

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

WRIT PETITION NO.3444 OF 2018

Himmatbhai M. Viradiya

... Petitioner

V/s.

The Income Tax Officer -25(2)(4) and ors.

... Respondents

Mr.Niraj Sheth with Mr.Tanzil Padvekar i/by M/s Dave & Padvekar Associates for the Petitioner.

Mr.Sham Walve for the Respondents.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : DECEMBER 13, 2018.**

P.C.:-

1. Petitioner has challenged a notice of re-opening of assessment dated 29th March, 2018 issued by the Respondent No.1-Income Tax Officer.

2. Brief facts are as under:

Petitioner is an individual. For the assessment year 2011-12, the petitioner filed return of income on 29th July, 2011

declaring total income of Rs.6,04,017/-. The return was accepted under Section 143(1) of the Income Tax Act, 1961 (“the Act” for short) without scrutiny. To re-open such assessment, the Assessing Officer issued the impugned notice. There is some controversy about what precisely the reasons the Assessing Officer had recorded, in order to issue such notice. However, the gist of the reasons was that the assessee had received brokerage in cash Rs.21,65,980/- and invested a sum of Rs.61,34,800/- in cash for purchase of a residential property in a scheme situated at Kandivali (W) to be developed by one M/s Sony & Associates. According to the reasons Police Authorities had recorded the statements of various persons including the petitioner, in which such cash payment was admitted. According to the Assessing Officer, therefore, the cash amount of Rs.61,34,800/- was undisclosed income of the assessee, which had escaped assessment.

3. The petitioner demanded reasons from the Assessing Officer. At one stage the Assessing Officer made a following communication on 22nd May, 2018:-

“Reasons recorded for reopening are as under:

Information received regarding group of persons from diamond market who have allegedly made cash payment for purchase of residential property to be constructed at Dahanukarwadi, Kandivali (W), Mumbai, under SRA scheme by developer M/s Soni & associates. As per information, during the F.Y. 2010-11, assessee being Estate Agent have received brokerage in cash of Rs.21,65,080/- & also amount of Rs.61,34,800/- in cash is invested by him to purchase residential property under the said SRA scheme of Kandivali by developer M/s Soni & associates.

The fact is admitted in the statement recorded in Malad police station for the FIR filed dated 29/04/2015, against developer M/s Soni & Associates for not completing the said SRA project & also not returning the back the cash paid by the members. On verification of the AIR information the assessee has declared business income of Rs.6,03,739/- only in return for the A.Y. 2011-12, whereas he has paid cash of Rs.61,34,800/- to M/s Soni & Associates. The said cash investment is from unexplained source & undisclosed & not offered to tax, for the A.Y. 2011-12. On this basis, I have reason to believe that escapement of income exceeding Rs.1 lac has resulted in underassessment within the meaning of sec.147 of I.T.Act, 1961, for the A.Y. 2011-12. Hence, the case is reopened.”

4. In response to the application filed by the petitioner under Right to Information Act, the Assessing Officer supplied the reasons in prescribed format. The contents of which read as

under:-

“Reasons for reopening of the assessment in the case of HIMMAT M. VIRADIYA for A.Y. 2011-12 u/s 147 of the Income Tax Act, 1961

The assessee has filed return of income for A.Y. 2011-12 on 29/07/2011 declaring total income of Rs.6,04,017/-. The return was processed under section 143(1) of the Income tax Act, 1961.

2. Information was received regarding group of persons from diamond market who have allegedly made cash payments for purchase of residential property to be constructed at Dahanukar wadi, Kandivali(W), Mumbai, under SRA scheme by developer M/s Soni & Associates. The assessee is one of the persons in this case of black money transaction/tax evasion. As per the information, it is seen that during the F.Y. 2010-11, the assessee being estate agent has received brokerage in cash of Rs.21,65,980/- & also amount of Rs.61,34,800/- in cash is invested by him to purchase residential property under the said SRA Scheme at Kandivali West by developer M/s Soni & Associates.

3. All the members filed FIR with Malad Police Station vide FIR No.22/2015 dtd. 29.4.2015 against the developer for not completing the said project & also not returning back the money, to them. During the statements recorded in police station, all the members including the assessee admitted the payment of cash made for the purchase of residential flat, during F.Y. 2010-11 to the developer M/s soni & Associates.

4. On verification of the AIR information, it is seen the assessee has declared business income

of Rs.6,03,739/- only for A.Y. 2011-12 whereas as per the information, he has paid a sum of Rs.61,34,800/- in cash to M/s Soni & Associates in F.Y. 2010-11.

5. Thus the cash investment of Rs.61,34,800/- has been through undisclosed sources and is unexplained. The source of income has not been disclosed and offered to tax for A.Y. 2011-12.

