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

WRIT PETITION NO. 958 OF 2015

Tanna Builders Ltd. ….Petitioner

V/s.

The Income Tax Officer 2(3)(3),
Mumbai and 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 &
N. J. JAMADAR, JJ.
DATED : 11th MARCH, 2022

P.C. :

1. Petitioner is engaged in the business of construction of residential building, owns a plot of land at Prabhadevi and started construction of building on the said plot in 1994 which was completed in F.Y. 2001-02. The shareholders of petitioner, by virtue of holding shares and debentures are entitled to occupy either themselves or through their nominee such portion of the immovable property of petitioner as may be decided by ordinary resolution of the shareholders. Petitioner recouped the cost of construction of the building by issue of redeemable debentures to the shareholders of petitioner.

2. Petitioner filed its return of income for A.Y. 2008-09 on 22nd September, 2008 declaring total income of Rs.(-)3,63,865/-. The return of

income was processed under Section 143(1) of the Income Tax Act, 1961 (the Act) on 24th August, 2009. Later the case was selected for scrutiny and statutory notice dated 17th August, 2009 under Section 143(2) of the Act was issued and served on petitioner on 26th August, 2009. Thereafter, statutory notices were issued under Section 142(1) of the Act alongwith questionnaire asking petitioner to submit various details. Petitioner submitted details and assessment was completed accepting total income as per return of income, i.e., Rs.(-)3,63,865/-.

3. During the assessment proceedings as per notice issued as mentioned in the assessment order dated 26th April, 2010 petitioner was called upon to submit notes on business activity of petitioner and notes on issue of debentures. By its letter dated 11th March, 2010 petitioner first gave a note for construction of building Tanna Residency and by its letter dated 8th April, 2010 petitioner gave a note on issue of debentures. In the note on debentures petitioner has explained how it issued further debentures for covering cost of construction and for additional FSI.

4. In the reasons recorded for re-opening the assessment, the Assessing Officer says that the amount of Rs.5,51,23,200/- which petitioner received against new unsecured non-convertible redeemable debentures was actually the sale consideration received in respect of sale of flats and that has escaped assessment within the meaning of Section 147 of the Act.

5. In our view, this issue has been the subject matter for discussion and consideration by the Assessing Officer before the assessment order dated 26th April, 2010 was passed. Moreover, since the proposed re-opening is after expiry of four years from the end of the relevant assessment years, Revenue has to show that there was failure on the part of petitioner to disclose truly and fully all material facts required for assessment. We cannot make out, from the reasons for re-opening, that there has been any such failure. The entire basis for re-opening is relying upon the balance sheet filed by petitioner. The statement of Revenue that there has been failure on the part of petitioner to disclose fully and truly all material facts is only to get over restrictions imposed in Section 147 of the Act. On this ground alone the notice has to be quashed and set aside.

6. Moreover, since the issue of debentures has been a subject of consideration of assessment proceedings, re-opening on the same basis relying on the same primary facts disclosed based on change of opinion is not permissible.

7. Mr. Suresh Kumar submitted that issue of debentures has not been disclosed in the assessment order. That would not help Revenue because it is settled law that it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Once a query is raised during the assessment

proceedings and the assessee has replied to it, it follows that a query raised was a subject of consideration of the Assessing Officer while completing the assessment. This court in paragraph no.14 of ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income Tax 2(1)***[1] held as under :

> *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*

1 [2014] 44 taxmann.com 304 (Bombay)

> *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.*

8. We have to note that the order rejecting petitioner's objections does not even deal with petitioner's objections on merits.

9. In the circumstances, notice dated 17th February, 2014 and the order dated 25th February, 2015 rejecting petitioner's objections are quashed and set aside.

10. Petition disposed.

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