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

WRIT PETITION NO.3415 OF 2019

Sanjay Devkinandan Gupta ...Petitioner

Vs.
Union of India and Anr. ...Respondents

Ms. Aarti Sathe a/w. Ms. Aasavari Kadam for Petitioner.
Mr. Akhileshwar Sharma for the Respondent-Revenue.

CORAM : K. R. SHRIRAM &
AMIT B. BORKAR, JJ.

DATED : 23 DECEMBER 2021.

P. C. :

Petitioner is impugning the notice dated 29/3/2019 received under Section 148 of the Income Tax Act, 1961 (said Act) for Assessment Year 2014-15 and order dated 11/11/2019 rejecting objections filed by the Petitioner.

2. Since the reopening is proposed within the expiry of 4 years from the relevant Assessment year, proviso to Section 147 will not apply. As submitted by Mr. Sharma what the Court has to look for is only whether there is tangible material mentioned for reopening the assessment. Of course Mr. Sharma also submitted the document for profit on sale of and surrender and allotment of new flats and gift of shares of 3G Motors Private Limited were not submitted to the Assessing Officer. Mr. Sharma relied on affidavit in reply. We cannot accept

submissions of Mr. Sharma because this fact does not appear in the reasons for reopening and it is settled law that Revenue cannot improve upon the reasons in its oral argument or affidavit in reply as held in ***First Source Solutions Limited vs. The Assistant Commissioner of Income Tax*** in Writ Petition No.2762/19 dated 31/8/2021. Reasons for reopening and assessment has to be decided/examined only on the basis of the reasons recorded at the time of issuing notice under Section 148 of the Act seeking to reopen the assessment. These reasons cannot be improved upon and/or supplemented and much less substituted by affidavit and/or oral submissions.

3. Having considered the reasons for reopening provided to petitioner, we are satisfied that it is nothing but a mere change of opinion. It is settled law that the Assessing Officer has no power to review an assessment which has been concluded.

4. In this case petitioner had filed its return of income for Assessment Year 2014-2015 on 11/9/2014 declaring total income of Rs.1,58,27,930/- Thereafter, petitioner had filed revised return of income for Assessment Year 2014-2015 on 31/3/2015 declaring total income of Rs.1,58,27,930/-. Assessment was completed under section 143(3) of the Act on 15/12/2016 and assessed income was Rs.1,75,23,910/-.

5. During course of assessment proceedings petitioner received a notice dated 3/11/2016 under Section 142(1) of the Act calling upon petitioner to provide *interalia* information in writing and verified in prescribed manner relating to profit on sale of surrendered and allotment of new flats amounting to Rs.2,88,73,800/- and gift of 3G Motors Private Limited shares (Devkinandan J. Gupta) amounting to Rs.28,99,950/-. In reply petitioner, through Chartered Accountant's letter dated 9/11/2016, provided details together with copies of agreements. Petitioner also provided copy of the Gift Deed dated 13/3/2014 regarding shares. This was followed by another notice dated 15/11/2016 under Section 142(1) of the said Act whereby the Assessing Officer has stated that on verification of details filed on 9/11/2016 it was seen that petitioner had sold and purchased new flats as per details mentioned in the said notice and claimed deduction under Section 54 of the said Act. It is also mentioned that on scrutiny of the details and as per agreement of new purchased flats, it is seen that petitioner had surrendered old flats purchased in Financial Year 2010-2011 against a new flat on 30/12/2013. Petitioner was called upon to produce a copy of possession letters of old flats and new flats and explanation whether old flats were shown in the balance sheet and whether house property income has been applied for the old flats and new flats and reasons.

6. Petitioner by its Chartered Accountant's letter dated 21/11/2016 and 30/11/2016 provided documents and explanation. This was followed by the

Assessment order dated 15/12/2016 in which the Assessing officer has not made any reference to the exchange of flats or sale of flats and Gift Deed of shares of 3G Motors Private Limited. But considering the notices issued under Section 142(1) it is quite clear that the Assessing Officer has applied his mind because he has sought further details/documents and information on verification of documents submitted by petitioner and on scrutiny of those documents.

7. Mr. Sharma submitted that the Assessing Officer while passing regular assessment of its order has overlooked or ignored the particular issue mentioned in the reasons for reopening. Relying upon the judgment of the Hon’ble Delhi High Court in ***Consolidated Photo and Finvest Ltd. vs. CIT (Asst.)***[1], Mr. Sharma submits that a mere change of opinion cannot be a basis for reopening. Computed assessment would be applicable only to situation where the Assessing Officer has applied his mind and taken conscious decision on a particular matter in issue.

8. Delhi High Court in ***KLM Royal Dutch Airlines vs. Assistant Director of Income- Tax***[2] has observed that decision in ***Consolidated Photo and Finvest Ltd. (supra)*** must be held not to lay down correct law. Paragraph 15 reads as under:

> *"15. The Full Bench of this Court in Commissioner of Income-Tax v. Kelvinator of India Ltd. [2002] 256 ITR 1 had opined that the amendments introduced into Section 147 with effect from 1.4.1989*

1 (2006) 281 ITR 394 (Delhi)
2 2007 SCC Online Del 1785

have not altered the position that a mere change of opinion of the AO was not sufficient ground for embarking on a reassessment. Calcutta Discount was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax, inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section of Section 143, but under the third Sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view in this case that of the Gujarat High Court as in Gruh Finance Ltd. v. Joint Commissioner of Income-Tax (Assessment), Praful Chunilal Patel v. M.J. Makwana, Assistant CIT and Garden Silk Mills Ltd. vs. Deputy CIT (No.1). The Full Bench of this Court has taken into consideration both Praful Chunilal Patel as well as Garden Silk Mills. In Kelvinator the Full Bench had also analysed the earlier Division Bench decisions, namely, Jindal Photo Films Ltd. v. Deputy Commissioner of Income-Tax presided over by R.C. Lahoti J. (as learned Chief Justice of India then was) and Bawa Abhai Singh v. Deputy Commissioner of Income-Tax [2002] 253 ITR 83 comprising Arijit Pasayat and D.K. Jain Page 0602 (as their Lordships then were). It is quite possible that had the Court in Consolidated Photo been made aware of the consistent opinion of this Court in Jindal Photo and Bawa Abhai Singh, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court."

