

R.M. AMBERKAR
(Private Secretary)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.**

WRIT PETITION NO. 345 OF 2019

M/s. Zain Constructions

.. Petitioner

Versus

The Income Tax Officer -18(3)(5) & Ors.

.. Respondents

-
- Mr. Devendra H. Jain for the Petitioner
 - Mr. A.R. Malhotra for the Respondents
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**CORAM : AKIL KURESHI &
SARANG V. KOTWAL, JJ.**

DATE : MARCH 29, 2019.

P.C.:

1. Heard learned counsel for the parties for final disposal of the petition.

2. The petitioner has challenged a notice of reopening of assessment as also an order of assessment passed pursuant to such notice.

3. Facts in brief are as under:-

3.1 Petitioner is a partnership firm and is engaged in the business of real estate development. For the assessment

year 2013-14, the petitioner had filed return of income declaring income of Rs. 1,15,560/-. Pending such return, a survey action was taken against the petitioner under Section 133A of the Income Tax Act, 1961 ("the Act" for short) on 15.1.2015. During survey, it was found that the petitioner had sold certain flats in one Zain Tower at a price lower than the stamp valuation of such property. The statement of a partner of the petitioner firm was recorded. On the basis of such statement and other material, the Assessing officer passed an order of assessment under Section 143(3) of the Act on 28.3.2016 determining the total income of Rs. 76.75 Lakhs (rounded off).

3.2 To reopen such assessment, the Assessing Officer issued impugned notice on 28.3.2018. In order to do so, he had recorded following reasons:-

"Reasons recorded for issue of notice u/s. 148 of the Income Tax Act, 1961 in the case of M/s. Zain Construction (PAN:AAAFZ4368E) FOR AY 2013-14"

Brief details of the assessee: The assessee is a partnership Firm and filed its return of income for AY 2013-14 on 30/09/2013 declaring the total income at Rs 1,15,560/-. The same was processed u/s.143(1) on 22.04.2014. Scrutiny assessment u/s. 143(3) of the Act, was completed on 29.03.2016, determining the total income at Rs. 77,90,560/-.

Brief details of information collected / received by the AO : In this case, a survey u/s 133A of the Income tax Act 1961 was conducted on 15.01.2015. During the survey action, it was found that the assessee is a firm engaged in the business activities of development of property and has developed a property named 'Zain Tower'. It was also found that the assessee has sold the flats of Zain tower at a price lesser than the Market Value (Stamp Duty Value). Mr. Umer Basar holding 90% stake of the firm, accepted the discrepancies regarding sale of flats at lower value than that of current market value and declared an amount of Rs. 76,75,000/- for the FY 2012-13 relevant to AY 2013-14, accordingly scrutiny assessment was completed making addition of Rs. 76,75,000/- to the total income of the assessee.

However, recently it has come to the notice of the undersigned that the total market value of the 13 flats (each having area of 355 sq ft) sold during the year under consideration works out to Rs. 4,46,81,000/- as per Market Value (Stamp Duty Value) mentioned in the AIR/CIB information. The assessee has shown income towards sale of flats at Rs. 3,03,70,000/- and offered profit of Rs. 59,497/- in the return and further declared an amount of Rs. 76,75,000/- towards under valuation of flats during the survey action. Thus, an amount of Rs. 66,36,000/- (44681000 - 30370000 - 7675000) escaped assessment.

It was further seen that during the FY 2011-12 relevant to AY 2012-13, assessee constructed 33 flats, out of which it sold 18, and was left with a closing stock of 15, whose value was Rs. 2,61,93,081/-. During the FY 2012-13 relevant to the AY 2013-14, the assessee constructed one more flat and sold 13 flats, hence it should have been left with 3 [(15+1)-13] unsold flats, however, the assessee had shown only one unsold flat, in its closing stock, amounting to Rs. 9,08,114/-.

Value of unsold flat as on 31.03.2013

Opening WIP of 15 flats unsold as on 31.03.2012	Rs. 2,61,93,081/-
Add : Expenses during FY 2012-13	Rs. 46,81,323/-
	Rs. 3,08,74,404/-
Closing WIP of 3 unsold flat as on 31.3.2013	
30874404*3/16	Rs. 57,88,950/-

Thus, as on 31.03.2013, the assessee has undervalue the unsold flats to the extent of Rs. 48,80,836/- (5788950 - 908114), on account of reduced closing stock.

