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

WRIT PETITION NO.1072 OF 2014

M/s Anjis Developers Pvt. Ltd. .... Petitioner.

Vs.

Commissioner of Income Tax-5
& Anr. ... Respondents.

Mr.S.C. Tiwari a/w Ms Rutuja Pawar for petitioner.
Mr. Suresh Kumar a/w Ms Sumandevi Yadav for respondents.

CORAM : K.R. SHRIRAM &
N.R.BORKAR, JJ.

DATE : 29th APRIL, 2022.

P.C.:

1. Petitioner is impugning notice dated 30.3.2013 issued under Section 148 of the Income Tax, 1961 (hereinafter to be referred to as the 'said Act') on the ground that the petitioner's income in respect of which it was assessable to tax for the Assessment Year 2008-2009, has escaped assessment within the meaning of Section 147 of the said Act. Petitioner has been provided reasons for re-opening with letter dated 26.4.2013. We have perused the reasons recorded and we are satisfied that it is a clear case of change of opinion. It is settled law that reopening can not be based on change of opinion. Change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped

assessment. Assessing Officer admits that petitioner's return of income has been processed under Section 143(3) of the said Act. According to the Assessing Officer by an Agreement dated 5.3.1994 petitioner agreed with the promoters of the Company to finance and to manage development/ re-development project by financing a sum of Rs.159,306,256/-. The promoters of petitioner also took deposit of Rs.183,155,710/- from 7 parties and agreed to allot premises in proposed building. However, vide agreement dated 19.12.2002 alongwith supplemental agreement dated 2.1.2003, the promoters transferred development rights to petitioner for consideration of Rs.34,24,61,966/- and during assessment year under consideration, petitioner cancelled the respective allotment with 7 parties on condition of refunding the deposit paid by them. Entire amount payable of Rs.18,31,55,710/- is debited to project account as compensation payable. According to Respondent No.2, assessee has refunded the deposit /advance to those 7 persons and showed the amount of Rs.18,31,55,710/- as expenditure whereas, it should have been shown as capital payment. Hence, there is escapement of income in the sum of Rs.18,31,55,710/- which is assessable to tax.

2. Admittedly, in this case, there was even survey operation under Section 133-A on 31.1.2008 and in the survey report it was specifically commented to examine in detail genuineness of claim of assessee company

about compensation payable amounting to Rs. 18,31,55,710/-. It is also admitted that the Assessing Officer in his order dated 31.12.2010 has accepted submissions of petitioner and allowed expenditure of Rs.183155710/-. According to Respondent No.2, the Assessing Officer who passed the original assessment order should not have accepted the payment as expenditure but should have treated it as 'capital payment'. In the reasons the Assessing Officer writes as under:

> "While passing the order u/s 143(3) of the Act, the assessing officer accepted the above submission and allowed the expenditure. In this connection it is pointed out that the assessee company has refunded the deposit/advance received from the prospective buyers and repayment thereof constitute the capital payment as such allowance of expenditure of Rs.18,31,55,710/- is not in order. As the same is capex in nature.

3. In the circumstances, it is clear case of change of opinion. Therefore, petition is allowed in terms of prayer clause (a) which reads as under :

> "(a) That the Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any appropriate writ, order or direction after calling for the records and proceedings of the respondents and quash and set aside notice u/s 148 dated 30th March, 2013 i.e. Exhibit-H to the petition."

4. Petition disposed with no order as to costs.

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