

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

WRIT PETITION NO.3398 OF 2018

South Yarra Holdings .. Petitioner
vs
Income Tax Officer 16 (1) (1) (4)
Mumbai & anr ... Respondents

Mr.K.Gopal with Mr.Tanmay Phadke I/b
Ms.Neha Paranjpe for Petitioner
Mr.Suresh Kumar for Respondents.

***CORAM : AKIL KURESHI &
M.S.SANKLECHA, JJ***
DATE : 1st MARCH, 2019

P.C.

1. At the request of the parties, the petition is taken up for final disposal.

2. This petition under Article 226 of the Constitution of India challenges a notice dated 29.3.2018 issued by respondent no.1-Assessing Officer under section 148 of the Income Tax Act, 1961 (for short, 'the Act'). The impugned notice seeks to re-open assessment for A.Y.2011-12.

3. For the Assessment Year 2011-12 the petitioner filed its return of income on 29.9.2012 declaring an income of Rs.12.52 lacs (rounded off). The return was taken up for scrutiny assessment by the Assessing Officer. On 1.11.2013 the Assessing Officer passed an order under section 143 (3) of the Act enhancing the petitioner's income to Rs.20.14 lacs.

4. Thereafter on 29.3.2018, the Assessing Officer issued the impugned notice seeking to re-open assessment for A.Y.2011-12. The reasons in support of the impugned notice as communicated to the petitioner reads thus:-

“Reasons for reopening u/s 148 for A.Y.2-011-12 is provided as under :

1. The information has been received from DDIT (Inv) Unit 8 (3) Scindia House, Mumbai-38 vide their letter dated 23-3-2018 which is received in this office on 28-03-2018.

2) The DDIT (Inv) Mumbai has received information that M/s Nivyah Infrastructure & Telecom Services Ltd is a penny stock listed do in BSE with scrip code (517634) and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or short term capital loss in their books of accounts. It was noticed that share price of M/s Nivyah Infrastructure & Telecom Services Ltd rose from Rs.39 in 21st July 2009 to Rs.2050 on January 2011 and dipped to Rs.47.20 on 18th July 2012. However, the financials of the company for the relevant period do not show any substantial change so as to support such huge share price movement. The company does not have business worth while to justify the sharp rise in market price of shares. The sharp rise in market price of this entity is not supported by the fundamentals of the company. Both purchase and sale of the shares are concentrated within few person/entities.

2.2. The DDIT (Inv) has traded in the above script namely M/s Nivyah Infrastructure & Telecom Services Ltd during the F.Y. 2010-11 to the tune of Rs.3504000000000000000.

2.3. The DDIT (Inv) Unit – 8 (3) Mumbai has given a finding that enquiries have been conducted in the penny scrip namely M/s Nivyah Infrastructure & Telecom Services Ltd vis-a-vis facilitating introduction of unaccounted income of members of beneficiaries in the form of exempt Capital gain or Short term Capital Loss in their books of account. These transactions are mostly in view of cash of equal amount and commission is charged over and above at certain fixed percentage for providing such accommodation entry. These accommodation entries were taken from various beneficiaries for introducing their unaccounted cash into their books of accounts without paying the due taxes.

2.4 The detailed investigation report containing the modus operandi of tax evasion through penny stock and discussion in entry operators from brokers and scripts has been provided along with the letter of DDIT (Inv) Mumbai.

2.5. Our assessee is one of the beneficiary who have availed accommodation entries by way of traded in shares to the tune of Rs.3504000,0000000000005 in M/s Nivyah Infrastructure & Telecom Services Ltd with a view to ultimately reduce tax liability and or to bring capital in the form of equity or debt or tax exempt income or a combination of the above transaction, therefore, it is necessary to verify the actual amount of bogus LTCG analyzing the D-mat statement and bank account statement.

3. In this case return of income as fixed for the year under consideration and regular assessment u/s 143 (3) was made on 27.11.2013. Since 4 years from the end of the relevant year has expired in this case the requirements to initiate proceedings u/s 147 of the IT Act are reasons to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded in paragraph 2 above.

