IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2827 OF 2019

Peninsula Land Limited ....Petitioner

V/s.

Assistant Commissioner of Income Tax
Central Circle-1(3), Mumbai & Ors. ...Respondents

Mr. Madhur Agarawal i/b Mr. Atul K. Jasani for Petitioner
Mr. Suresh Kumar for Respondents

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 25th OCTOBER 2021

P.C. :

1 Petitioner is impugning a notice dated 30th March 2019 and the assessment order dated 5th September 2019 on the ground that the reasons recorded in support of the impugned notice do not indicate the manner in which the Assessing Officer has come to the conclusion that income chargeable to tax has escaped assessment in the hands of petitioner. Petitioner has also alleged that in the reasons for re-opening, there is not even a whisper as to what was the tangible material in the hands of the Assessing Officer which made him believe that income chargeable to tax has escaped assessment and because notice has been issued four years after the assessment order, what was the material fact that was not fully and truly disclosed.

2 With the assistance of Mr. Agarawal we have perused the reasons for issuance of notice under Section 148 of the Income Tax Act, 1961 (the said Act), which was given to petitioner vide letter dated 2nd May 2019. We would agree with petitioner.

3 The law on this is well settled. To confer jurisdiction under Section 147 (a), two conditions were required to be satisfied, firstly the Assessing Officer must have reasons to believe that income, profits or gains chargeable to income tax had escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions had to be satisfied before the Assessing Officer could assume jurisdiction for issue of notice under Section 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the Assessing Officer has reason to believe that income has escaped assessment, that was enough to confer jurisdiction to reopen the assessment.

4 The reasons for reopening of assessment as held in ***Aronic Commercials Ltd. Vs. Deputy Commissioner of Income Tax & Anr.***[1] has to be

1 (2014) 362 ITR 403 Bom

tested / examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen the assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and /or oral submissions. Moreover, the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Moreover, the tangible material upon the basis of which the Assessing Officer comes to the reason to believe that income chargeable to tax has escaped assessment can come to him from any source, however, reasons for the reopening has to be only of the Assessing Officer issuing the notice (***Jainam Investments Vs. Assistant Commissioner of Income Tax***[2])

5 It is also settled law that the Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses

2 Writ Petition No.2760 of 2019 dated 24th August 2021

what was the material fact which was not truly and fully disclosed by the assessee.

6 Division Bench of this Court in ***Hindustan Lever Ltd. Vs. R. B. Wadkar***[3] in paragraph 20 has laid down what should be recorded in the reasons for issuance of notice under Section 148 of the Act. Paragraph 20 reads as under:

> *20. The reasons recorded by the assessing officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the assessing officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the assessing officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the assessing officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the assessing officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the assessing officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The assessing officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the assessing officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.*

7 In the reasons for issuance of notice in this case it is recorded that the

3 (2004) 137 Taxman 479 (BOM)

return of income for the assessment year under consideration was filed on 28th September 2012, further revised return of income was filed on 28th March 2014 and 9th May 2015, the return of income was processed under Section 143(1) of the Act and the assessment order under Section 143(3) read with Section 153A of the Act was passed by the Assessing Officer on 30th December 2016. The entire basis if one considers the reasons for issuance of notice is that information was received from the Dy. Director of Income Tax Mumbai that a search and survey action under Section 132 of the Act was carried out in the case M/s Evergreen Enterprises and based on the statement recorded of the partner of M/s Evergreen Enterprises and documentary evidences found in the search of the premises of M/s Evergreen Enterprises unearthed an undisclosed activity of money lending and borrowing in unaccounted cash being operated at the premises of M/s Evergreen Enterprises. It is also recorded in the reasons that based on statements recorded of partners of M/s Evergreen Enterprises and employees of M/s Evergreen Enterprises, it came to light that one of the individuals / business concerns has lent cash of Rs.30,00,000/-. It is alleged that petitioner has lent cash loan of Rs.30,00,000/- in Financial Year 2011-2012 and therefore, petitioner has been indulging in lending of cash loan and therefore, the amount of Rs.30,00,000/- has escaped assessment within the meaning of Section 147 of the Act.

For ease of reference, the reasons is scanned and reproduced hereinbelow:

Reasons for issuance of Notice u/s 148 of the Income Tax Act, 1961.
M/s Peninsula Land Ltd. (PAN : AAACT5173A) A.Y 2012-13 (F.Y 2011-12)

Return of income for the Assessment Year under consideration was filed on 28.09.2012, assessing total income of Rs. 119,13,47,240/-. Further, revised return of income was filed on 28.03.2014 and 09.05.2015 declaring total income of Rs. 116,13,61,910/-. The Return of Income was processed u/s 143(1) of the Income Tax Act, 1961. Subsequently the Assessment order u/s 143(3) r.w.s 153A of the Income Tax Act, 1961 was passed by the then Assessing Officer assessing the income at Rs. 119,13,47,240/- on 30.12.2016.

