position, the Assessing Officer accepted the explanation of the Petitioner. The Apex Court in the case of *Gemini Leather Store Vs. Income Tax Officer, B-Ward and others*¹ has observed that in every assessment proceeding the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inference as regards certain other facts; and ultimately from the primary facts and the further facts inferred from

¹[(1975) 100 ITR 1 (SC)]

them, the authority has to draw the proper legal inferences. It was held that once all the primary facts are before the assessing authority he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else, far less the assessee, to tell the assessing authority what inferences, whether of facts or law, should be drawn. The Apex Court has thus concluded that the Income Tax Officer in that case thus had all the material facts before him when he made the original assessment and he cannot now take recourse to [Section 147\(a\)](#) to remedy the error resulting from his own oversight.

11. Thus, if the primary facts are placed before the Assessing Officer, the Assessing Officer is in a position to take decision thereupon, it cannot amount to failure on the part of the assessee to withhold to furnish the material particulars. The Assessing Officer, in the impugned order has referred to various decisions, however, none of the decisions lay down that even though the primary facts were placed before the Assessing Officer at the time of scrutiny, on account of non-furnishing of the Form at the time of the original assessment, the assessment can be reopened, neither any such decision is brought to our notice.

12. Therefore, we are of the opinion that the Petitioner had placed on record the necessary information for the purpose of assessing income as regard the transfer of shares. What is sought to be done by the Assessing Officer now is a reopening of assessment after four years, on a mere change of opinion. The non-furnishing of the Form is only an excuse given by the Assessing Officer to attempt to exercise an nonexistent power.

13. In these circumstances, since the jurisdictional requirements for invoking the provisions of Sections 147 and 148 of the Act are not met, as the Petitioner did not fail to disclose all the material facts necessary for the assessment, the petitioner is entitled to succeed. Accordingly, the writ petition is allowed in terms of prayer clauses (a) and (b).

14. Rule is made absolute in the above terms. No order as to costs.

Prithviraj K. Chavan, J

N.M. Jamdar, J.