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

WRIT PETITION NO. 3576 OF 2019

S.A. Developers …. Petitioner
v/s.
Assistant Commissioner of Income Tax
- 26(3), Mumbai and ors. …. Respondents

Mr. Devendra H. Jain a/w. Ms. Radha Halbe for Petitioner.
Mr. Sham V. Walve for Respondents – Revenue.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : JANUARY 04, 2022

P. C. :-

. Petitioner is impugning a notice dated 27/03/2019 issued under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'), subsequent order dated 19/11/2019 disposing petitioner's objections to the impugned notice and the Assessment Order and notice of demand dated 09/12/2019. As regards Assessment Order and notice of demand, the same was passed without waiting for the mandatory period of 4 weeks prescribed in the Judgment of this Court in the case of ***Asian Paints Ltd. v/s. Deputy Commissioner of Income Tax***[1]*.* The Officer Mr. Arvind Ramchandra Kumbhare who has passed the Assessment Order has filed an Affidavit dated 01/12/2021 stating that he was not aware about the *Asian Paints* Judgment and hence passed the order before expiry of the mandatory period of 4

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weeks. The Affidavit is taken on record and the apology tendered by Mr. Kumbhare is accepted. In view of this, Mr. Walve states that the Assessment Order and notice of demand dated 09/12/2019 be considered as withdrawn.

2. Now what remains to be considered is whether the notice dated 27/03/2019 issued under Section 148 is a valid notice. If the Court answers in negative, the subsequent order dated 19/11/2019 will also get set aside.

3. Petitioner had filed its return of income on 19/11/2014 for AY 2012-2013 declaring total income of Rs.39,50,776/-. The case was selected for limited scrutiny under Computer Aided Scrutiny Selection (CASS) and the assessment was completed under Section 143(3) of the Act on 27/01/2015 determining the assessed income at Rs.40,10,780/-.

4. On 27/03/2019, petitioner received a notice under Section 148 of the Act stating that there are reasons to believe that petitioner's income chargeable to tax for AY 2012-13 has escaped assessment within the meaning of Section 147 of the Act. The reasons for re-opening have been provided and it is contained in a communication dated 07/06/2019, copy whereof is at Exh.J to the Petition. We have perused the reasons with the assistance of Mr. Jain and Mr. Walve. Since re-opening of the assessment is proposed after expiry of period of 4 years, the proviso to Section 147 is

applicable. The Assessing Officer has no power to review an assessment which has been concluded so he has to first come to the conclusion based on tangible material that there is an escapement of income from assessment and he has to also show that there was failure on the part of petitioner to truly and fully disclose material facts. At the same time, the Assessing Officer cannot re-open an assessment merely on the basis of change of opinion. But in the reasons to believe in the present case, we do not find even a single ground which can be considered to be tangible basis for re-opening the assessment or conclude that there has been failure to disclose any material fact. The Assessing Officer states that from the partnership deed, audited accounts and Form No.3CD report, it is seen that that the Assessee has 15 partners, one of whom is Dhansukh Nanda HUF. According to the Assessing Officer, an HUF cannot become a partner of a firm or enter into a contract with other person and hence the Assessee has not complied with the provisions of Section 184 of the Act and the amount of Rs.89,24,703/- and remuneration of Rs.60,00,000/- paid to partners, aggregating to Rs.1,49,24,703/- cannot be considered for deduction.

5. In our view, this is a clear case of change of opinion because petitioner had, before the original assessment order was passed, filed Form No.3CD in which Dhansukh Nanda HUF is shown as a partner with 10% profit sharing ratio. Form No.3CD also indicates that a sum of Rs.1,94,826/- has been paid

as interest to Dhansukh Nanda (HUF). These materials were on the face of a document available before the Assessing Officer who passed the original Assessing Order dated 27/01/2015. Mr. Walve states that in the original Assessment Order, there is no mention about Dhansukh Nanda HUF and therefore it is likely that the original Assessing Officer has failed to note that one of the partners in petitioner firm was an HUF. We do not agree with Mr. Walve because if Assessment Order does not speak about this, we would consider it as having been accepted by the Assessing Officer who passed the original Assessment Order that it was perfectly okay for an HUF to be a partner in petitioner firm. We would hasten to add that we are not for a moment opining whether an HUF can be a partner in a firm under the provisions of Indian Parnership Act, 1932.

6. This is a clear case of change of opinion. There is also nothing to indicate any failure on the part of petitioner to disclose any material fact. Hence, we do not propose to go into the issue as to whether the stand of respondent that petitioner has not complied with provisions of Section 184 of the Act is correct.

7. For reasons aforesaid, Petition is allowed in terms of prayer clause (a) which reads as under :-

> *" (a) that this Hon'ble 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, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the notice u/s 148 dated 27.03.2019 ("Exhibit H"), the subsequent Order dated 19.11.2019 ("Exhibit L") disposing of Petitioner's objections on the issue of impugned notice and the assessment order and notice of demand dated 09.12.2019 ("Exhibit N"). "*

8. Petition disposed.

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

PREETI H JAYANI Digitally signed by PREETI H JAYANI Date: 2022.01.10 12:35:45 +0530