

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

WRIT PETITION NO.2818 OF 2008

Golden Tobacco Limited

...Petitioner

vs.

The Assistant Commissioner of Income
Tax-8(1), Mumbai and Another

...Respondents

Mr. Dharan Gandhi, for the Petitioner.
Mr. Suresh Kumar, for the Respondents.

**VISHAL
SUBHASH
PAREKAR**

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**CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.**

DATE : JANUARY 06, 2022

(THROUGH VIDEO CONFERENCING)

P.C.:

1. The Petitioner is a company engaged in the business of manufacture and trading of tobacco products. Petitioner received a notice dated 26th March, 2008 under section 148 of the Income Tax Act, 1961(the Act) for reopening the assessment for assessment year 2003-2004. Petitioner filed its objections which came to be rejected by an undated order passed by respondent No. 1.

2. According to Petitioner, respondent No. 1 has raised five issues which according to him represent the income which has escaped assessment. None of these five issues give him jurisdiction to reopen the assessment because not only Petitioner has made full

and true disclosure of all material facts but there has also been full application of mind by respondent No. 1 at the stage of passing original assessment order under section 143(3) of the Act.

3. In respect of the assessment year 2003-2004 Petitioner had filed return of income on 27th November, 2003 in which petitioner disclosed a total loss of Rs. 24,08,76,434/-. With the said return Petitioner filed statement of income, profit and loss account, balance sheet and its schedules, annual report, tax audit report in Form 3CA and Form 3CD. Petitioner received a notice dated 17th February, 2006 from respondent No. 1 under section 142 of the Act together with a questionnaire also dated 17th February, 2006 by which Petitioner was called upon to furnish details and explanation relating to number of issues. In response to the questionnaire, Petitioner addressed two communications, one dated 7th March, 2006 and the other dated 13th March, 2006 by which it provided exhaustive information relating to each of the issues raised by respondent No. 1. Subsequently, respondent No 1 passed assessment order dated 17th March, 2006 in which, after making several additions and disallowances, Petitioner's total loss was computed at Rs. 22,00,24,880/-. Thereafter petitioner received impugned notice dated 26th March, 2008 to which it filed objections

and the objections came to be rejected. It is this notice under section 148 of the Act dated 26th March, 2008 and the undated order disposing objections are impugned in this petition. Of course, Petitioner is also impugning two notices received in between under sections 142(1) and 143(2) of the Act.

4. Mr. Gandhi, submitted that there can be no reason to believe that no income was given to assessment and the entire approach has been on mere change in opinion which cannot constitute reason to believe. Mr. Gandhi submitted that each of the five issues raised in the reasons for reopening were raised during the assessment proceeding. Inquiries were made by Assessment Officer in the course of assessment proceeding and Petitioner has replied to each of these queries in detail. Mr. Gandhi submitted that once a query raised was the subject of consideration of the Assessment Officer while completing the assessment, it is not permissible on the same set of facts to reopen the assessment to take another view. Mr. Gandhi submitted that the change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

5. We have considered the reasons for reopening the assessment

with the assistance of Mr. Gandhi and Mr. Suresh Kumar.

6. The assessment is proposed to be opened within four years from the end of relevant assessment year and therefore the proviso to section 147 of the Act then in force would not apply. The Assessment Officer has to only show that there was some tangible material that give reasons to believe that income chargeable to income tax has escaped assessment, but at the same time, assessment cannot be reopened on mere change of opinion.

7. It is also settled law, as held in **First Source Solutions Ltd. vs. Assistant Commissioner of Income tax 12(2)(1), Mumbai**¹, that reasons for reopening an assessment has to be tested/examined only on the basis of reasons recorded at the time of assessing notice under section 148 of the Act seeking reopening the assessment. These reasons cannot be impugned and/or supplemented much less substituted by affidavit and/or oral submissions.

8. Five points which have been raised in the reasons for reopening the assessment are:- (a) Depreciation of property Sharing Residential Units amounting to Rs. 1,87,21,654/- cannot be allowed; (b) Assessee cannot write off an amount of Rs.

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1,51,11,785/- that could not be recovered from the parties to whom equity shares of joint stock companies were sold; (c) Bad debts written off in support of two companies where arbitration award has been given in favour of the assessee, the amount to Rs. 24,61,372/- cannot be written off; (d) Deduction in the amount of Rs. 83,65,499/- being liability for increase in the value of third party securities under settlement is not allowable and (e) Claim of bad debts in the sum of Rs. 31,40,96,154/- which has been written off are not allowable to be written off.

9. We have considered the documents annexed to the petition and we are satisfied that on each of these five items, query was raised by the Assessing Officer in the notice dated 17th February, 2006 issued under section 142(1) of the Act and for each of these items, explanation has been given by petitioner in its letter dated 7th March, 2006. In fact, in the assessment order, the Assessing Officer records the fact that the notice under section 142(1) along with the questionnaire was issued to Petitioner on 17th February, 2006 and response was filed thereto. In fact, items No. 1, 3 and 5 of the reopening noted above has been discussed in the assessment order dated 17th March, 2006. As regards the items No. 2 and 4 which does not find mention in the assessment order, the effect of

non mention has been discussed by this Court in **Aroni Commercial Ltd. vs. Deputy Commissioner of Income-Tax -2(1)**² where paragraph no. 14 reads 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

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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.

10. Therefore once a query is raised during the assessment proceeding and the assessee has replied to it, it follows that the query raised was a subject for consideration of the Assessment Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussions to disclose its satisfaction in respect of the query raised. There can be no doubt that in the present facts, the five points mentioned above, was a subject matter of consideration by the Assessing Officer during the original assessment proceeding leading to an order dated 17th March, 2006. It would, therefore, follow that the reopening of the assessment by the impugned notice dated 26th

March, 2008 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 17th March, 2006. This change of opinion does not constitute justification and/or reasons to believe that the income chargeable to tax has escaped assessment.

11. We have to also add that item No. 5 in the reasons noted above includes item No. 3 mentioned earlier. Moreover, in the assessment order a sum of Rs. 57,16,601/- out of Rs. 31,40,96,154/- has already been added to petitioner's income. Therefore, to say in the reasons for reopening that the assessee's claim of bad debts of Rs. 31,40,96,154/- was not allowable and that has resulted in escapement of income of the said amount shows non application of mind. On this count alone, it can be held that the Assessment Officer should not have formed the reasons to believe that income chargeable to tax has escaped assessment.

12. In view of the discussion above, we set aside the undated order rejecting petitioner's objections. We also hold that there was no reason for the Assessing Officer to have a reasonable belief that income chargeable to tax has escaped assessment.

13. Accordingly, we allow the petition in terms of prayer clause

(a) and the same read as under:

(a) This 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 under Article 226 of the Constitution of India calling for the records of the petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 26th March, 2008 issued by respondent No. 1 under section 148 of the Act to reopen the assessment for the assessment year 2003-2004 together with the consequential notices dated 4th December, 2008 under sections 142(1) and 143(2) of Income Tax Act, 1961 (Exh. G and I) and the order dated Nil purportedly dealing with the petitioner's objections (Exh.K).

14. Petition disposed.

15. No order as to costs.

(N. J. JAMADAR, J.)

(K. R. SHRIRAM, J.)