IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2685 OF 2007

Bang Securities Pvt. Ltd. ....Petitioner

V/s.

The Assistant Commissioner of Income
Tax Central Circle-41 & Ors. ...Respondents

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

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ
DATED : 10th DECEMBER 2021

P.C. :

1 Petitioner received a notice dated 30th March 2007 from respondent no.1 under Section 148 of the Income Tax Act, 1961 (the Act), seeking to reopen the assessment for the A.Y.-2000-2001 followed by two notices dated 20th November 2007 and 13th December 2007 under Section 142(1) and 143(2), respectively. Thereafter, an order dated 12th December 2007 rejecting petitioner's objections to reopen for A.Y.-2000-2001 came to be passed. These three notices and the order are impugned in this petition.

2 Section 147 of the Act which provides for re-opening of assessment, in the proviso makes it clear that where an assessment has been made under Section 143(3), no action shall be taken under Section 147 after expiry of 4 years from the end of the relevant assessment year unless the income of the assessee chargeable to tax has escaped assessment by reason of the failure on part of the assessee to make a return under Section 139 or in response to

a notice issued under Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the case of petitioner, the assessment was completed under Section 143(3) of the Act on 31st March 2003. The proposed re-opening indisputably is after expiry of 4 years from end of assessment year. We have considered the reasons recorded for re-opening and issuance of notice under Section 148 and in our view, it does not make out any case of petitioner failing to disclose fully and truly all material facts necessary for its assessment for that year. In fact, there is not even an allegation that there has been a failure on the part of petitioner.

3 Mr. Suresh Kumar relied upon a judgment of this Court in ***Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax, Circle 6 (2)***[1] to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. We would certainly agree with Mr. Suresh Kumar but as held in *Crompton Greaves Ltd.* (Supra), this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled down from the reasons in support of the notice seeking to reopen

1 (2015) 55 Taxmann.com 59 (Bombay)

assessment, that will certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. The Court held *"However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act"*.

4 The point that emerges from the reasons recorded for re-opening petitioner's assessment concerns transactions of two clients of petitioner namely: Parth Investment Consultants Pvt Ltd. (Parth) and Devki Finance & Trading Pvt Ltd. (Devki). Both these had effected share transactions through petitioner and these transactions were also recorded in the books of account of Parth and Devki, which were found during search related proceedings. Ofcourse, both Parth and Devki have subsequently denied these transactions as theirs and contended that these were petitioner's transactions. In the reasons recorded, the Assessing Officer has cited more particularly from the assessments of Parth and Devki and has made it the basis for re-opening. Therefore, as respondents have not crossed the threshold for re-opening after a period of 4 years, i.e., discharge the onus of proving failure to disclose fully and truly all material facts for petitioner's assessment, the notice dated 30th March 2007 issued under Section 148 of the Act, has to be set aside on this ground alone.

5 In the reasons, it is recorded that in the case of Parth it is noted that an addition of Rs.50,31,450/- has been made by Assessing Officer on

account of speculation profit earned for A.Y.-2000-2001. In the reasons, it is also mentioned that in the case of Devki the Assessing Officer has added a sum of Rs.17,77,500/- on account of profit from share trading for A.Y.-2000-2001 and added Rs.3,37,17,358/- for A.Y.-2001-2002 in the case of Devki on account of credit entry treated as income under Section 68 of the Act. Once these amounts have been added as income of Parth and Devki, certainly that cannot be a reason to conclude that any income chargeable to tax has escaped the assessment for the same assessment years in the hands of another party, i.e, petitioner.

6 It appears from the reasons that the Assessing Officer has decided to reopen petitioner's case for A.Y.-2000-2001 under Section 148 of the Act because of retraction by Parth and Devki and before passing a block assessment order in the case of petitioner for the period 1st April 1991 to 23rd March 2001 on 26th September 2003. In the case of assessment of Parth and Devki, the Assessing Officer has recorded their retraction and dismissed those retractions as after thought because the transactions were recorded by Parth and Devki in their own books of account but they did not book the same into account while computing the profit. Where on consideration of material on record, one view conclusively is taken by the Assessing Officer, it would not be open to re-open the assessment based on very same material with a view to take another view. In our view, this is a case where the assessment is sought to be re-opened on account of change of opinion of the Assessing Officer. There is no new material to which reference is to be

found and the entire basis for re-opening the assessment is the material which was available before the Assessing Officer in the course of assessment proceedings of petitioner, Parth and Devki and respondent no.1 is the common Assessing Officer. In this case, it cannot be postulated that the condition precedent to the re-opening of the assessment beyond a period of 4 years has been fulfilled.

7 In the circumstances, petition is allowed in terms of prayer clause (a) which reads as under:

> *"(a) 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 Petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 30th March 2007 issued by Respondent no.1 under Section 148 of the Act seeking to reopen the assessment for the assessment year 2000-01 and the two notices, dated 20th November 2007 and 13th December 2007, issued by Respondent no.1 under Sections 142(1) and 143(2) respectively and the order dated 12th December 2007."*

8 Petition disposed with no order as to costs.

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