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

5. Notice u/s 148 was issued with prior approval of Pr.Commissioner of Income Tax-6 Mumbai.”

5. On receipt of above reasons on 9.8.2018, the petitioner filed its objections to the reasons in support of the impugned notice and in particular pointed out that the assessee had dealt with a company called “S.V.Electricals Ltd” and not with M/s Nivyah Infrastructure & Telecom Services Ltd. The name of company “S.V.Electricals Ltd” had subsequently changed on 14.2.2012 to M/s Nivyah Infrastructure and Telecom Ltd. It had also pointed out in its objection that during the regular assessment proceedings, details of the petitioner's dealing in scrip namely “S.V.Electricals Ltd” had been submitted during the regular assessment proceedings. The objections primarily proceeds on the basis, that the reasons as recorded, display total non-application of mind while forming reason to believe, this as during the relevant time, there was no company by the name “M/s Nivyah Infrastructure and Telecom Services Ltd” in which the petitioner could have dealt. The petitioner's objections were rejected by the Assessing Officer by passing an order on 28.9.2018. The order on objections, does not deal with the petitioner's primary contentions that the petitioner had not dealt with any company by name “M/s Nivyah Infrastructure and Telecom Services Ltd” during the period relevant to the subject assessment. This order dated 28.9.2018 disposing of the objections is completely silent on the above objections while

rejecting the petitioner's objections.

6. The respondent's Assessing Officer has filed an affidavit-in reply dated 5.2.2019 of the Assessing Officer. However, the reply does not deal with this objection taken in the petition. Nevertheless, Mr.Suresh Kumar the learned counsel for the revenue submits that all these issues will be subject of consideration during the re-assessment proceedings. Thus, this Court should not interfere at this stage.

7. It is a settled position in law that re-opening of an assessment has to be done by an Assessing Officer on his own satisfaction. It is not open to an Assessing Officer issue a reopening notice at the dictate and/or satisfaction of some other authority. Therefore, on receipt of any information which suggests escapement of income, the Assessing Officer must examine the information in the context of the facts of the case and only on satisfaction leading to a reasonable belief that income chargeable to tax has escaped assessment, that re-opening notice is to be issued.

8. From the reasons, it is evident that the impugned notice has been issued on the basis of information received from the Deputy Collector

Income Tax (Investigation) alleging that M/s Nivyah Infrastructure & Telecom Services Ltd is a penny stock listed on the Bombay Stock Exchange and that the petitioner had dealt with the same leading to escapement of income. On receipt of information, the least that is expected of the Assessing Officer is to examine the same in the context of the facts of this case and satisfy himself whether the information received does *prima facie* lead to a reasonable belief that income chargeable to tax has escaped assessment. In this case, the reasons indicate that the Assessing Officer has not carried out such exercise and accepted the report of the Deputy Collector of Income Tax (Investigation) Mumbai to conclude that the petitioner had dealt with Nivyah Infrastructure and Telecom Services Ltd during the previous year relevant to the assessment year 2011-12. Admittedly, there was no company by name “M/s Nivyah Infrastructure & Telecom Services Ltd” in existence during that year for consideration. This clearly shows that the Assessing Officer acted on the satisfaction of the Deputy Collector of Income Tax (Investigation) that income chargeable to tax has escaped assessment. It must also be borne in mind that the impugned notice is issued beyond the period of four years from the end of the relevant assessment year in a case, where the assessment was completed under section 143 (3) of the Act. Therefore,

the Assessing Officer would have to examine the information received in the context of the facts on record. If such an exercise were to be done, it is likely that the Assessing Officer would have come to the conclusion that there was no failure to disclose truly and fully all material facts necessary for assessment. Thus, hit by the proviso to section 147 of the Act. However, the Assessing Officer has not applied his mind to the information received in the context of the facts on record. The impugned notice is bad-in-law, as it has not been issued by the Assessing Officer on his satisfaction that there is reason to believe, that income chargeable to tax has escaped assessment.

9. In the above circumstances, the impugned notice is unsustainable in law and therefore, is quashed and set aside.

10. Accordingly, Petition allowed.

(M.S.SANKLECHA, J)

(AKIL KURESHI, J)