IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2976 OF 1999

M/s. B.M. Associates .. Petitioners

v/s.

Asst. Commissioner of Income Tax,
Circle 29(2), Mumbai & Ors. .. Respondents

Mr. Prakash Pandit a/w Ms. Prachi Pandit, Mr. P.L. Tripathi i/b Prashant Prabhu for the petitioners
None for the respondents

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

DATED : 18th JANUARY, 2018.

P.C.

1. None appears for the respondents. This inspite of the respondents having waived service at the time of admission of the petition on 21th December, 1999. Nor have the respondents filed any reply opposing this petition.

2. This petition under Article 226 of the Constitution of India challenges Notice dated 10th August, 1998 issued by respondent no.1 – Assistant Commissioner of Income Tax under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice seeks to reopen the assessment for Assessment Year 1994-95.

3. For the Assessment Year 1994-95, the petitioners filed its return of income on 31st August, 1994 declaring a total income of Rs.6.43 lakhs. During the course of assessment proceedings, the Assessing Officer called upon the petitioners to furnish information with regards to loans / advances taken from its sisters concern M/s. A.T.C. Clearing and Shipping (P) Ltd. in which the petitioners hold more than 10% share holdings. This was in the context of deemed dividend under Section 2(22)(e) of the Act. On examination of the accounts and consideration of submissions made by the petitioners, the Assessing Officer added an amount of Rs.8.17 lakhs as deemed dividend under Section 2(22)(e) of the Act on account of the loans taken by the petitioners from M/s. A.T.C. Clearing and Shipping (P) Ltd. Thus, by an assessment order dated 14th February, 1996 passed under Section 143(3) of the Act assessed the petitioners to a total taxable income of Rs.14.90 lakhs.

4. Thereafter, on 10th August, 1998, the respondent no.1 – Assistant Commissioner of Income Tax, issued the impugned notice seeking to reopen the assessment for Assessment Year 1994-95. The reasons recorded in support of the impugned Notice dated 10th August, 1998 as

made available to the petitioners, reads as under :-

> *"The reasons recorded for re-opening your case for the A.Y. 1994-95 is as under :-*
>
> *The assessee has taken loan / advances from its sister concern, M/s. A.T.C. (Clearing and Shipping) Pvt. Ltd. a company in which it hold more than 10% share holding. During the course of assessment proceedings, an addition of Rs.8,17,507/- was made u/s 2(22)(e) on account of deemed dividend. However, in doing so, the A.O. Considered only the credit balance in the account. When all the transactions of loan / advance needed to be considered for the purpose of section 2(22)(e). This as can be pointed out would result in a much higher addition on account of 2(22)(e) than the peak credit originally added back, during the course of assessment. Hence there has been under assessment to the extent of difference between all credit transaction and peak credit.*
>
> *In view of the above, under assessment of the income, it is proposed to re-assessment u/s 147. Notice u/s 148 re-opening the assessment is issued".*

5. The petitioners had filed this petition challenging the reopening notice as being without jurisdiction. The respondents have entered appearance but have not filed any reply opposing the petition.

6. In the present case, the impugned Notice dated 10th August, 1998

has been issued within the period of 4 years from the end of the relevant assessment year i.e. A.Y. 1994-95. The impugned reopening notice is in respect of the assessment which has been done under Section 143(3) of the Act. However, as the notice has been issued within the period of 4 years from the end of the assessment year, the first proviso of failure to disclose truly and fully all material facts necessary for assessment, would not apply. Nevertheless, as held by the Apex Court in ***Commissioner of Income Tax Vs. Kelvinator of India Ltd. 320 ITR 561***, the following observations will determine the validity of the notice :-

> *"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse*

of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act."

7. In the present facts, from the reasons as recorded in support of the impugned notice, it is clear that the Assessing Officer has arrived at a reason to believe that income chargeable to tax has escaped assessment on the same material, which was a subject matter of consideration while passing of the assessment order dated 14th February, 1996 under Section 143(3) of the Act. Thus, there is no tangible material which was not available and examined during the regular assessment proceedings under Section 143(3) of the Act.

8. In fact, in this case we find that the Assessing Officer had during the assessment proceedings, leading to the order dated 14th February, 1996 under Section 143(3) of the Act had examined the very issue of deemed dividend in respect of loans taken from M/s. A.T.C. Clearing and Shipping (P) Ltd. On complete inquiry, the Assessing Officer in his assessment order dated 14th February, 1996 after a detailed discussion on the issue, added Rs.8.17 lakhs as deemed dividend under Section

2(22)(e) of the Act. This on the basis of loans taken from M/s. A.T.C. Clearing and Shipping (P) Ltd. The reasons as recorded now seeks to take a different view (change of opinion) on the same material on which the original assessment order dated 14th February, 1996 was passed after due consideration to hold that income chargeable to tax has escaped assessment.

9. In view of the above, the impugned notice is completely without jurisdiction as it is based purely on a change of opinion. The impugned notice for reassessment seeks to review the Assessment Order dated 14th February, 1996. This is not permissible.

10. Accordingly, the petition is allowed and the Notice dated 10th August, 1998 issued under Section 148 of the Act is quashed and set aside.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**