Information has been received from the Dy. Director of Income Tax (Inv.)-5(4), Mumbai that a search and survey action u/s 132 of the Income-tax act, 1961 was carried out in the case of M/s Evergreen Enterprises (AADFE8617J). Mr. Nilesh Bharani is one of the partners in M/s Evergreen Enterprises. The documentary evidences found in the search as well as statement on oath of Mr. Nilesh Bharani recorded u/ 132(4) of the Income-tax act, 1961, unearthed an undisclosed activity of money lending and borrowing in unaccounted cash being operated at the premises of M/s Evergreen Enterprises by Mr. Nilesh Bharani.

On the basis of documents found and seized at the premise M/s Evergreen Enterprises during the course of search action u/s 132 of the Income-tax Act, 1961, and statements recorded on oath u/s 132(4) of the Income-tax Act, 1961 of Mr. Nilesh Bharni, one of the partner of M/s Evergreen Enterprises and Mr. Jagdish T Ramani, Ashwin Rathod, Vibha Sachin Rawate & Shankar Jadhav (Employees of M/s Evergreen Enterprises), one of the Individuals/business concerns who have lend cash loan to/through Nilesh Bharani/ M/s Evergreen Enterprises is mentioned below :

Sr. No.	Code	Name as per ledger	Coded Amount (In 000)	Contact Person	Contac Number	F.Y.
1	B/38/3	Bharat Sanghvi	3000	3000000	9920444550	2011-12

Hence, it is seen that M/s Peninsula Land Ltd. has lent cash loan of Rs. 30,00,000/- in the F.Y. 2011-12.

In view of the above finding/information regarding, the Assessee's indulgence in lending of cash loan to the tune of Rs. 30,00,000/-. There is a reason to believe that the aforementioned income of Rs. of Rs. 30,00,000/- has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

It is pertinent to note that all the requisite material facts as noted above in the reason for re-opening, had not been disclosed fully & truly by the Assessee, which are necessary for its assessment and thus the fact of the case are covered by section 147 of the Act. Therefore, the undersigned has reason to believe that aforesaid income of Rs. 30,00,000/- has escaped assessment within the meaning of section 147 of the Act.

In view of the above, the Assessment Year under consideration is deemed to be a case where income chargeable to tax has escaped assessment and accordingly permission to invoke the provisions of Section 147 of the Income Tax Act, 1961, and issue the corresponding Statutory Notice u/s 148 of the Income Tax Act, 1961, is sought from the Pr.CIT, Central-1, Mumbai in accordance with the provisions of Section 151(1) of the Income Tax Act, 1961.

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(ATUL K. JASANI)
ADVOCATE

Therefore, there is absolutely no mention as to how either the partners of M/s Evergreen Enterprises or the employees of Ms/ Evergreen Enterprises or this Bharat Sanghavi is connected to petitioner. Mr. Suresh Kumar relied upon the affidavit in reply to submit that Bharat Sanghavi was an employee of petitioner and, therefore, the reasons have been correctly recorded and the Assessing Officer has reason to believe that income had escaped assessment.

8 As noted earlier, the reasons for reopening of assessment has to be tested / examined only on the basis of the reasons recorded and those reasons cannot be improved upon and/or submissions much less substituted by an affidavit and/or oral submission. In the reasons for the reopening, the Assessing Officer does not state anywhere that Bharat Sanghavi was an employee of petitioner. Further in the reasons for reopening, the Assessing Officer does not even disclose when the search and survey action under Section 132 of the Act was carried out in the case of M/s Evergreen Enterprises, whether it was before the assessment order dated 30th December 2016 in the case of petitioner was passed or afterwards. The reasons for reopening is absolutely silent as to how the search and survey action on M/s Evergreen Enterprises or the statement referred or relied upon in the reasons have any connection with petitioner.

9 In the circumstances, we have to hold that the impugned notice dated

30th March 2019 and the impugned order dated 5th September 2019 have been issued without jurisdiction and hence are quashed and set aside. Any consequent notice or demand, if issued, shall also stand quashed and set aside.

10 Petition disposed with no order as to costs.

(AMIT B. BORKAR, J) **(K.R. SHRIRAM, J.)**