

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3452 OF 2019

Macrotech Developers Limited	)	
(Successor to Palava Dwellers Pvt. Ltd.)	)	
a company incorporated under the Companies	)	
Act, 1956, having its registered office at	)	
Lodha Excelus, N. M. Joshi Marg,	)	
Mahalaxmi, Mumbai 400 001 and registered	)	
Office at 412, Floor-4, 17G Vardhaman Chamber	)	
Cawasji Patel Road, Horniman Circle,	)	
Fort, Mumbai 400 001	)	Petitioner

Vs.

- | | | | |
|----|--|---|-------------|
| 1. | Assistant Commissioner of Income Tax, Central |) | |
| | Circle 7(3), Mumbai having his office at Room |) | |
| | No.655, 6 th floor, Aayakar Bhavan, |) | |
| | Maharishi Karve Road, Mumbai 400 020 |) | |
| 2. | The Principal Commissioner of Income Tax, |) | |
| | Central-4 having his office at Floor Aayakar Bhavan) |) | |
| | Maharishi Karve Road, Mumbai 400 020 |) | |
| 3. | The Union of India, |) | |
| | Through the Secretary, Department of Finance |) | |
| | Ministry of Finance, North Block, |) | |
| | New Delhi 110001 |) | Respondents |

Mr. Prakash Shah i/b. PDS Legal for Petitioner.

Mr. Sham V. Walve for Respondents.

**CORAM : K. R. SHRIRAM &
R. N. LADDHA, JJ.**

DATE : JANUARY 17, 2022

JUDGMENT :- (Per R. N. Laddha, J.)

The petitioner has sought to question the legality of a Notice dated 27 March 2019 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (for short 'the Act') seeking to

re-open the assessment for the Assessment Year 2012-13. There is also a challenge to the order dated 13 November 2019 passed by the Assistant Commissioner of Income Tax - Respondent No.1 rejecting the objections raised by the petitioner to the validity of the impugned notice.

2. Petitioner is a company registered under the Companies Act, 1956 and is engaged in the business of developing and construction of real estate properties. The National Company Law Tribunal, Mumbai by its order dated 09 January 2018 has sanctioned the Scheme of Arrangement between the Lodha Developers Private Limited and Palava Dwellers Private Limited and their respective shareholders and creditors. By the said Scheme, Palava Dwellers Private Limited was merged with Lodha Developers Private Limited. Subsequently, the name of Lodha Developers Private Limited was changed to Macrotech Developers Limited i.e., the petitioner with effect from 24 May 2019.

3. During the year under consideration, the petitioner had filed on 30 September 2012 e-return of income tax disclosing total income of Rs.208,86,67,827/- and claimed deduction of interest expense amounting to Rs.74,30,91,206/- in the computation of income under Section 36(1)(iii) of the Act. The petitioner had subsequently revised its income and filed revised return declaring total income of Rs.120,94,29,942/- on 31 March 2014.

4. Thereafter, on 22 December 2014, a notice under Section 143(2) of the Act was issued to the petitioner calling upon the petitioner to attend the office of the Assessing Officer and produce the copies of balance sheet, profit and loss account, computation of income and audit report etc. The petitioner responded by its letters dated 12 February 2015, 23 March 2015, 24 March 2015 and 30 March 2015 and provided requisite information and details with the supporting documents asked for. Subsequently, assessment order dated 31 March 2015 under Section 143(3) of the Act was passed by the Assessing Officer.

5. On 15 October 2015, the petitioner moved an application for rectification under Section 154 of the Act before the then Assessing Officer seeking to rectify certain mistakes in the order dated 31 March 2015. The Assessing Officer *vide* his order dated 03 November 2015 was pleased to rectify the assessment order dated 31 March 2015.

