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

WRIT PETITION NO. 3172 OF 2019

Sea Glimpse Investments Pvt. Ltd.

....Petitioner

V/s.

The Deputy Commissioner of Income
Tax Circle 3 (3) (1) and Ors.

...Respondents

Ms. Dinkle Hariya i/b Ms. Namrata Kasale for Petitioner.

Mr. Sham V. Walve for Respondents-Revenue.

**CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 22nd DECEMBER, 2021**

P.C. :

1. Petitioner is impugning the notice dated 31st March, 2019 issued by first respondent under Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2014-15 and also the order dated 14th October, 2019 rejecting the objections raised by petitioner to the proposed re-opening.

2. Various grounds have been raised in the petition. The primary ground being (a) there has been non application of mind while granting the sanction under Section 151 of the Act; and (b) the facts as recorded in the reasons are not correct.

3. Ms. Hariya submitted that it is the settled position in law that the Assessing Officer acquires jurisdiction to issue re-opening notice only

when he has reason to believe that income chargeable to tax has escaped assessment and the reasons to believe that income chargeable to tax has escaped assessment must be on correct facts. If the facts as recorded in the reasons are not correct re-opening notice could not be issued.

4. The reasons to re-open is annexed to the petition. In paragraph no. 5 it says necessary approval of the Additional Commissioner of Income Tax has been obtained vide letter No. dated _____, 2019. This is one lacuna that Ms. Hariya pointed out.

Secondly, Ms. Hariya submitted that the assessee had filed its e-return of income on 25th November, 2014 as could be seen in the assessment order dated 27th October, 2016 but in the reasons for re-opening it is stated that assessee e-filed its return on 27th October, 2016 and scrutiny assessment was completed under Section 143(3) of the Act on 27th October, 2016. This ground itself would show non application of mind not only by the Assessing Officer but also the authority which sanctioned the proposal of re-opening the assessment. Any one reading the first paragraph in the reasons for re-opening would wonder how the filing of return of income and scrutiny assessment under Section 143(3) of the Act can be completed on the same date. It is therefore, clear that the sanction has been granted without application of mind.

One more fact which appears from the reasons for re-opening that exposes total non application of mind by the sanctioning authority and

also the person recording the reasons is it says that the assessee holds 0.01% i.e., 10 shares in itself. How can a company hold its own shares? This erroneous statement of fact in the reasons itself should have made the authority granting sanction to refuse granting the sanction. Moreover, in the petition, position before amalgamation and post amalgamation has been mentioned which is at variance with what is given in the reasons for re-opening. It is also alleged in the petition that change in shareholding pattern as recorded in the reasons for re-opening is erroneous. That has not been denied in the affidavit in reply. The reason to believe that income chargeable to tax has escaped assessment must be on correct fact. If the facts as recorded in the reasons are not correct, it is for the Assessing Officer to establish that the facts stated by him in the reason as recorded are correct. The Division Bench of this court in **Ankita A. Choksey vs. Income-Tax Officer And Others**¹ in paragraph no. 6 and 7 has held as under :

6. It is a settled position in law that the Assessing Officer acquires jurisdiction to issue a reopening notice only when he has reason to believe that income chargeable to tax has escaped Assessment. This basic condition precedent is applicable whether the return of income was processed under Section 143(1) of the Act by intimation or assessed by scrutiny under Section 143(3) of the Act. [See Asst. Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers (P) Ltd., [2007] 291 ITR 500 (SC) and Principal CIT v/s. Shodimen Investments P. Ltd. [2018] (93) taxmann.com 153 (Bom). Further, the reasons to believe that income chargeable to tax has escaped Assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and prima facie, establish that the facts stated by it in its reasons as recorded are correct. In

¹ [2019] 411 ITR 207 (BOM)

the absence of the order of objections dealing with the assertion of the assessee that the correct facts are not as recorded in the return, it would be safe to draw an adverse inference against the Revenue.

7. *Thus, we are of the view that even in cases where the return of income has been accepted by processing under Section 143(1) of the Act, reopening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under Section 143(1) of the Act, does not give the Assessing Officer a carte blanche to issue a reopening notice. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the reopening notice. In the present case, the Assessing Officer has proceeded on fundamentally wrong facts to come to the reasonable belief/conclusion that income chargeable to tax has escaped assessment. Further, even when the same is pointed out by the Petitioner, the Assessing Officer in his order disposing of the objection does not deal with factual position asserted by the Petitioner. Thus, it would be safe to conclude that the Revenue does not dispute the facts stated by the Petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment.*

5. It is settled law as held by the Division Bench of this court in ***German Remedies Ltd. vs. Deputy Commissioner of Income Tax***² that while granting approval it was obligatory on the part of the Principal Commissioner of Income Tax to verify whether there was any failure on the part of the assessee to disclose full and true relevant facts in the return of income filed for the assessment of income of that assessment order.

6. In view of the above, the impugned notice and consequential order justifying reasons recorded are unsustainable. The same are liable to be quashed and set aside. Hence, petition is allowed. Rule made absolute

2 [2006] 287 ITR 494 (BOM)

in terms of prayer clause - (a) and (b) which reads as under :

(a) that this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of 'Certiorari', calling for the records of the case and after satisfying itself as to the legality thereof quash and set aside the notice dated 31.03.2019 issued by the First Respondent under section 148 of the Income Tax Act, 1961, being Ex. - 'G' hereto ;

(b) that this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of 'Certiorari', calling for the records of the case and after satisfying itself as to the legality thereof quash and set aside the order dated 14.10.2019, Ex. - 'T' herein, passed by the First Respondent, purportedly disposing of the objections raised by the Petitioner against the initiation of the reassessment proceeding by the First Respondent.

7. Petition disposed.

(AMIT B. BORKAR, J.)

(K.R. SHRIRAM, J.)