Analysis of information collected / received:

The total market value of the 13 flats, each having area of 355 Sq. Ft, sold during FY 2012-13 worked out to Rs. 4,46,81,000/-, as per Market Value (Stamp Duty Value) mentioned in the AIR/CIB information. Thus, an amount of Rs. 66,36,000/-, escaped assessment towards under valuation of flats. Further, an amount of Rs. 48,80,836/-, also escaped assessment on account of reduced closing stock.

Enquiries made by the AO: The above findings were made from the details filed by the assessee during the assessment proceedings for AY 2013-14. The partners of the assessee firm were also issued summons u/s 131 of the Act, at their registered address, which returned unserved.

Findings of the AO: After appraisal of the above material on record there is enough reason to believe that the assessee did not offer an amount of Rs. 66,36,000/- towards under valuation of flats. Assessee has shown one unsold flat instead of three and shown value of closing stock at Rs. 9,08,114/- instead of Rs. 57,88,950/-, and therefore, an amount of Rs. 48,80,836/-, also escaped assessment. Hence, the assessee has failed to disclose truly and fully all material facts for determination of total income.

Basis of forming reason to believe and details of escapement of income: In the light of above facts and detailed findings, I have reason to believe that **Rs. 1,15,16,836/-**, has escaped assessment within the meaning assigned in the provision of section 147 of the Act, since, the assessee clearly failed to disclose truly and fully all material facts for determination of income, hence, it is a fit case for issue of notice u/s.148 of the Income Tax Act, 1961. Accordingly, approval u/s 151(2) of the Income Tax Act, 1961 is solicited for issuing notice u/s 148 of the Act.”

3.3 The petitioner raised objections to the reopening of assessment on 15.11.2018. The Assessing Officer rejected such objections by order dated 03.12.2018. Without allowing a period of four weeks to the assessee after communication of disposal of the objections as provided by this Court in case of **Asian Paints Ltd Vs. Dy. CIT & Anr.¹**, the Assessing Officer passed assessment order dated 17.12.2018 under Section 143 r/w 147 of the Act. At that stage, the present petition has been filed.

1 [2008] 296 ITR 90 (Bom)

4. Previously, learned counsel for the petitioner had stated that he does not wish to enter into the question of Assessing Officer passing the order of assessment before less than four weeks' of disposing of the petition since eventually, it would amount to requiring the Assessing Officer, at best to pass a fresh order. He had, therefore, focussed his challenge to the very notice of reopening of assessment and in that context, we have heard the learned counsel for both the sides in this petition.

5. Perusal of the reasons recorded by the Assessing Officer would indicate two grounds on which he sought to reopen the assessment. First is with respect to the receipts arising out of the sale of flats in Zain Tower by the assessee. According to the Assessing Officer, during survey, it was found that the assessee had sold the flats at a price less than the market value which fact the partner of the assessee firm had accepted in his statement and declared the amount of Rs. 76.75 Lakhs by way of additional income. Subsequently, however, the Assessing Officer noticed that as per the stamp duty valuation, the total consideration of the sold flats came

to Rs. 4.46 Crores (rounded off) as against the total sale value of 3.03 crores (rounded off). Thus, the assessee had disclosed a sum of Rs. 66.36 Lakhs short in the process. The second ground for reopening the assessment was that there was a discrepancy of three units of unsold flats, the valuation of which had to be added to the closing stock.

6. In so far as the second ground is concerned, the Revenue was unable to substantiate the same. When the Assessing Officer raised a factual dispute about the left over unsold flats, it is at least his primary duty to substantiate the same with material on record. The assessee has been at a total loss from where the Assessing Officer obtained such figures. The assessee cannot be expected to prove the negative and it was a duty of the Assessing Officer who asserted a certain discrepancy to establish the same. This ground of reopening of assessment, therefore, remains unsubstantiated and is, therefore, ignored.