6. Thereafter, the Assessing Officer issued a notice dated 27 March 2019 under Section 148 of the Act to the petitioner seeking to re-open the assessment for the Assessment Year 2012-13 for the purposes of re-assessment. On receipt of the notice, the petitioner sought the reasons for re-opening of the assessment. In response, the Assessing Officer *vide* his letter dated 30 August 2019 communicated the following reasons for proposed re-opening of the assessment:-

“ The return of income for A.Y.2012-13 was filed by the assessee on 30.09.2012, declaring an income of Rs.208,86,67,827/-. Subsequently, the assessee filed revised return on 31.03.2014 declaring total income of Rs.120,94,29,942/-. Further, the assessment u/s.143(3) was passed on 31.05.2015 and determined the total income 120,94,29,940/-.

In this case, it is observed that the assessee company had, during the year claimed interest expenses of Rs.74,30,91,206 which is also allowed by AO. It was also observed that the assessee has borrowed fund for its construction project on which this interest was paid. Thus borrowing has direct nexus with its project. As per the matching concept of restricting expenses to the income offered during that particular year, expenses relating to future income should be capitalised and allowed in the year in which the income is offered. Accordingly, interest expenses of Rs.74,30,91,206 should have been capitalised.

It was also observed that similar claim of interest for Assessment Years 2013-14 and 2014-15 had been disallowed and added to Work in Progress.

. After examine the case it is submitted that, the assessee engaged in the business of construction activity. The accounting of the construction activity is governed by the Accounting Standard 7 as well as guidance note on accounting for real estate transaction issued by the Institute of Chartered Accountants of India (ICAI). The said guidance note categorically states that all the expenses directly related to the

project have to be carried over and debited to the cost of project. Such expenses can be claimed as deduction in the year in which the corresponding income of the project is credited in the books of account and offered to tax. The assessee had allocated all other expenses to the work in progress except interest. If the interest cost has been claimed in the year of its incurrence for the reason that it is periodic cost then going by the same logic the entire salary cost should also have been claimed as deduction for the same reason that it is also a periodic fixed cost. However, the assessee has allocated the salary cost to the work in progress which is directly related to the project. Thus, the treatments given by the assessee to expenses are contradictory to each other. It is not out of the place to state that the assessee had not followed the correct method of accounting for accounting the expenses towards the project being developed by the assessee. Thus, the entire interest expenses have to be carried over to the work in progress and shall be allowable as deduction in the year in which the revenue pertaining to the said interest shall be offered for taxation. The above view is fully supported by the judgment of Hon'ble Special Bench Mumbai in the case of M/s. Wall Street Construction Limited [102 TTJ 505] wherein the Hon'ble Bench has held that the interest cost shall be debited to work in progress and allowed to be claimed as deduction only in the year in which corresponding income is offered to tax. Proviso to Section 36(1)(iii) as under:

Provided that any amount of the interest paid, in respect of capital borrowed for acquisition of an asset for extension of existing business or profession (whether capitalized in the books of account or not) for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which such asset was first put to use, shall not be allowed as deduction.

In the light of the discussion in the preceding paragraphs, I have reasons to believe that income chargeable to tax to the tune of Rs.74,30,91,206/- has escaped assessment for the Assessment Year 2012-13. The amount of Rs.74,30,91,206 has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the Assessment Year 2012-13."

7. On 04 November 2019, the petitioner filed its objections to the reasons for re-opening of the assessment for Assessment Year 2012-13, which came to be rejected by the impugned order dated 13 November 2019.

8. In assailing the impugned notice under Section 148, the learned counsel appearing on behalf of the petitioner submitted that there was no failure to truly and fully disclose material and there was no fresh tangible material for initiating re-assessment proceedings. It was further contended that the assessment for Assessment Year 2012-13 is sought to be re-opened on the basis of a mere change of opinion. It is argued that since the notice under Section 148 was issued beyond the period of four years from the end of the relevant assessment year and since there was failure on the part of the respondents to disclose which are the material facts not disclosed, the initiation of re-assessment proceedings was bad in law by virtue of the first proviso to Section 147 of the Act.

