

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
WRIT PETITION NO. 2959 OF 2019

Upal Developers Pvt Ltd. )  
2<sup>nd</sup> Floor, RR Hosiery Building, )  
Shree Laxmi Woolen Mills Estate, )  
Mumbai 400 011 ) ..Petitioner

Vs.

1 Deputy Commissioner of Income Tax )  
Range-6(2), Lucknow, Peekay Complex, )  
27/2, Raja Ram Mohan Rai Marg, )  
3<sup>rd</sup> Floor, P. K. Complex, Lucknow 226001 )  
  
2 Deputy Commissioner of Income Tax )  
8(3)(1), Room No.615, 6<sup>th</sup> Floor, )  
Aayakar Bhavan, M. K. Road, Mumbai-01 )  
  
3 Commissioner of Income Tax-2, Lucknow )  
Aaykar Bhawan, 5-Ashok Marg, )  
Hazratgang, Lucknow 226001 )  
  
4 Union of India )  
through the Secretary, Department of )  
Revenue, Ministry of Finance, Government )  
of India, North Block, New Delhi-110-001 ) ..Respondents

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Mr. P. J. Pardiwala, Senior Advocate, a/w Mr. Madhur Agrawal i/b Mr. Atul  
K. Jasani for Petitioner  
Mr. Suresh Kumar for Respondents

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CORAM : K.R. SHRIRAM &  
AMIT B. BORKAR, JJ  
DATED : 6th DECEMBER 2021

**ORAL JUDGMENT (PER K. R. SHRIRAM J.) :**

- 1 Rule. Rule made returnable forthwith and heard.
- 2 The Petitioner was served with a notice dated 27<sup>th</sup> March 2019 under  
Section 148 of the Income Tax Act 1961 (the Act) for A.Y.-2012-2013

alleging that petitioner's income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. Petitioner is impugning this notice as well as the order dated 21<sup>st</sup> September 2019 disposing petitioner's objections. As the notice under Section 148 of the Act has been issued after the expiry of 4 years from the end of the relevant assessment year and in this case, admittedly, assessment under Sub Section 3 of Section 143 of the Act has been made for the relevant assessment year, the onus is on respondents to show that petitioner's income chargeable to tax has escaped the assessment by reason of the failure on the part of petitioner to disclose fully and truly all material facts for the assessment of that year.

3 We have considered the reasons for re-opening which was provided to petitioner with a letter dated 13<sup>th</sup> May 2019. In our view, it does not make out any case of failure on the part of petitioner to fully and truly disclose any material fact.

4 Petitioner is in the business of developing and running a shopping mall at Lucknow. Petitioner had constructed the mall and then licensed the premises in the mall to various parties who were interested in utilizing the space in the mall to set up their shops, restaurants etc. Overall control and management including the maintenance security etc., was with petitioner. The consideration in leave and licence agreement with the licensee included (i) the compensation / licence fees for use of the premises and (ii) a separate and distinct common area maintenance charge for providing maintenance services in the common area like cleaning of common area, security services

like air-condition in the common area repairs and maintenance etc. While computing its income, petitioner offered the amount of license fee as income chargeable under the head “income from house property” and the common area maintenance charges as income chargeable under the head “income from the business and profession. In computing the income under the head “income from business and profession” petitioner reduced the expenses of maintaining the common area from the amount received by petitioner as common area maintenance charge and offers differential amount as income chargeable to tax under the said head.

5 Petitioner filed the return of income for A.Y.-2012-2013 on 23<sup>rd</sup> September 2012 declaring total loss of Rs.10,80,19,428/- and later on 31<sup>st</sup> March 2014 petitioner filed revised return of income revising the loss of Rs.10,41,09,240/- consisting of loss under the head “house property” of Rs.3,20,99,528/- and business loss of Rs.7,20,09,172/-. During the relevant year petitioner had disclosed gross rental income of Rs.13,07,87,076/- chargeable under the heads “income from house property” and income from other services as “business income” including common area maintenance charge of Rs.9,90,65,830/-.

6 During the course of assessment proceedings, petitioner had received a notice dated 22<sup>nd</sup> May 2014 calling upon petitioner to, inter alia, give a note on the business activity carried on by petitioner, complete details of revenue from operation under the head “sale of service”, license fee and details of rental income, details of revenue receipt and heads of other

