

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

WRIT PETITION NO.3390 OF 2018

The Swastik Safe Deposit And Investments Ltd. ... Petitioner

V/s.

The Assistant Commissioner of,

Income-tax-(8)(3)(1), Mumbai and ors. ... Respondents

Mr.Jehangir Mistri, Senior Counsel with Mr.Madhur Agrawal i/by
Mr.Atul Jasani for the Petitioner.

Mr.N.C.Mohanty for Respondent Nos.1 and 2.

**CORAM : AKIL KURESHI AND
M.S.SANKLECHA, JJ.
DATE : FEBRUARY 14, 2019.**

P.C.:-

1. Heard learned counsel for the parties for final disposal of the petition.
2. Petitioner has challenged a notice of reopening of assessment dated 24th March, 2018.
3. Brief facts are as under:

Petitioner is a company registered under the Companies Act, 1956. One M/s Savoy Finance and Investments Private Limited (hereinafter referred to as “Savoy Finance”) had sold certain shares of one M/s Piramal Healthcare Limited for a total consideration of Rs.322.36 crores (rounded off). Savoy Finance merged with the petitioner company-The Swastik Safe Deposit and Investments Limited (hereinafter referred to “Swastik Safe”), the effective date of merger being 1st April, 2010.

4. The petitioner-Swastik Safe filed the return of income for the assessment year 2011-12 on 28th September, 2011 declaring total income of Rs.57.87 lakhs, which mainly consisted of short term capital gain on sale of shares. This return was accepted without scrutiny in terms of Section 143(1) of the Income Tax Act, 1961 (“the Act” for short). To reopen such assessment, the Assessing Officer issued impugned notice. In order to do so, he had recorded following reasons:-

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Annexure
M/s The Swastik Safe Deposit &
Investments Ltd.-PAN AAAC 3608G-A.Y.
2011-12
Reasons for Reopening

Information was received from the office of ITO 8(1)(3) Mumbai, wherein it was found that M/s Savoy Finance and Investment Private Limited being a Non Filer of Return of Income for A.Y. 2011-12 had entered in Sale of Share;

On further verification of ITS details of M/s. Savoy Finance and Investment Private Limited for F.Y. 2010-11 relevant to A.Y. 2011-12 it is seen that M/s Savoy Finance and Investment Private Limited has sold shares of M/s Piramal Health for Rs.322,36,60,636/- during A.Y.2011-12. Further it is found that M/s. Savoy Finance and Investment Private Limited has been amalgamated with M/s Swastik Safe Deposit & Investment Limited w.e.f. 01.04.2010.

The return of income of the assessee was generated from the ITD system. On perusal of the same it was observed from Schedule C.G. parting to the return of income filed by M/s Swastik Safe Deposit & Investment Limited that the assessee has only offered a sum of Rs.83,34,78,806/- as the full value of consideration against which capital gain of Rs.57,87,762/- has been offered.

Considering the above fact I have reasons to believe that the share of M/s Piramal Health of Rs.322,36,60,636/- sold by M/s Savoy Finance and Investment Private Limited which is amalgamated in the assessee company i.e. the Swastik Safe Deposit & Investment Limited has escaped assessment in the hand of the assessee company i.e. the Swastik Safe Deposit & Investment Limited for A.Y. 2011-12, within the meaning of section 147 of the I.T.Act, 1961.

Permission for issuance of notice u/s.

148 as per the provisions of Sec.151(2) of the I.T.Act, 1961 is solicited.”

5. Perusal of the reasons would show that according to the Assessing Officer, Savoy Finance had sold shares of Piramal Healthcare for Rs.322.36 crores during assessment year 2011-12. Savoy Finance had an amalgamated with Swastik Safe. In the return of income filed by the Swatik Safe, only a sum of Rs.83.34 crores as a full sale consideration of shares was shown, declaring capital gain of Rs.57.87 lakhs. The Assessing Officer therefore held a belief that the sum of Rs.322.36 crores upon sale of shares of Piramal Healthcare by Savoy Finance had escaped assessment.

6. The petitioner filed detailed objections to the notice of reopening of assessment under a communication dated 9th October, 2018 and followed it up with another set of objections dated 26th October, 2018. Alongwith these objections the petitioner had produced several documents. The crux of the petitioner's objection to the notice of reopening of assessment

was that there is no income chargeable to tax which had escaped assessment. The petitioner did not dispute that the said sum of Rs.322.36 crores was not reflected in the return filed for the said assessment year. However, on the basis of the documents produced alongwith the objections the petitioner contended that the shares in question were held by Piramal Healthcare for several years and therefore, in terms of Section 10(38) of the Act, there would be no liability of capital gain tax. The Assessing Officer disposed of the objections by detailed order dated 2nd November, 2018, upon which this petition has been filed.