6. It is evident from the above facts that in this case, the assessee has failed to disclose fully and truly all material facts relevant to the assessment year under consideration. Therefore, on the basis of the above findings, I have reason to believe that income of more than Rs.61,34,800/- has escaped assessment for A.Y. 2011-12 within the meaning of Explanation 2(b) to section 147 of the Act.

7. It is pertinent to mention that the assessee has filed return of income for year under consideration but no assessment as stipulated u/s 2 (40) of the Act was made and the return of only processed u/s 143 (1) of the Act. In view of the above, the provisions of clause (b) of Explanation 1 to Section 147 of the I.T.Act, 1961 are applicable to the facts of this case and the assessment year in consideration is deemed to be a case where income chargeable to tax has escaped assessment.

8. In this case, more than four years have lapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice u/s 148 of the Act has been obtained separately from the Pr. Commissioner of Income Tax as per the provisions of Sec 151 of the Act.”

5. Petitioner raised detailed objections to the notice of re-opening under a communication dated 4th September, 2018. such objections however were rejected by the Assessing Officer by an order dated 29th September, 2018. Dissatisfied with the manner of disposal of the objections by the Assessing Officer, the petitioner yet again approached the Assessing Officer under a communication dated 17th October, 2018 and requested him to pass a speaking order. Such request was rejected by the Assessing Officer under communication dated 15th November, 2018, thereupon the present petition has been filed.

6. Counsel for the petitioner submitted that the Assessing Officer had supplied two sets of reasons. It is not clear which reasons were existing on record when the sanction from the Principal Commissioner was obtained and impugned notice issued. He submitted that the Assessing Officer has not recorded any satisfaction in either of two sets of the reasons that income chargeable to tax had escaped assessment. He further submitted that there was no tangible material available with the Assessing Officer in order to issue the impugned notice of re-assessment.

Counsel further submitted that the reference to the information received by the Assessing Officer in the reasons recorded was not supplied to the petitioner nor backed by any documents on record.

7. On the other hand Mr. Walve for the department opposed the petition contending that the Assessing Officer had recorded only one set of reasons. There is material to believe that income of the petitioner has escaped assessment. Return filed by the petitioner was accepted under Section 143(1) of the Act.

8. It is undoubtedly true that the Department has communicated the reasons to the petitioner twice. We have taken note of both the communications and reproduced the relevant portions in this judgment. In the context of this controversy as to which set of reasons were on record and whether at the relevant time the reasons existed on record at all or not, we have summoned the original files from the Department. Learned counsel for the Department had made available the file of the Assessing Officer, of the Joint Commissioner of Income Tax

through whom the process of obtaining sanction was routed and that of the Principal Commissioner of the Income tax who had granted the sanction. We have perused all these files. We find that reasons conveyed to the petitioner in response to his query under Right to Information Act, the contents of which we have reproduced in this judgment existed on the file right from the beginning. The reasons find place in the file of the Assessing Officer. The request for granting sanction made to the Principal Commissioner was routed through the Joint Commissioner. The file of the Joint Commissioner shows that the request was received on 28th March, 2018. The Joint Commissioner put his remarks in the proforma that it was a fit case to re-open. This happened on 28th March, 2018. Perusal of the file of the Principal Commissioner would show that the Principal Commissioner also examined the reasons and the note put by the Joint Commissioner and in his own hand granted sanction in following terms:-

“Yes, I am satisfied with the reason given by the Assessing officer for re-opening the case under section 147.”

9. Right after the said sanction letter of the Principal

Commissioner Income Tax, one would find the reasons recorded by the Assessing Officer.

10. Under the circumstances, we are satisfied that the reasons did exist on file, were duly recorded by the Assessing Officer before obtaining sanction from the Principal Commissioner, that the Joint Commissioner perused such reasons and forwarded the same to the Principal Commissioner with his own remarks and lastly that the Principal Commissioner also put his endorsement that it was a fit case for re-opening of assessment.

11. The mix up by the Departmental Authorities in conveying reasons twice would not be fatal in the present case. Firstly, as noted above, we have verified that it was later set of reasons conveyed to the petitioner which exist on file. Secondly, the earlier communication dated 22nd May, 2018 also concerns the gist of same reasons. So far as the material aspects are concerned, we notice no change. In essence under communication dated 22nd May, 2018 the Assessing Officer had merely conveyed the gist of his reasons to the petitioner.

12. As noted, the present case is one where return filed by the petitioner is accepted without scrutiny. The Assessing Officer therefore, would have much wider latitude to re-open the assessment. The reasons recorded by him show that according to the Assessing Officer, the petitioner had invested the cash amount of Rs.61,34,800/- for purchase of an immovable property to be developed by one M/s Soni & Associates. The Petitioner had given a statement to the Police Authority, in which he had made such declaration. The return filed by the petitioner declared a total income Rs.6,04,017/-. It can thus be seen that the Assessing Officer had tangible material at his command to form a reasonable belief that income chargeable tax had escaped assessment. In the result, the petition is dismissed.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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