

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

WRIT PETITION NO. 2102 OF 2022

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D.K. Realty India Private Limited,
8 Abhishek Building, Dalia Industrial Estate,
Andheri Link Road, Andheri West,
Andheri (E), Mumbai 400 0058, Maharashtra
PAN : AAECD4308D ... Petitioner

Versus

1. Asstt. Commissioner of Income-tax,
Circle 1(3)(1), Mumbai,
R.No. 540, 5th Floor,
Aayakar Bhavan,
M.K. Road, Mumbai – 400 020.

2. The National Faceless Assessment Centre,
E Ramp, Jawaharlal Nehru Stadium,
Delhi 110 003.

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

Dr.K. Shivram, Senior Advocate with Mr.Rahul K. Hakani &
Mr.Shashi A. Bekal, Advocate for petitioner.

Mr.Akhileshwar Sharma with Mr.Vikas T. Khanchandani,
Advocate for respondents.

**CORAM : DHIRAJ SINGH THAKUR &
VALMIKI SA MENEZES, JJ.**

PRONOUNCED ON : 15th FEBRUARY, 2023.

: J U D G M E N T :

PER DHIRAJ SINGH THAKUR, J.

1. The petitioner challenges the notice dated 30th March 2021 issued under section 148 of the Income Tax Act, 1961 ('the Act') which sought to reopen the petitioner's assessment for the assessment year 2017-18 on the ground that income had escaped assessment within the meaning of section 147 of the Act.

2. The reasons for reopening are as under :

1. The assessee company had filed its return of income for A.Y. 2017-18 on 30.10.17 declaring loss of (-)Rs.3,69,85,637/-. The case was selected for scrutiny and the assessment was completed u/s 143(3) of the Act on 29.12.2019 assessing loss of assessee at (-) Rs.59,95,891/-.

2. In this case, an information was received from the office from office of Deputy Director of Income Tax (Investigation) Unit 6(3), Mumbai dated 23.06.2017, that in the search action (u/s. 132/133A) in the case of M/s. Dyaneshwari Multi State Urban Cooperative Credit Society Limited (PAN : AABAD6102E), it was discovered by Investigation wing that during F.Y. 2015-16 & F.Y. 2016-17, the assessee M/s. D.K. Realty had deposited Rs.9,65,50,000/- (Rs.7,50,00,000/- in F.Y. 2015-16 & Rs.2,15,50,000/- in F.Y. 2016-17) in the said Credit society and on summons issued u/s. 131 of the Income Tax Act to the Assessee, it had stated that the funds deposited to M/s. Dyaneshwari Multi State Urban Credit Society were in nature of advances for business purpose. The investigation wing after further investigation

concluded that the society's (M/s. Dyaneshwari) records and those of persons managing and evidences seized/impounded during search proceedings clearly establish the fact that M/s. Dyaneshwari has only been used as a conduit of conversion of cash into RTGS and vice versa. M/s. Dyaneshwari did not engage in any kind of actual business activity, nor has it engaged in any kind of sale/purchase business activity, the entity M/s. D.K. Realty was also not able to produce any kind of supporting evidences to provide as to what was the business activity for which it provided advances to Rs.9.65 crore to M/s. Dyaneshwari Multi State Urban Credit Society.

In view of the above facts, and since the assessee company has clearly been unable to explain/substantiate the impugned transaction, it can be concluded that the amount of Rs.2,15,50,000/- represents nothing but unexplained sum and needs to be brought to tax accordingly.

3 Hence, it is clear that there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the year in question within the meaning of First proviso to section 147(1) of the Act.

4 In view of the above, I have reason to believe that income chargeable to tax to the tune of Rs.2,15,50,000/- has escaped assessment within the meaning of section 147 of the Act for the A.Y. 2017-18. It is, therefore, proposed to issue notice under section 148 of the Income-tax Act, 1961 for A.Y. 2017-18 to reassess such income and also any other income chargeable to tax which has escaped assessment and which may come to notice subsequently in the course of proceedings under this section.

