

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 14490 OF 2018

Akshar Builders and Developers

.. Petitioner

v/s.

Asstt. Commissioner of Income Tax-28(1)
Mumbai & Anr.

.. Respondents

Ms. Ritika Agarwal I/b ACE Legal for the petitioner
Mr. N.C. Mohanty for the respondents

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 17th JANUARY, 2019

P.C.

1. The petitioner has challenged a notice of reopening of assessment dated 29th March, 2018 under which the respondent no.1- Assessing Officer has reopened the petitioner's assessment for A.Y. 2011-12. In order to issue the notice, the Assessing Officer had recorded following reasons :-

“1. In this case return of income for A.Y. 2011-12 has been filed on 25.3.2013 declaring total income at Rs. NIL/-. The assessee is a builder and developer.

2. A detailed investigation report has been forwarded by Directorate of Investigation, Unit-1(2), Ahmedabad regarding survey action conducted on M/s. Mudra Finvest (Guj) Ltd. On 8.12.2016. The entity is involved in the jewellery business.

3. Four hard disk which contain digital data were impounded from the premises, 6 ground floor, revdi bazaar, Ahmedabad

during survey. On examination of these disks it is seen that M/s. MUDRA REAL ESTATE PRIVATE LTD is a group entity who has constructed and developed project "4-D SQUARE" in Ahmedabad – Gandhi Nagar road.

3.1 The tally data from the disk, contained ledgers of various parties cash book, trial balance, P/I account and balance sheet of M/s. Mudra Real Estate Private Ltd. For F.Y. 2010-11. On perusal of the same it is seen that huge amount was paid in cash to various entities. The name of AKSHAR BUILDER AND DEVELOPER PAN : AANFA3072H appears as one of these entities and is JV PARTNER in the development and construction of '4-D SQUARE'. A cash amount of Rs.3,54,82,000/- was paid to M/s. Akshar Builder and Developers on different dates. The ledger account retrieved from the disks of the period 1.4.2010 to 31.3.2011 showing cash entries paid to M/s. Akshar Builders and Developers along with other information is forwarded to the undersigned.

4. Specific information has been passed in the case of M/s. Akshar Builders and Developers regarding cash payments made by M/s. Mudra Real Estate Pvt. Ltd. Ahmedabad to M/s. Akshar Builders and Developers. The assessee firm M/s. Akshar Builders and Developers has filed Nil return of income for the A.Y. 2011-12. The information received from DGIT (Inv) Unit 1(2), Ahmedabad is credible information. The cash amount received amounting to Rs.3,54,82,000/- is not accounted for and not offered for taxation.

5. It is worth mentioning that the statement of Shri. Sanjaykumar Hundia Director of M/s. MUDRA REAL ESTATE PRIVATE LTD was recorded u/s 131 of the IT Act on 25.1.2018. He has admitted to knowing M/s. Akshar Builders and Developers who is co-developer of the project '4-D Square'. The cash book of M/s. Mudra Real Estate Pvt. Ltd. Ahmedabad which is enclosed also reflects the amount paid to M/s. Akshar Builder and Developer.

6. The analysis of the return of income filed does not reflect these transactions in the accounts or income. The return of income for AY 2011-12 does not reflect any of the above transaction. The statement by the director of M/s. Mudra Real Estate Pvt. Ltd. the cash book, ledger account reveal that the assessee is having cash income of Rs.3,54,82,000/- for FY 2010-11 for FY 2010-11 relevant to A.Y. 2011-12 which is not

accounted for or disclosed for taxation.

7. In view of the above, I have reason to believe that income chargeable to tax which has escaped assessment to the tune of Rs.3,54,82,000/- (Rs. Three Crore fifty four lakhs eighty two thousand only) chargeable to tax within the meaning of Explanation 2(b) of Section 147 of the I.T. Act, 1961. As such it is a fit case for issuance of notice u/s 148 of the Income Tax Act, 1961.

8. In this case, since more than four years have lapsed from the end of assessment year under consideration, hence necessary sanction to initiate proceedings u/s 147 and to issue notice u/s 148 of the I.T. Act may be accorded as per provisions of Section 151 of the Income Tax Act.”

