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

WRIT PETITION NO.3231 OF 2019

Kalpataru Land Private Limited ….Petitioner

V/s.

Assistant Commissioner of Income Tax
Central Circle – 5 (3) & Ors. ….Respondents

Ms. Vasanti B. Patel for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 20th DECEMBER 2021

P.C. :

1 Prayer clause - (a) of the petition 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 27th March 2019 issued by respondent no.1 under Section 148 of the Act seeking to reopen the assessment for the assessment year 2013-14 being Exhibit J hereto and the order dated 11th November 2019 being Exhibit N hereto.*

2 Petitioner's assessment for Assessment Year 2013-2014 was completed under Section 143(3) of the Income Tax Act, 1961 (the said Act) on 20th February 2016 by determining the total income of Rs.Nil. On 27th March 2019 notice under Section 148 of the said Act was issued to petitioner for Assessment Year 2013-2014. The reasons for reopening of assessment read as under :

> *1. The assessee is engaged in the business of real estate and*

> *development and filed its return of income for AY 2013-14 on 23/11/2013 declaring total income of Rs. Nil. The assessment in the instant case was completed u/s. 143(3) on 20/02/2016 by determining the total income of Rs. Nil.*
>
> *2. Thereafter, it is noticed that the assessee company had issued its shares at premium of Rs.990/- per share in FY 2012-13 relevant to AY 2013-14. During the said period, the assessee company had no significant transaction except having capitalized its interest expenses to the cost of the land purchased. The valuation of shares at a high premium of Rs.990/- per share by the company was based on the Discounted Cash Flow (DCF) method in which projections of profitability was computed on unrealistic future growth projections which is not correct. The company had received consideration which exceeded the Fair Market Value (FMV) of the shares and therefore liable to be taxed as the difference between the aggregate value of the shares and FMV u/s 56(2) (viib) of the Act.*
>
> *3. ………*
>
> *4. ……...*

3 First of all we find the entire view expressed is to be speculative and conjecture. The Assessing Officer has not even indicated what according to him should be the fair market value of the shares and how he has arrived at. The Assessing Officer has also not mentioned why according to him the valuation of shares were based on projections of profitability computed on unrealistic future growth projections. Moreover, it does not even indicate what was the material fact which was not truly and fully disclosed by petitioner during the assessment proceedings.

4 Mr. Suresh Kumar relied upon a judgment of this Court in ***Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax,***

Circle 6 (2) 4 [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 assessment, that will certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the said 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*".

5 Moreover, by a letter dated 5th October 2015 the Assessing Officer had called upon petitioner to produce the evidence in support of increase of authorised share capital, produce the evidence of share allotment and name and address of the parties from whom share premium

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

was received, among other things. Petitioner by its letter dated 23rd December 2015 provided the details of share premium received including name of the party from whom it was received. After considering the same, the assessment order has been passed on 10th February 2016.

6 Therefore, it is not permissible for an Assessing Officer to reopen the assessment based on the very same material with a view to take another view without consideration of material on record one view is conclusively taken by the Assessing Officer. It is also not permissible to reopen purely on change of opinion. A general statement that the escapement of income is by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is not enough. The Assessing Officer should indicate what was the material fact that was not truly and fully disclosed to him.

7 In the circumstances, we are hereby allow the petition in terms of prayer clause - (a) quoted above.

8 Petition disposed.

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