IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3260 OF 2019

Ataul Usmangani Memon ….Petitioner

V/s.

Income Tax Officer, 26(1)(6) & Anr. …Respondent

Mr. S. Sriram a/w Ms Neha Sharma i/b Mr. B. V. Jhaveri for Petitioner
Mr. Sham V. Walve for Respondents-Revenue

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 30th NOVEMBER 2021

P.C. :

1 This petition was filed impugning a notice dated 31st March 2019 issued under Section 148 of the Income Tax Act 1961 (the Act) and the order dated 14th November 2019 rejecting the objections of petitioner. Thereafter, petition was amended on 19th May 2021 pursuant to this court's order dated 4th May 2021, by which petition has challenged the order dated 27th March 2021 passed by respondent no.1 under Section 147 of the Act, concluding the proceedings pursuant to the re-opening of the assessment.

2 We have perused the petition and the affidavit in reply with the assistance of Mr. Sriram and Mr. Walve and also considered the additional reply filed by respondents after the petition was amended. Mr. Sriram states if the court holds the notice of re-opening under Section 148 of the Act issued on 31st March 2019 is set aside, the consequential orders will also collapse. We agree with Mr. Sriram. Now let us examine whether the notice

to reopen dated 31st March 2019, where respondents have stated that they have reasons to believe that petitioner's income chargeable to tax for A.Y.-2012-2013 has escaped assessment within the meaning of Section 147 of the Act, was valid notice. The reasons for re-opening dated 6th August 2019 has been provided to petitioner, copy whereof is annexed to the petition. Since notice to reopen has been issued after expiry of 4 years of completion of assessment, the proviso to Section 147 of the Act squarely applies to the case. The proviso to Section 147 was applicable at the relevant time provides where an assessment under Sub-Section (3) of Section 143 of the Act has been made for the relevant assessment year, no action shall be taken after the expiry of 4 years from the end of relevant assessment year. There is a bar. The exception to this bar is whether income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of assessee, to disclose fully and truly all material facts necessary for his assessment, for that assessment year. Therefore, only if there is a failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment, can an action be taken under Section 147 after expiry of 4 years from the end of the relevant assessment year. In this case, 4 years having expired, let us examine the reasons for re-opening to see what was that material fact which petitioner had failed to disclosed fully and truly.

3 In our view, the reasons does not indicate any material fact that has not been disclosed. The reasons as it reads are merely change of opinion which is not permissible. There are two points on which respondents wanted

to reopen, one is the rate of depreciation that was applied on cylinders and the second is a gift amounting to Rs.42,25,000/- that petitioner had received from one Fazle Rehaman. As regards the depreciation on cylinders, petitioner had claimed @ 80% whereas according to the Assessing Officer, who wanted to reopen, the correct rate of depreciation was only @60%. In the assessment order originally passed on 9th March 2015, it says "the case is selected under CASS on the issue of .... depreciation at higher rate". It further says the assessee has claimed higher rate of depreciation @ 80% and it is verified and allowed. Therefore, even if the correct rate of depreciation was only @ 60%, still there was no failure on the part of the assessee to fully and truly disclose the rate of depreciation claimed. On this point, there cannot be re-opening.

On the second aspect of gift from Fazle Rehaman amounting to Rs.42,25,000/-, in the reasons of re-opening itself it is stated "as per material available on record". The assessee has received the gift amounting to Rs.42,25,000/- but no details of gift deed is available on record. It is true that the original assessment order does not discuss this item of gift but the indisputable fact is in the balance sheet as on 31st March 2012 filed by petitioner, petitioner has disclosed in his capital account a sum of Rs.42,25,000/- received from Fazle Rehaman. The Assessing Officer, who passed the earlier assessment order after selecting the case under Computer Aided Scrutiny Selection (CASS) would have certainly considered right on the face of the balance sheet this disclosure by petitioner.

4 In the circumstances, as the reasons do not disclose any material that has not been fully and truly disclose by petitioner, in our view, respondents could not have validly reopened petitioner's case for A.Y.-2012-2013.

5 In the circumstances, petition is allowed in terms of prayer clauses (a) and (aa), which read as under:

> *"(a) that this Hon'ble court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate 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 notice under Section 148 of the Act dated 31st March 2019 (Ex. H) and the order dated 14th November 2019 rejecting the objections of the petitioner (Ex. R) and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned notice u/s 148 of the Act dated 31st March 2019 (Ex.H) and the order dated 14th November 2019 rejecting the objections of Petitioner (Ex.R).*
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> *(aa) that this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the passing of the order under Section 147 of the Act dated 27th March 2021 (Ex.S) and after going through the same and examining the question of legality thereof to quash, cancel and set aside the impugned order under section 147 of the Act dated 27th March 2021 (Ex.S)."*

6 Petition disposed with no order as to cost.

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