

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2827 of 2022
ALONG WITH
WRIT PETITION NO. 3197 OF 2022

Prabhat Properties Private Limited]
J-N-3, 14-5, Aashirwad CHS, Sector – 9,]
Vashi, Navi Mumbai – 400 703] ...Petitioner

Versus

1. Asst. Commissioner of Income]
Tax – Central Circle 8(4), Mumbai,]
R. No.658, 6th Floor, Aaykar Bhavan,]
M K. Road, Mumbai – 400 020]

2. Pr. Commissioner of Income-]
Tax, Mumbai – 4, Aaykar Bhavan,]
R. No.663, 6th Floor, M. K. Road,]
Mumbai – 400 020]

3. Union of India, through the,]
Secretary, Ministry of Finance]
North Block, New Delhi – 110 001] ...Respondents

...

Mr. Riyaz Padvekar a/w. Mr. Tanzil Padvekar for the petitioner in both matters..

Ms. Suresh Kumar for the respondents.

...

**CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.**

PRONOUNCED ON : 27TH JUNE, 2023

J U D G M E N T

[PER: KAMAL KHATA, J.]

1. The above two Writ Petitions are for the assessment years ('AYs') 2015-16 and 2016-17 having common facts and can be disposed of with a common order. For the sake of brevity we advert to the facts stated in Writ Petition No. 2827 of 2022.

2. This Petition under Article 226 impugns notice under section 148 of the Income-tax Act, 1961 ('Act') dated 31st March 2021 issued by Respondent No.1 proposing to reassess the income for the AY 2015-16 and the order dated 24th January 2022, rejecting the objections raised by Petitioner challenging the validity of the said notice.

3. The reasons for opening are as under:

"The assessee company filed its return of income for A.Y. 2015-16 on 28.09.2015. Further, the case was selected for scrutiny and the assessment was completed under section 143(3) on 15.11.2017 assessing total income at Rs. Nil. Subsequently, a credible information has been received from ITO (I&CI) Unit 2(3) Mumbai, that the assessee i.e. Ms. PRABHAT PROPERTIES PRIVATE LIMITED has shown a total profit of Rs. 2,07,33,019 from trading in shares in F & O/commodities/currency. The same was verified by I&CI in the course of verification made after SEBI passed orders in cases of reversal trades and accommodation entries. The assessee has traded through two share brokers namely Master

Capital Services Ltd & Skung Trade link Ltd. The Global report of Skung Trade link Ltd. shows loss of Rs. 84,94,990 and though the assessee has not submitted further break up of other income, it appeared that the profit shown above was a net profit taking into account transactions of both the brokers and after setting of the loss from trading in futures and option on BSE platform of Rs. 94,90,000. This has reduced assessee's net profit of the F.Y. 2014-15 to the tune of Rs.84,90,000. The assessment in the case of assessee for A.Y. 2015-16 was completed under section 143(3) on 15.11.2017. During the assessment proceedings, there is clear failure on part of the assessee to make full and true disclosure of these material facts.

*In view of the above, since assessee has failed to disclose fully and truly all material facts necessary during assessment, I have reason to believe that income amounting to **Rs. 84,90,000/-** chargeable to tax has escaped assessment. Accordingly, provisions of sub-clause(c)(i) of Explanation 2 of section 147 of the Act are clearly attracted."*

4. The Petitioner responded to the reasons giving all details and explanations. The relevant para is as under:

"3. In the reasons for reopening , it is mentioned that you have received the information from ITO(I&CI), Unit 2(3), Mumbai that the Assessee has shown a total profit of Rs. 2,07,22,019/- from trading in shares in F&O/Commodities / Currency . The above profit was verified by I&CI in the course of verification made after SEBI passed orders in case of reversal trades and accommodation entries. The Assessee has traded through two share brokers namely Master Capital Services Ltd. and Skung Trade Link Ltd. The Global Report of Skung Trade Link Ltd. shows loss of Rs. 84,94,990. It appeared that the profit shown above was not a net profit taking into account transactions of both the brokers and after setting off the loss from trading in futures and

option on BSE platform of Rs. 94,90,000/-. This has reduced assessee's net profit of the Financial Year 2014-15 to the tune of Rs. 84,90,000/-.

*4. In this respect we submit that the assessee has done the transaction on the Stock Exchange in derivative transactions and earned profit on these transactions during the to the tune of Rs. 1,98,74,269/- and Profit of Rs. 8,58,750/- from Intraday Trading. The same was declared as Profit / Loss from Trading In Intraday / Futures / Options of Shares / Commodities / Currencies under the head Other Income Profit & Loss Account of Rs. 2,07,33,019./-. The same can be verified from Note No. 17 of profit and loss account forming part of the Financial Statements for the year ended 31-03-2015 and Part A-P&L in income tax return. Copy of computation of income and extract of financial statement enclosed herewith at **Annexure-1.**"*

5. The Original Assessment was completed u/s 143(3) of the Act by passing order of assessment on 15th November 2017. The Petitioner was subjected to detail enquiries in respect of all issues and the reasons recorded, do not suggest, any failure on the part of the Petitioner to disclose truly and fully all the material facts for completing assessment and passing order.

6. Notice u/s 148 was issued after four years on 31st March 2021 and response thereto was filed on 20th December 2021. The Respondent No. 1 rejected the objections on 24th January 2022 and hence the Petitioner was constrained to file this Petition on 14th March 2022.