9. On the other hand, it has been urged on behalf of the Revenue that the reasons which have been indicated in the communication dated 27 March 2019 are sufficient to re-open the assessment. It was submitted that while finalizing the assessment for Assessment Year 2012-13, the Assessing Officer found that the assessee had calculated depreciation on goodwill by adopting wrong method of purchase. According to the learned counsel for the respondents, in the present case, the Assessing Officer has reasonable belief that income chargeable to tax has escaped assessment and on the basis of such belief the respondent authority is entitled to re-open the assessment.

10. It is not in dispute that by the notice under Section 148 issued on 27 March 2019, the assessment pertaining to the year 2012-13 was sought to be re-opened after the lapse of four years and assessment under Section 143(3) has been completed. First proviso to Section 147 applies when the re-assessment proceedings are initiated after four years from the end of the relevant assessment year. The said proviso reads as under:-

“Provided that where an assessment under sub section (3) of Section 143 or this Section has been made for the

relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”

11. The question is whether there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of Assessment Year 2012-13. It is not the case that there is failure on the part of the assessee to make a return under Section 139 of the Act. The case of the assessee was selected for scrutiny for Assessment Year 2012-13 and it is after complete examination of the original computation of income, revised computation of income and audit, the Assessing Officer has allowed the claim of the assessee towards deductibility of interest expense of Rs.74,30,91,206/-. Thus, it is clear that the complete details were made available by the petitioner company in the course of assessment proceedings under Section 143(3) of the Act for Assessment Year 2012-13. In this backdrop, it can safely be concluded that the re-assessment proceedings for this year have been initiated despite the fact that the details in connection with the reasons for re-opening were already furnished for Assessment Year 2012-13. It is also stated that no disallowance were made in the assessment order regarding interest inventorization and the same was accepted by the Assessing Officer towards deductibility of interest expense of Rs.74,30,91,206/-. Thus, the reasons for re-opening the assessment of the relevant year were based on the details furnished in the assessment proceedings of Assessment Year 2012-13. Merely, if some other decision has been taken by the Department for other years i.e., Assessment Year 2013-14 and Assessment Year 2014-15, the respondent authorities do not retain the power to review the order of Assessment Year 2012-13 in the garb of re-opening under Section 147 of the Act. Thus, on change of

opinion and reviewing its own order is bad in law and without jurisdiction. In our view, re-opening of the assessment without any basis and merely change of opinion is not permissible while exercising powers under Section 147 r/w Section 148 of the Act. In the present case, the reasons which have been recorded by the assessing officer for reopening of the assessment do not disclose that the assessee had failed to disclose fully and truly all material facts necessary for the purpose of assessment. The duty is cast upon the assessee to make true and full disclosure of the facts at the time of original assessment. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. It is for the Assessing officer to draw the correct inference from the primary facts. If the assessing officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.

12. In this context, the legal position is well settled. A profitable reference can be made to the judgement of the Delhi High Court in the case of ***CIT vs. Kelvinator of India Limited, (2002) 256 ITR 1 (Delhi) (FB)*** wherein, it was enunciated that a mere change of opinion cannot form the basis of reopening a completed assessment.

13. Similarly, a Division Bench of this Court in the case of ***Ananta Landmark Private Limited Vs. Deputy Commissioner of Income Tax and others, W.P. No. 2814 of 2019, dated 14 September 2021***, on which reliance was placed on behalf of the petitioner, illuminates the path. In this case, after taking survey of the previous pronouncements it was enunciated that when the primary facts necessary for assessment are fully and truly disclosed, the assessing officer is not entitled on change of opinion to commence proceedings for reassessment. We may usefully refer to paragraph 16 of the aforesaid judgement, which reads thus:

