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

WRIT PETITION NO.1224 OF 2022

Chandrakant Narayan Patkar Charitable Trust ....Petitioner

V/s.

Income Tax Officer (Exemption) 1(2) and Ors. ....Respondents

Mr. Dharan V. Gandhi for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM &
N.R. BORKAR, JJ.
DATED : 12th APRIL 2022

P.C.:

1 Petitioner is a charitable Trust registered under the Bombay Public Trust Act, 1950. Petitioner is also a registered Trust under Section 12A of the Income Tax Act, 1961 (the Act). Petitioner filed its return of income for Assessment Year 2016-2017 under Section 139(1) of the Act on 13th October 2016 declaring total income of Rs.37,25,830/- under Section 11(1B) of the Act. Petitioner's audited accounts also was uploaded alongwith the audit report in Form 10B. For the year under consideration, petitioner had claimed an accumulation of Rs.70,00,000/- for using for charitable and religious purposes in India over a period of five years under Section 11(2) of the Act. The same was duly claimed by filing Form No.10 in this regard. According to petitioner, in the audit report and in the return of income, inadvertently it was mentioned that such accumulation is against Section 11(1) of the Act. This was duly explained during the course of

assessment proceedings which explanation was accepted.

2 Thereafter, an assessment order came to be passed on 5th December 2018. Petitioner received a notice dated 30th March 2021 under Section 148 of the Act. Petitioner also received the reasons for reopening vide a communication dated 30th June 2021. Petitioner filed its objections to the reopening which came to be rejected by an order dated 28th December 2021. It is this notice and the order which are impugned in the petition.

3 We have considered the petition, the documents annexed thereto and the affidavit in reply and we are satisfied that the proposed reopening is based on change of opinion which the law does not permit.

4 We say this because the reasons for reopening pertains to a sum of Rs.70,00,000/- accumulated in the relevant year. In the reasons, the Assessing Officer states that it is not ascertainable whether the amount of Rs.70,00,000/- is accumulation of income under Section 11(2) or deemed application of income as per clause (2) of Explanation to Section 11(1) of the Act. It is also alleged that petitioner has not disclosed the true and correct information during the scrutiny proceedings of Assessment Year 2016-2017 before the Assessing Officer and thereby suppressed its income by unlawful claim of accumulation/deemed application of income and hence, there has been an escapement of income to the extent of Rs.70,00,000/-. Infact this has been a subject matter in consideration during

the assessment proceedings. Petitioner had received a notice dated 19th July 2018 under Section 142(1) of the Act calling upon petitioner to furnish details of accumulation made under Section 11(2), if any, in last 10 years and the details of utilization as per the format provided. Petitioner was also called upon to furnish copies of application in Form 10 and Resolution of Trustees in this regard. Petitioner, by its letter dated 7th August 2018, provided details of accumulation made under Section 11(2) in the last 10 years. Thereafter, petitioner received another notice dated 30th August 2018 under Section 142(1) of the Act once again calling upon petitioner to furnish copy of Form 10 alongwith acknowledgment and Resolution of Trustees with regard to accumulation under Section 11(2) of the Act. By a letter dated 5th September 2018, petitioner provided the details, i.e., the Resolution as well as Form 10. Thereafter, petitioner received a show cause notice dated 9th November 2018 specifically calling upon petitioner as to why petitioner's explanation should not be rejected. In the show cause notice, it is mentioned that the details on record show that the Trust has been accumulating continuously as per provisions of Section 11(2) of the Act and it is also noticed that the accumulated amount is not utilised for the purposes specified of accumulation. It is also stated in the show cause notice that from the audit report filed in Form 10B it is seen that an amount of Rs.70,00,000/- has been accumulated as per Explanation 2 to Section 11(1) of the Act and there is no accumulation under Section 11(2) of the Act.

Instead of filing Form 9A, the Trust had filed Form 10 with no specific purposes as required mandatorily. Petitioner was called upon to show cause why the application be not denied since necessary requirements have not been fulfilled. Petitioner replied to the show cause notice vide its Chartered Accountants' letter dated 14th November 2018 and showed cause as to why petitioner's claim to accumulation should be allowed. Petitioner explained that while mentioning in Form 10B, it was inadvertently mentioned against 11(1) and also in the return as the same software generates all three form, viz., 10B, 10 and ITR-7. This explanation was accepted and no further query was raised and the accumulation under Section 11 of the Act of Rs.70,00,000/- was factored in while computing the income. Therefore, it is quite clear that this issue was under active consideration during the assessment proceedings. Infact in the affidavit in reply at paragraph 6.13 respondents admit the fact that the amount of Rs.70,00,000/- was inadvertently shown as deemed application of income and after a show cause notice was issued and an explanation was received, the Income Tax Officer accepted the claim of accumulation of Rs.70,00,000/- under Section 11(2) of the Act and finalised the assessment under Section 143(3) of the Act on 5th December 2018.

5 As regards the allegation in the reasons recorded that it is not ascertainable whether the amount of Rs.70,00,000/- is accumulation of income under Section 11(2) or deemed application of income as per clause

(2) of Explanation to Section 11(1) of the Act, at paragraph 6.17 of the affidavit in reply, respondents have accepted that there is an error in the reasons recorded. Respondents have stated in the affidavit in reply that "*therefore, the question in reason recorded that it is not ascertainable whether the amount of Rs.70,00,000/- is accumulation of income u/s 11(2) or deemed application of income as per clause (2) of Explanation to section 11(1) of the Act as shown in return of income does not arise*".

6 In the circumstances, it is quite clear that the entire reopening is based on change of opinion.

7 Mr. Gandhi relies on a judgment of this Court in ***Commissioner of Income Tax – 15 V/s. Srusti Diam***[1] to submit that though there is no bar to form an opinion based on tangible material obtained from the assessment of subsequent years, if the material obtained during the assessment proceedings for another year is based on same material which has already been considered, then it would amount to change of opinion. The Court in *Srusti Diam* (Supra) held that the reopening of an assessment cannot be on the basis of a material which has already been considered during the regular assessment proceedings by the Assessing Officer. We also find that all material which was relevant to the determination was available when the assessment was completed for the assessment year in question. Consequently, the mere formation of another view in the course

1. 2015 (57) taxmann.com 392 (Bombay)

of assessment proceedings for subsequent years would not justify the Revenue in reopening the assessment for Assessment Year 2016-2017. Therefore, in the present case, there was no tangible material, no new information and no fresh material which came before the Revenue in the course of assessment of subsequent years which can justify the reopening of the Assessment Year 2016-2017.

8 In the circumstances, petition is allowed in terms of prayer clause – (a), which reads 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, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said notice dated 30 March 2021 (Exhibit "E") and the subsequent Order dated 28 December 2021 (Exhibit "I").*

9 Petition accordingly disposed.

(N.R. BORKAR, J.) **(K.R. SHRIRAM, J.)**