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

WRIT PETITION NO. 3456 OF 2021

Parinee Realty Pvt. Ltd. ….Petitioner

V/s.

Assistant Commissioner of Income Tax Central Circle-2(3) and Ors. …Respondents

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Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b Lumiere Law Partners for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATED : 23rd FEBRUARY, 2022

P.C. :

1. Petitioner is impugning the notice dated 10th March, 2021 for A.Y. 2014-15 issued under Section 148 of the Income Tax Act, 1961 (the Act) and the order dated 22nd June, 2021 rejecting petitioner's objections to re-opening.

2. As per the notice issued under Section 148 of the Act, re-opening is proposed after the expiry of four years from the end of the relevant assessment year and assessment having been completed under Section 143(3) of the Act on 30th March, 2016, the proviso to Section 147 of the Act applies. Respondent has to show that there was failure of petitioner to truly and fully disclose all material facts necessary for assessment.

3. We have perused the reasons for re-opening as contained in a communication dated 7th April, 2021 and the said reasons does not disclose that there was non disclosure on the part of petitioner.

4. The re-opening is proposed on the basis that certain information received on 20th January, 2019 after the assessment was completed indicated that petitioner has taken interest bearing loan from various institutions in the market and advanced a part of loan so taken to group companies either at low interest rate or at NIL interest rate. According to the Jurisdictional Assessing Officer (JAO) during the year interest has been received @ 12% per annum from Parinee Developers Pvt. Ltd. and Parinee Contour Construction Pvt. Ltd., two group companies but no interest has been charged to Parinee Shelters Pvt. Ltd. and Parinee Realtors Pvt. Ltd. Therefore, interest @ 12% per annum should have been charged on Parinee Shelters Pvt. Ltd. and Parinee Realtors Pvt. Ltd., and the charged amount would have been Rs.1,03,18,959/- which has escaped assessment.

For the assessment year 2017-18 also notice under Section 148 of the Act had been issued and the reasons recorded are almost identical. Petitioner had challenged that notice by Writ Petition No.3638 of 2021 and this court by order and judgment dated 19th January, 2021 had quashed and set aside the said notice. Paragraph no.6, 7 and 8 of the said judgment reads as under :

6. There can be no doubt in the facts of the present case that the issue of loan being given to group companies either at low interest rate or no interest rate was a subject matter of consideration by the Assessing Officer during the original assessment proceedings. It would therefore, follow that the re-opening of the assessment is merely on the basis of change of opinion of JAO from that held during the course of assessment proceedings leading to the assessment order dated 21st December, 2019. This change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment.

7. According to the JAO, survey report submitted by DDIT investigation indicate that interest should be charged at 12% per annum on loan given to sister concern totaling to Rs.4,17,04,380/- and therefore income chargeable to tax has been under assessed by the said amount. According to the JAO this interest income of Rs.4,17,04,380/- has escaped assessment. We find it rather strange that such an opinion is formed by the JAO. It is an accepted position that petitioner has in fact not received any interest in respect of the loans/advances given to seven of its group companies in the assessment order 2017-18. When no income is received there is no question of paying any tax on income which respondent think should have been received but was in fact not received. Income which accrues to a person is taxable in his hands but we have not seen any provision of law which says that income which he could have earned but he has not earned is taxable as income accrued to him. It will be useful to reproduce paragraph no.7 of the judgment of this court in ***India Finance & Construction Co. (P.) Ltd. vs. B.N. Panda, Deputy Commissioner***[1]*. The same reads as under :*

> *7. The second transaction on the basis of which notice under section 148 is issued relates to a transaction entered into in May, 1982, under which the assessee-company advanced to M/s. C. R. Developers (P) Ltd. a sum of Rs.15 lakhs purporting to be an advance for the purpose of construction of a hotel. The advance is in the nature of a loan and no interest is being charged on this account. The respondents contend that the assessee-company should have received an interest income worth approximately income worth approximately Rs. 3 lakhs if interest had been charged on this advance. Hence, this interest income of approximately Rs. 3 lakhs has escaped assessment. Once again the reason which is recorded is beyond the scope of section 147. It is an accepted position that the assessee-company*

1 [1993] 200 ITR 710 (Bombay)

has in fact not received any interest in respect of this advance from M/s. C. R. Developers (P) Ltd. in the assessment year 1988-89. When no income is received there is no question of paying any tax on income which the respondents think, should have been received but was in fact not received. In the case of CIT v. A. Raman and Co. [1968] 67 ITR 11, the Supreme Court said that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have but has not earned, is not made taxable as income accrued to him. The Court also said that the High Court exercising Jurisdiction under article 226 of the Constitution has power to set aside a notice issued under section 147(b) if the condition precedent for the exercise of jurisdiction does not exist. It is open to the court to ascertain whether the ITO had in his possession any information and whether from the information the ITO have reason to believe that the income chargeable to tax has escaped assessment. In the present case, the reasons which are recorded clearly show that there is no material at all on the basis of which the Assessing Officer could have reason to believe that any interest income had escaped assessment. No such income had accrued during the assessment year in question.

8. It will also be useful to reproduce paragraph nos.5, 6 and 7 of the judgment of the High Court of Delhi in ***Shivnandan Buildcon (P.) Ltd. vs. Commissioner of Income-tax***[2] *.*

5. On going through the said decision, it can be discerned that the Guwahati High Court held that there was nothing to show that the assessee had, in fact, received interest or that the company to whom the loan was given had, in fact, paid interest to the assessee. There was also nothing on record to show that the alleged interest was not reflected in the accounts. The only finding recorded was that the assessee "ought to" have charged interest. Referring to an earlier decision of the Guwahati High Court, in Highways Construction Co. (P.) Ltd. v. CIT [1993] 199 ITR 702, the Court observed that their attention had not been invited to any provision of the Income-Tax Act empowering the income-tax authorities to include in the income, interest which was not due or not

2 [2015] 60 taxmann.com 347 (Delhi)

> *collected.*
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> *6. In similar vein, when we asked Mr Sahni, who is appearing for the respondent to point out some provision of the Income Tax Act, whereunder such 'notional' interest could be made the subject matter of tax, the only reference he made was to Section 144 of the said Act. However, we are clear that Section 144 does not at all apply to the present proceedings because the present proceedings originate from an assessment under Section 143(3) of the said Act.*
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> *7. In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.*

5. In the circumstances, petition is allowed and the impugned noticed dated 10th March, 2021 and order on objections dated 22nd June, 2021 are quashed and set aside.

6. Petition disposed.

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