service charge and other operating revenues etc. Petitioner responded by its letter dated 10<sup>th</sup> June 2014 and 20<sup>th</sup> August 2014 and provided all details including copies of agreements. The Assessing Officer after considering petitioner's submissions issued another notice dated 11<sup>th</sup> June 2014 asking the details of service charge of Rs.9,37,75,539/- . In fact with its letter dated 10<sup>th</sup> June 2014 petitioner had also provided party wise details of the total contractual receipt of petitioner amounting to Rs.22,45,62,615/-. By its letter dated 16<sup>th</sup> October 2014 petitioner submitted the details and bifurcation of service charge of Rs.9,37,75,539/-. Petitioner also filed further submissions dated 19<sup>th</sup> December 2014. Petitioner had also submitted it was charging depreciation only on assets which are used for maintenance of the mall and no depreciation is charged on the building as rental income is offered tax under the head "income from house property". Petitioner thereafter received another show cause notice dated 4<sup>th</sup> December 2015 asking for further information with respect to expenses claimed by petitioner in computing income under the head "income from business and profession". Petitioner submitted a letter dated 18<sup>th</sup> February 2015 containing detailed submission of petitioner. The Assessing Officer after considering all the submissions of petitioner passed the assessment order dated 30<sup>th</sup> March 2015 under Section 143(3) of the Act, noting that the assessee company is engaged in the business of constructing and running shopping mall called Phoenix Mall at Kanpur Road, Lucknow. The assessee company is showing its income of rent from shops under the head "income

from house property” and income from other services mainly common area maintenance income, Electricity Income, Parking income etc. under the head “income from business and profession”. During the year the assessee had disclosed rental income of Rs.13,07,87,076/- and after claim of taxes, interest on loan and deduction u/s 24(a) net loss of Rs.(-)3,20,99,528/- has been declared. Further, income from other services and operating revenue have been disclosed at Rs.9,90,65,830/- After claim of business expenses and after making adjustments net business loss of Rs.(-)7,20,09,712/- has been shown.

After recording the facts, the Assessing Officer added an amount of Rs.44,93,520/- under the head “income from business” and computed the total income of petitioner.

7 We thought it necessary to give all the details above only in support of our view that impugned notice dated 27<sup>th</sup> March 2019 is only based on change of opinion and not due to any failure on the part of petitioner to fully and truly disclosing all material facts. The only basis as we would cull out from the reasons for re-opening for respondents to form an opinion that petitioner’s income chargeable to tax has escaped assessment is contained in paragraph 5 and it reads as under:

*“5. Assessee had shown rent received as Rs.13,07,87,076/- whereas the amount of Rs.9,37,75,539/- had been shown as other service charges by the assessee. These other service charges include various miscellaneous services such as lift, air conditioning, security etc. provided in the mall. However, these services are inseparably connected to letting out of the building by the assessee and assessee is not running any separate business to account for these receipts as business receipts. These receipts should be a part of income from house property only. “*

8 According to the Assessing Officer, the amount of Rs.9,37,75,539/- shown as other service charges was for service inseparably connected with the letting out of the building by the assessee and the assessee was not running any separate business to account for these receipts as business receipts and, therefore, these receipts should be part of income from house property only. It is not the case whether petitioner has not disclosed any details. The figures and details are available not only in the return of income, profit and loss and balance sheet filed by petitioner but all these points have been raised and considered in the original assessment order passed. According to respondent no.1, independent field inquiries were conducted to verify the information as disclosed above. The details above are those details which were available in the profit and loss account and the balance sheet. Copy of the field inquiry report is annexed to the affidavit in reply and the said report is risible. It simply states *“As per your directions ..... facilities of lift, Air conditioning, Security etc are available in Mall and these facilities are connected with the mall and no separate arrangements of such facilities related business have been seen.”* Specimen agreement annexed to the petition indicate separate arrangement disclosed in the agreement. Agreements have also been provided to the Assessing Officer before the original assessment order was passed giving the break up as well.

9 We are satisfied that petitioner had fully and truly disclosed all

material facts necessary for the purpose of assessment which are wrongfully alleged as not disclosed fully and truly. Not only material facts were disclosed by petitioner truly and fully but they were carefully scrutinized and figures of income as well as deduction were reworked carefully by the Assessing Officer. In the reasons for re-opening, the Assessing Officer has in fact relied upon the annual report and audited P & L A/c and balance sheet and he admits “..... various information/material were disclosed.” But according to the new Assessing Officer, the fact that other service charges were inseparably connected to the letting out of the building of the assessee is not acceptable. When on consideration of material fact one view is exclusively taken by the Assessing Officer it would not be open to re-open the assessment based on the very same material with a view to take another view.

11 In the circumstances, Rule is made absolute in terms of prayer clause (a) which reads as under:

*(a) That this Hon'ble Court be pleased to issue a writ of certiorari or any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned notice and passing of the impugned order and after going through the same and examining the question of legality thereof quash, cancel and set aside the impugned notice (Exhibit K) dated 27<sup>th</sup> March 2019 and impugned order (Exhibit O) dated 21<sup>st</sup> September 2019.*

12 Petition disposed.

**(AMIT B. BORKAR, J)**

**(K.R. SHRIRAM, J.)**