7. Appearing for the petitioner counsel Shri Mistri raised following contentions:-

(i) That even in a case where return of the assessee had been accepted without scrutiny, the Assessing Officer must have a reason to believe that income chargeable to tax had escaped assessment. Reliance in this respect was made on the decision of this Court in case **Prashant S. Joshi and anr. Vs. Income-Tax Officer and another¹** and one dated 20th July, 2016 in Writ

1 (2010) 324 ITR 154 (Bom)

**Petition No.1155 of 2016 in case of General Electoral Trust
Vs. Income Tax Officer 20(1)(2) Mumbai and ors.**

(ii) The notice of reopening of assessment could not be issued for carrying out fishing inquiry.

(iii) In the present case the assessee had brought to the notice of the Assessing Officer reliable evidence to show that Piramal Healthcare had held the shares in question for long over a period over one year and that therefore, sale of such shares would not attract capital gain tax. Assessing Officer did not consider this objection in light of the documents produced.

(iv) He submitted that merely because in the return filed the petitioner did not mention the factum of sale of shares, would not enable the Assessing Officer to reopen the assessment if necessary conditions were not fulfilled.

8. On the other hand, learned counsel Shri Mohanty opposed the petitioner contending that:-

(i) At the stage of issuance of notice, the Assessing Officer is not required to establish beyond doubt that invariably the additions would be sustained.

(ii) The Court while examining the reasons recorded by the Assessing Officer would not go into sufficiency of such reasons. Reliance was placed on the decision of the Supreme Court in **Raymond Woollen Mills Ltd. Vs. Income-Tax Officer and ors.**¹ and on the observations made by the Supreme Court in case of **Rajesh Jhaveri Stock Brokers P. Ltd.(supra).**

(iii) Counsel further submitted that whether Savoy Finance had held the shares of Piramal Healthcare for a period in excess of one year is a matter of inquiry. The assessee had not declared such sale in the return filed at all. All inquiries can be made by the Assessing Officer in the assessment proceedings.

9. It is undoubtedly true that in the present case assessee's return has been accepted without scrutiny and therefore the Assessing Officer can not be stated to have formed any opinion and therefore, the concept of change of opinion would have no applicability. In such a case the Assessing Officer would have much wider latitude to reopen the assessment and the scrutiny of this Court would be limited. Nevertheless, it is well

1 236 ITR 34

established principle through series of judgments of this Court and other Courts that even in such a case the requirement that the Assessing Officer forms a belief that income chargeable to tax had escaped assessment must exist. Within this narrow confine, it is always open for the assessee to argue that the reasons recorded by the Assessing Officer lack validity. With this, we may revert back to the facts of the case. It is undisputed that Savoy Finance before its merger with the assessee-company had sold substantial number of shares of Piramal Healthcare for a sale consideration of Rs.322.36 crores. In the return of income filed by the petitioner for the assessment year 2011-12 relevant to the period of sale of shares after merger of Savoy Finance with the petitioner, this sale was not reflected. In the column requiring the petitioner to declare if any capital gain exempt from tax is received, the petitioner showed a figure of "Nil". This is undoubtedly not a correct declaration. This by itself would not be the conclusive of the question whether the proceeds of sale of shares was otherwise taxable as a capital gain and that therefore, reopening of assessment would be necessary. What would be relevant is did Savoy Finance hold the shares which

came to be sold later on, for a period in excess of one year before sale. This exercise, we are ofcourse are not inclined to undertake in a writ petition.

10. Minute perusal of the reasons recorded would show the ground pressed in service by him is that the petitioner had earned capital gain out of sale of shares which was not disclosed and therefore, income chargeable to tax had escaped assessment. This was also the line adopted by the Assessing Officer in the order disposing of the objection. We have perused the detail objections raised by the petitioner and the documents produced alongwith the same and also the order passed by the Assessing Officer disposing of such objections. We do not find that the Assessing Officer had dealt with the contention of the petitioner that the petitioner is in a position to establish that the shares in question were held by Savoy Finance for a period in excess of one year and therefore, there was no liability to pay capital gain tax on the proceeds of sale of shares.

11. In facts of the present case, therefore, we ask the Assessing

Officer to consider this objection of the petitioner and give his specific finding through a speaking order. For this limited purpose, we place the matter back before the Assessing Officer. The Assessing Officer shall pass a further order dealing with this specific objection of the petitioner. In facts of the case, the Assessing Officer may give personal hearing to the authorized representative of the petitioner. Further order may be passed preferably within two months from today. For a period of four weeks after such order is communicated to the petitioner, reassessment shall stand stayed. Petition disposed of accordingly.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)

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