9. In the case of ***Commissioner of Income Tax and Ors. vs. Rubix Trading Pvt. Ltd.***[3] reported in in paragraph 16 it is held as under:

“16. It is true that in the final order of assessment, the Assessing Officer had not elaborated this aspect but had not made any disallowance or addition in the hands of the assessee. Merely because the order of assessment was silent on a particular claim of the assessee, would not by itself mean that the same was not scrutinized or that the Assessing Officer had

3 *2020 (421) ITR 330(Bom)*

not formed an opinion with respect to the same. If after detailed scrutiny during the assessment, the Assessing Officer examines a claim but does not reject the claim of the assessee which had come up for scrutiny, would not enable the Revenue to argue that the Assessing Officer had not formed any opinion on such issue and, therefore, reopening of the assessment would be permissible without there being any new or additional material available to the Assessing Officer. We may refer to the decision of the Gujarat High Court in the case of Gujarat Power Corporation Ltd. v. Asst. CIT, (2013) 350 ITR 266, in which following observations were made :-

> *"41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be reopened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving a large number of asses-sees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time fame. To protect the interests of the Revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to the entire original assessment, of course at the hands of the Revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are*

zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that the power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and, therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve a large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given

> *case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the Revenue that the Assessing Officer cannot be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.*
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> *43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition."*

10. Moreover it is an accepted position that the assessment orders would necessarily deal only with the claims being disallowed and not with the claims being allowed. ***(State Bank of India vs. Assistant Commissioner of Income Tax, Circle 2(2)(1), Mumbai and Ors.[4])***

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4 *Writ Petition No.271/2018 dated 15/6/2018*

11. This Court in ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax-2(1)***[5] has held that once query is raised during the assessment proceedings and the assessee had replied to it, it follows that a query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that the assessment order should contain reference and/ or discussion to disclose its satisfaction in respect of the query raised. Paragraphs 11, 12 and 14 of *Aroni Commercials Ltd (supra)* reads as under:

> *"11) In this case we are dealing with the reopening of assessment completed by order dated 12 October 2010 under Section 143(3) of the Act. The law with regard to reopening of assessment is fairly settled by decisions of Courts. The power of the Assessing Officers under Sections 147 and 148 of the Act to reopen an assessment is classified into two :-*
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> *(a) Reopening of assessment within a period of 4 years from the end of the relevant assessment year and*
>
> *(b) Reopening of assessment beyond a period of 4 years from the end of the relevant assessment year.*
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> *The common jurisdictional requirement for reopening of assessment both within and beyond a period of 4 years has to be on the basis of reason to believe that income chargeable to tax has escaped assessment and the reason for issuing a notice to reopen are recorded before issuing a notice. However, there is one additional jurisdictional requirement to be satisfied while seeking to reopen the assessment beyond the period of 4 years from the end of the relevant assessment year viz. that there must have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings. Thus the primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. However, as observed by the Supreme Court in the case of CIT vs. Kelvinator India Limited 320 ITR 561 in the context of Sections 147/148 of the*

5 *(2014) 44 taxmann.com 304 (Bombay)*

Act that reason to believe found therein does not give arbitrary powers to reopen an assessment. The concept of change of opinion is excluded/omitted from the words reason to believe. Thus a change of opinion would not be reason to believe that income chargeable to tax has escaped assessment. Besides the power to reassess is not a power to review. Further reopening must be on the basis of tangible material.

12) Therefore the power to reassess cannot be exercised on the basis of mere change of opinion i.e. if all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under Section 147/148 of the Act is not permissible. The powers under Section-147/148 of the Act cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under Section 147/ 148 of the Act only on satisfaction of the jurisdictional requirements. Further, the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and /or oral submissions. Moreover, the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Moreover, the tangible material upon the basis of which the Assessing Officer comes to the reason to believe that income chargeable to tax has escaped assessment can come to him from any source, however, reasons for the reopening has to be only of the Assessing Officer issuing the notice. At the stage of issuing notice under Section 148 of the Act to reopen a concluded assessment the satisfaction of the Assessing Officer issuing the notice is of primary importance. This satisfaction must be prima facie satisfaction of having a reason to believe that income chargeable to tax has escaped assessment. At the stage of the issuing of the notice under Section 148 of the Act it is not necessary for the Assessing officer to establish beyond doubt that income indeed has escaped *assessment."*

"14) We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143 (3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject

matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."

12. The reasons in this case relate to same issues which we have mentioned earlier on capital gains on exchange of flats and on the gift of shares of 3G Motors Private Limited received by petitioner from his late father. The Assessing Officer in the reasons for the re-opening says that he is of the opinion that there has been escapement of income, on perusal of revised return of income filed, ledger of profit on surrender/allotment of new flats, details filed and submission made by the assessee that the transfer of capital assets has been effected by way of exchange in this case and as per assessees calculations.

13. Therefore, it is clear that the primary facts necessary for assessment were also disclosed. It is settled law that the Assessing Officer is not entitled for change of opinion to commence proceedings for reassessment. It is also settled law that when on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view.

14. In the circumstances, we are satisfied that petition has merits.

Notice dated 29/3/2019 and order dated 11/11/2019 are hereby quashed and set aside. Petition disposed.

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