7. The Respondent no.1 by their reply to this Petition defends its reopening by stating:

“4.2 Merely not mentioning the year-wise amount and exact amount in the reasons for reopening does not change the character of non-genuine transactions as genuine. During the said assessment proceeding, the assessee filed an objection dated 20.12.2021 stating all this transaction undertaken by the assessee are shown in books of accounts and profit of Rs. 2,07,33,019/- truly & fully disclosed in the return of income. However, nowhere in the objection has the assessee given any details of dates and amounts of transactions in stock options on BSE which were the subject matter of order passed by SEBI. Despite knowing that the case was reopened on the basis of findings of I&CI and SEBI, the assessee did not submit any details of actual transactions to prove its own case.”

8. The Respondent No. 1 placed reliance on the judgments of the Supreme Court in the case of **Raymond Woollen Mills (1999) 236 ITR 34 (S.C)** and **Rajesh Jhaveri Stock Brokers P. Ltd¹** to contend that sufficiency or correctness of material is not a thing to be considered at the stage of re-opening of assessment.

9. An identical issue was decided by this Court in the case of **Tilak Ventures Ltd. v ITO -11(3)(1)²** where the notice was quashed and set aside as there was failure to disclose anything that could be remotely termed as ‘reasons to believe income has escaped assessment.’

¹ 291 ITR 500

² Writ Petition No. 2574 of 2021 decided on 21st February 2022

10. The criteria for reopening of assessment after a period of four years are no longer *res integra* in view of the judgment of this Court in the case of **Ananta Landmark P. Ltd v Dy. CIT** wherein this Court held that, where assessment was not sought to be reopened on the '*reasonable belief*' that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income, but was a case wherein assessment was sought to be reopened on account of '*change of opinion*' of AO the reopening was not justified. It is also held that where primary facts necessary for assessment are fully and truly disclosed the AO is not entitled to reopen the assessment on a change of opinion. It is held that while considering the material on record, when one view is conclusively taken by AO, it would not be open for the AO to reopen the assessment based on the very same material and take another view.

11. The Supreme Court in the case of **ITO vs Lakhmani Mewal Das³** has held that:

"... the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from the

³ [1976] 103 ITR 437

assessment in the particular year because of his failure to disclose fully and truly all material facts.

“The live link or close nexus which should be there between the material before the Income-tax Officer.”

12. In the present case, the Respondent No. 1 has received information from ITO (I & CI) Unit 2(3) Mumbai, that SEBI passed orders in cases of reversal trades and accommodation entries. However, even though the Petitioner has explained the transactions done, through note No. 17 submitted along with the Profit and Loss Account and other supporting documents, the Respondents have mindfully taken a stand, that at this stage, they are not required to look into the sufficiency and correctness of the information and can consequently reopen the case.

13. As per section 103 of the Evidence Act, the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. This section amplifies the general rule in section 101 that the burden of proof lies on the person who asserts the affirmative of the issue. It lays down that if a person wishes the court to believe in the existence of a particular fact, the onus of proving the fact, is on him, unless

the burden of proving it is cast by any law on any particular person.

14. In our view, once the Petitioner provided the all the details, explanations and documents against the reasons for reopening. The AO considering the principle of '*shifting of onus*' under the evidence act, must necessarily carefully examine the material and then give particulars and reason/s to disbelieve the assessee, whilst rejecting the objections, to shift the onus on the assessee, as failure to do so, does not discharge the onus shifted upon him (AO) by the assessee by submitting all documents and explanations, and provides no reason for the Court to disbelieve the assessee.

15. The Supreme Court in the case of *R V E Venkatachala Gounder v Arulmigu Vishwesaraswami & V. P. Temple & anr.*⁴ relying on *A Raghavamma v A Chenchamma*⁵ held that there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

⁴ (2003) 8 SCC 752

⁵ AIR 1964 Supreme Court 136

16. The Delhi High Court in the case of ***PCIT v RMG Polyvinly (I)***

Ltd.⁶ held that:

“Where information was received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by Assessing Officer, said information could not be said to be tangible material per se and, thus, reassessment on said basis was not justified.”

17. Similar view was expressed by Delhi High Court in the case

of ***CIT vs Sfl Stock Broking Ltd.*** where it held that:

“Where on the basis of information given by the Dy. Director of Income-tax (Inv.) Assessing Officer reopened assessment and from so-called reasons, it was not at all discernible as to whether Assessing Officer had applied his mind to information and independently arrived at a belief that, on basis of material which he had before him, income had escaped assessment, reopening of assessment was not justified.”

18. Upon examination of response/objections to the notice it is evinced that there is no live link or nexus with the alleged orders passed by SEBI as alleged by the Respondent. Besides the Respondent has failed to aver the particulars of the information available which has led to the belief that income has escaped assessment. There appears no new tangible material available on record to conclude that income had escaped assessment. In our view it is clearly a ‘*change of opinion*’.

⁶ 83 taxmann.com 348

19. We, therefore pass the following order-

- i.* The impugned notices dated 31st March 2021 and the order dated 24th January 2022, issued by Respondent No.1 for AY 2015-16 & 2016-17 are quashed and set aside;
- ii.* Rule made absolute in above terms. No costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)