7. Coming to the main ground on which the Assessing Officer desires to open the assessment, we may recall his

contention is that during survey, the assessee had agreed that certain flats were sold at a value less than a market value adopted by the Stamp Valuation Authorities for levying stamp duty for registration of sale deed. The assessee had admitted additional income of Rs. 76.75 Lakhs in the statement recorded during survey. However, later on, the Assessing Officer realized that as per the stamp duty valuation, such difference between the stamp duty valuation and the sale price of the flat was much higher. He, therefore, quantified this difference at Rs. 66.36 Lakhs.

8. In our opinion, the entire approach of the Assessing Officer is wholly incorrect. As is well known, Section 50C of the Act would enable the Revenue to bring to tax by way of deemed capital gain difference between the stamp valuation and the sale price of a capital asset. For obvious reasons, this provision would not apply in case of a builder for whom such immovable property is in nature of stock in trade and not capital asset. To overcome this difficulty, the legislature had inserted Section 43CA under Finance Act, 2013 w.e.f. 1.4.2014. This provision would enable the Revenue to tax

the income arising out of sale of stock by a deeming fiction where subject to certain conditions, stamp valuation of such stock would substitute the actual receipt thereof. In absence of any such statutory provisions, giving rise to the deeming fiction, the Revenue cannot tax any amount which has not been received by a seller of an immovable property at the time of sale.

9. With this background, we may refer to the statement of the partner of the firm during survey. Relevant question and answer read as under:-

Q. 13. I am showing you a loose papers impounded and marked as Page No. 8 & 9 of Annexure 'A-1', which contains list of customers to whom flats in 'Zein Tower' has been sold. As per said list, the Agreement Value of the flats sold is varying from the Market Value (Stamp Duty Value) for which the flats should have been sold. You are asked to furnish justification in this regard.

Ans. These papers contains the list of customers to whom flats have been sold at the value lesser than the Market Value. I understand about tax implications for selling flats at the value lower than the Market Value. Therefore, in order to avoid litigation and to buy peace of mind I offer the amount of Rs. 83,25,000/- for Assessment Year 2012-2013 and Rs. 76,75,000/- for Assessment Year 2013-2014 to tax towards undervaluation of flats as compared to Market Value (Stamp Duty Value).

Under this question, the partner was then shown certain loose papers containing list of customers to whom flats in Zain Towner were sold. It was pointed out that as per this list, the agreement value of the flats was less than the market value i.e stamp duty valuation. The partner was asked to justify this difference. To this, the partner stated that the flats were sold at the value less than the market value. He understood the implications thereof and therefore, in order to avoid litigation, he offered an amount of Rs. 76.75 Lakhs for the assessment year 2013-14 to tax towards "undervaluation of flats as compared to Market Value (Stamp Duty Value)."

10. In plain terms, in this statement, the partner never admitted that the flats were sold at a price higher than what was reflected in the document. In other words, he did not admit to any cash payment not recorded in the documents. He was asked about the difference between the stamp valuation for the purpose of registration and the price at which the flats were sold. He admitted the different. He offered to tax the said amount of Rs. 76.75 Lakhs being the

difference between the stamp duty valuation and the sale price. We are prepared to proceed on the basis that this amount of Rs. 76.75 Lakhs does not reflect accurately such difference between the two valuations. However, in absence of voluntary surrender by the assessee of any additional income, it was simply not possible for the Revenue to make any addition on the ground of the difference between the stamp valuation and the sale price of the property in question. As noted, Section 43CA of the Act was inserted w.e.f 1.4.2014 and therefore, had no applicability to the assessment year in question. The attempt on the part of the Assessing Officer to make the addition with the aid of the statement of the partner of the assessee and reference to the correct stamp valuation, is simply invalid. What the Assessing Officer wishes to do is to adopt a stamp valuation for the properties in question, superimpose the statement of the partner of the assessee of the declaration of certain additional income and extrapolate such statement to fit within the scheme of Section 43CA of the Act.

11. In the result, the impugned notice of reopening of

assessment is set aside. Consequently, the order of assessment is rendered invalid. Petition disposed of accordingly.

[SARANG V. KOTWAL, J.]

[AKIL KURESHI, J]