3. Learned counsel for the petitioner urged that the reopening of the assessment was nothing but a change of opinion which

amounts to a review of the order of assessment which has repeatedly been held to be impermissible. Reliance in this regard has been placed on the judgment of the Delhi High Court in the case of *Commissioner of Income-tax Vs. Kelvinator of India Ltd.*¹.

4. It was urged that the basis for reopening as seen from the reasons recorded is the fact that the petitioner had deposited an amount of Rs.2,15,50,000/- in the financial year 2016-17 which had been brought to light by the Investigation Wing of the department. It is stated that the said issue was specifically gone into by the Assessing Officer ('AO') during the scrutiny assessment proceedings. Reference in this regard was made to the notice, dated 17th November 2019 issued under section 142(1) of the Act, whereby, the petitioner had been asked to furnish the details in the following manner :

"1. In a search action u/s. 132/133A of the IT Act in case of M/s. Dyaneshwari Multi State Urban Cooperative Credit Society Ltd. on 07.04.2017, it was found that an amount of Rs.9,65,50,000/- was received by Dyaneshwari from your Company on various dates (Rs.7,50,00,000/- in A.Y. 2016-17 and Rs.2,15,50,000/- in A.Y. 2017-18). Please explain for what purpose the said payment was made and explain sources of the same payment made to M/s. Dyaneshwari Multi State Urban Cooperative Credit Society Ltd. with documentary evidences i.e. bank statements and when the said amount

¹ [2010] 320 ITR 561 (SC)

was returned back to you. Please furnish the ledger account for the same.....”

5. This notice was replied by virtue of communications, dated 20th December 2019 and 27th December 2019. Finally, the order of assessment under section 143(3) was passed on 29th December 2019. It was urged that the queries having been raised and the issue considered in the light of the submissions made, as also the order of assessment having been passed under section 143(3), the reassessment proceedings sought to be initiated, would be a clear case of change of opinion, and would not satisfy the jurisdictional condition for the reopening under section 147 of the Act.

6. Admittedly, the assessment is sought to be reopened within a period of four years from the end of the relevant assessment year 2016-17, and therefore, it would not be necessary for the AO to establish that there had been any failure on the part of the assessee to furnish material facts fully and truly. However, notwithstanding the above requirement which is to operate additionally for a reopening beyond the period of four years, the AO had to have ‘reason to believe’ that income chargeable to tax had escaped assessment.

7. It is no longer *res-integra* that once during the course of assessment proceedings, a query was raised and replied, it will be presumed that the issue was the subject matter for consideration during the said assessment proceedings notwithstanding the fact that there is no specific mention of that particular issue in specific words in the order of assessment. An order of assessment under section 143(3) having been passed must be deemed to have been passed after considering all material facts in regard to the queries raised which stood duly answered in terms of the judgment of the Full Bench decision of Delhi High Court in ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.***². In the said judgment, the Full Bench of Delhi High Court held :

“ We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian

2 [2002] 123 Taxman 433 (Delhi)

Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong.”

8. The Apex Court in *Commissioner of Income Tax V/s. Kelvinator of India Ltd.*³ held that there was a difference between ‘power to review’ and ‘power to reassess’ under section 147 and that the AO had no power to review and that, if the concept of ‘change of opinion’ was removed, then, in the garb of reopening of the assessment, a review would take place. It was held :

“The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.”

9. Admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change

3 [2010] 320 ITR 561 (SC)

of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. Testing the facts of the present case on the touchstone of the judgments referred hereinabove, it is thus clear that the basis for reopening remains the same which was otherwise the subject matter of scrutiny by the AO during the scrutiny assessment proceedings leading to passing of the order under section 143(3) of the Act.

10. We are, therefore, of the opinion that the present case is nothing but a change of opinion which does not satisfy the jurisdictional requirement under section 147 of the Act. The impugned notice under section 148 dated 30th March 2021 and the impugned order rejecting the objections dated 16th March 2022 as also the draft assessment order dated 21st March 2022 are quashed.

11. The petition is allowed in the aforementioned terms. No order as to costs.

[VALMIKI SA MENEZES, J.]

[DHIRAJ SINGH THAKUR, J.]