2. Upon being supplied the reasons, the petitioner filed objections to the notice of reopening under communication dated 28th November, 2018. Such objections were however rejected by the Assessing Officer by order dated 14th December, 2018.

3. The petitioner is a partnership firm, Akshar Builders and Developers ("AB&D" for short). For Assessment Year 2011-12, the petitioner had filed its return of income which was accepted under Section 143(1) of the Income Tax Act, 1961 ("the Act" for short) without scrutiny. To reopen such assessment the impugned notice has been issued. The main ground of challenge raised by the Counsel for the petitioner is that there was no tangible material available with the Assessing Officer to form a belief that the income chargeable to tax has

escaped assessment. She pointed out that the Assessing Officer relies on the documents seized during the survey operation against one M/s. Mudra Real Estate Pvt. Ltd. ("Mudra" for short) which recorded certain cash payments to one M/s. Akshar Developers ("AD" for short). Counsel submitted that the petitioner AB&D, a partnership firm, has distinct identity and different partners from AB, another partnership firm having different set of partners. She pointed out that both the partnership firms have different PAN numbers. The Assessing Officer, therefore, acted on a material *prima facie* showing payments by Mudra to AD and reopened the assessment in case of the present petitioner. Counsel further submitted that the reassessment in case of Mudra has now been done by the Assessing Officer, passing order on 31st December, 2018 in which also there is no addition in relation to the said alleged payments by Mudra to AD. In other words, the Department in the assessment in case of Mudra has not relied on the payments in question.

4. On the other hand, learned Counsel for the Department opposed the petition contending that previously assessment was not framed after scrutiny. The Assessing Officer therefore would have much wider scope to reopen the assessment. In this regard, he relied upon the decision of

the Supreme Court in the case of ***ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd., (2007) 291 ITR 500.*** Counsel submitted that at this stage the sufficiency of material enabling the Assessing Officer to reopen the assessment would not be subject matter of scrutiny by the Court. He further submitted that the Assessing Officer had sufficient material at his command to form a belief that income of the present petitioner chargeable to tax has escaped assessment.

5. Since the factum of reassessment order in case of Mudra is not part of the present proceedings, we may keep the same out of consideration. From the record it emerges that the Assessing Officer has issued notice of reopening of assessment after recording his reasons for doing so. These reasons suggest information available to the Assessing Officer supplied by the Investigation wing of the Department that the assessee had received cash amounts of Rs.3.54 crores which was not accounted for and not offered to tax. He has referred to statement of one Shri. Sanjay Kumar Hundia, Director of Mudra recorded on 25th January, 2018 suggesting cash payment by Mudra to AB&D. However, the document supplied by the Assessing Officer which is a copy of the ledger account of AD in the books of Mudra, at best suggests that such cash payment was made to AD and not to the AB&D,

whereas notice of reopening of assessment is issued against AB&D i.e. the present petitioner. To cover this mismatch, it is now sought to be suggested by the Assessing Officer that Investigation Wing informed him that the two entities are one and the same and AB&D is popularly referred to as AD. However, this being the question of two entities being separate, having different partners and having distinct PAN numbers. These aspects are not disputed by the Revenue either while disposing of the objections raised by the petitioner to the notice of reopening or in the affidavit filed in response to the present petition. We, therefore, proceeded on such basis.

6. It is thus emerges from the record that the Assessing Officer has merely acted upon the information submitted to him by the investigation wing that there is material to suggest that Mudra had paid cash amount to AB&D whereas, the material collected during the survey against Mudra *prima faice* suggests such cash payment to AD. This would demonstrate total lack of application of mind on the part of the Assessing Officer. If he had perused the material supplied to him by the investigation wing, he would have immediately noticed that material referred would suggest cash payment to AD and not AB&D i.e. the present petitioner.

7. Even in a case where the return filed by the assessee is accepted without scrutiny, as per the settled law, the Assessing Officer can issue a notice of reopening of assessment provided he has reason to believe that income chargeable to tax has escaped assessment. The Assessing Officer cannot proceed mechanically and also on erroneous information that may have been supplied to him. In fact, we note that in the present case the Assessing Officer had issued a notice to a wrong person. The impugned notice is, therefore, set aside.

8. Petition is disposed of accordingly.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)