“16. Whether it is a disclosure or not within the

meaning of Section 147 of the Act would depend on the facts and circumstances of each case and nature of document and circumstances in which it is produced. The duty of the assessee is to fully and truly disclose all primary facts necessary for the purpose of assessment. It is not part of his duty to point out what legal inference should be drawn from the facts disclosed. It is for the Income Tax Officer to draw a proper reference. In the case at hand, petitioner had filed its annual returns alongwith computation of taxable income alongwith MAT (minimum alternate tax) calculation as per provisions of Section 115JB, audited annual financials including auditor's report, balance sheet, profit and loss account and notes to accounts, annual tax statement in Form 26AS under Section 203AA of the Act in response to the notices received under Section 142(1) and 143 (2) of the Act. Petitioner also explained how the borrowing costs that are attributable to the acquisition or construction of assets have been provided for, what are the short term borrowings and from whom have been provided for. Petitioner also gave details of interest expenses claimed under Section 57 of the Act in response to further notice dated 10 th October 2014 under Section 142 (1) of the Act, attended personal hearings and explained and gave further details as called for in the personal hearing vide its letter dated 17th December 2014 and after considering all that, the assessment order dated 20th February 2015 was passed accepting the return of income filed by the assessee.

The Assessing Officer had in his possession all primary facts, and it was for him to make necessary enquiries and draw proper inference as to whether from the interest paid of Rs.75,79,35,292/- an amount of Rs.7,66,66,663/- has to be allowed as deduction under Section 57 of the Act or the entire interest expenses of Rs.75,79,35,292/- should have been capitalized to the work in progress against claiming Rs.7,66,66,663/- as deduction under Section 57 of the Act. The Assessing Officer had had all materials facts before him when he made the original assessment. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the

assessment based on the very same material with a view to take another view.

As noted earlier, petitioner has filed the annual returns with the required documents as provided for under Section 139 of the Act. As held by the Calcutta High Court in *Income Tax Officer V/s. Calcutta Chromotype (P.) Ltd.*, (1974) 97 ITR 55 (Calcutta) relied upon by Mr. Pardiwalla, there was nothing more to disclose and a person cannot be said to have omitted or failed to disclose something when, of such thing, he had no knowledge. One cannot be expected to disclose a thing or said to have failed to disclose it unless it is a matter which he knows or knows of. In this case, except for a general statement in the reasons for reopening, the Assessing Officer has not disclosed what was the material fact that petitioner had failed to disclose.”

14. In the case of ***Bhavesh Developers vs Assessing officer and others***, (2010) 329 ITR 249 (Bom.) where the Division Bench of this Court held thus (page 254):

“The reasons which have been disclosed to the assessee would show that the inference that the income has escaped assessment is based on the disclosure made by the assessee itself. The reasons show that the finding is based on the details filed by the assessee and from the profits and loss account. Quite clearly, therefore, it was impossible for the Assessing Officer to even draw the inference that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for Assessment Year 2002-03. Significantly, the reasons that have been disclosed to the assessee do not contain a finding to the effect that there was a failure to fully and truly disclose all necessary facts, necessary for the purpose of assessment. In these circumstances, the condition precedent to a valid exercise of the power to reopen the assessment, after a lapse of four years from the relevant Assessment Year, is absent in the present case. There is merit in the submission which has been urged on behalf of the assessee that an exceptional power has been conferred upon the Revenue to reopen an assessment after a lapse of four years. The conditions which are prescribed by the statute for the exercise of such a power must be strictly fulfilled and in their absence, the exercise of power would not be sustainable in law. Though an attempt was made on

behalf of the Revenue to urge that the assessee should be relegated to the ordinary remedy of an appeal against the order of the assessment, we are of the view that a petition under Article 226 of the Constitution would be maintainable for questioning reopening of the assessment in a case such as this where the pre-conditions for the exercise of the power have not been fulfilled. ”

15. In the circumstances aforesaid, we set aside the impugned notice dated 27 March 2019 issued under Section 148 of the Act as well as the impugned order dated 13 November 2019 passed by the Assistant Commissioner of Income Tax - Respondent No. 1 rejecting the petitioners objections to reopen the assessment for the Assessment Year 2012-13.

16. The petition is allowed in the aforesaid terms. There shall be no order as to costs.

(R. N. LADDHA, J.)

(K. R. SHRIRAM, J.)

Minal Parab