

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

WRIT PETITION NO.1994 OF 2022

Noshir Darabshaw Talati]
Level 6, Ceejay House, Shivsagar Estate,]
Dr. Annie Besant Road, Worli,]
Mumbai-400 018.] .. Petitioner

v/s.

1) Assistant Commissioner of Income Tax,]
Central Circle-7(1),]
having his office at Room no.653,]
6th Floor, Aayakar Bhavan,]
M.K. Road, Mumbai - 400 020.]

2) Principal Commissioner of Income Tax,]
Central Circle -4,]
having his office at Room no.660,]
6th Floor, Aayakar Bhavan,]
M.K. Road, Mumbai - 400 020.]

3) Union of India]
through Ministry of Finance,]
North Block, New Delhi - 110 001.] .. Respondents

...

Mr. J. D. Mistri, Senior Advocate, a/w Mr. B. V. Jhaveri & Ms.
Bhargavi Rawal for the petitioner.

Mr. Suresh Kumar for the respondents.

...

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

**RESERVED ON : 1ST FEBRUARY 2023.
PRONOUNCED ON : 8TH MARCH 2023.**

J U D G M E N T

[PER: KAMAL KHATA, J.]

1. The present petition challenges the impugned notice under Section 148 of the Income Tax Act (“the Act”) dated 31st March 2021 on the ground that the respondent no. 1 had reasons to believe that income chargeable to tax for Assessment Year (AY) 2015-16 has escaped assessment within the meaning of section 147 of the Act and the Assessment Order passed under Section 143(3) r.w.s. 147 of the Act dated 31st March 2022 thereby rejecting the set off of the current year’s long-terms capital loss against long term capital gain and consequently the notice of demand u/s 156 of the Act dated 31st March 2022.

2. The reasons for reopening given under notice dated 28th January 2022 are as under:

“The original return of income was filed on 31-03-2016 declaring total income at Rs. 5,55,93,680/- for A.Y. 2015-16. Subsequently, the revised return was filed by the assessee on 14.02.2017 declaring total income of Rs. 5,56,63,130/-. In this case assessment proceedings u/s.143(3) of the act completed assessing total income at Rs. 6,13,89,818/-.

In this case on verification of case records, it

is seen that the assessee had computed long term capital gains of Rs. 2,25,57,987 by selling share of Silver Pearl Reality Pvt. Ltd. sold to Piramal Reality Pvt. Ltd. on 3.2.2015. A gain of Rs. 57,26,688 on sale of Non-Agricultural land. These capital gains were offset by a loss of Rs. 14.00 crores on sales of shares of Shandilya Properties P Ltd and net loss of Rs. 11.17 crores was claimed as carry forward loss which was allowed in scrutiny assessment.

The assessee had purchased the 3675 shares of Shandilya Properties P Ltd at Rs. 25,000 each on 17.09.2010 for a total consideration of Rs. 9,75,00,000 and sold the shares to Seaface Buildcon company LLP on 22.1.2015 at a price of Rs. 100 each thereby booking a loss of Rs. 14,00,31,941/-.

The purchasing concern Seaface Buildcon Company LLP is owned by the assessee along with Rashna Noshir Talati a relative of the assessee, so the net effect is that the controlling interest in the company still remained with the assessee. The company of which the shares were sold i.e., Shandilya Properties Pvt. Ltd was converted into LLP with the name Shandilya Properties LLP on 21st February 2015 and the new owners of the LLP were Talati Noshir Darabshaw and Talati Xeres Noshir the children / relatives of the assessee. This showed that the sale at such a low price was only a sham transaction to book a loss to avoid paying taxes on capital gains. The assessee had also received an amount of Rs. 124.36 crores from Shandilya Properties LLP (i.e., erstwhile Shandilya Properties Pvt. Ltd) which goes to show that the company

which was sold was a cash rich company and therefore the value of the company must have been very high and the sale price was much below the Fair market value and the sale was not an arm's length price and the shares were sold much below the market price only to book the losses.

Further the assessee continues to show an amount of Rs. 12.22 crores as receivable from Shandilya Properties Pvt.Ltd. As on 31st March 2015 even though the company was liquidated due to conversion into LLP in February 2015.

Therefore, the whole transaction of sale of shares of Shandilya Properties Pvt Ltd at the price below the market value to a company in which the assessee had a control is a colorful device to generate long term capital to offset the capital gains and therefore the capital loss of Rs. 14,00,31,941/- should have been disallowed.

The non-disallowance of loss Rs. 14,00,31,941 has resulted in excess carry forward of long-term capital loss Rs. 1,74,73,954/- and non-levy of tax on long term capital gains of Rs. 2,25,57,987 resulting in short levy of tax of Rs. 51,11,640 and further potential revenue loss (due to carry forward of losses) to the extent of Rs. 2,66,19,598/-.

3. Mr. Mistri the learned senior counsel for the petitioner submitted that the reopening of the assessment is based purely on change of opinion regarding set off of the long term capital loss against the long term capital gain of the current

year, which was considered and deliberated in the course of the original assessment proceedings by the respondent no.1 who passed an order under Section 143(3) of the Act dated 7th June 2017 for the Assessment Year 2015-16.

4. The learned counsel for the petitioner further submitted that the respondent no.1 has failed to show any tangible material based on which he formed a belief that the set off of the long-term capital loss against the long-term capital gain of the current year could not have been allowed while taxing the long-term capital gain. The learned counsel submitted that the respondent no.1 has also failed to furnish the copy of the approval of the Pr. CIT as provided under Section 151 of the Act before issuing the notice under Section 148.

5. The learned counsel for petitioner relied on the case of ***M/s. GKN Driveshafts (I) Ltd. V/s. ITO***¹ in support of his contention that the respondent has failed to dispose of the objections filed by the petitioner by his letter dated 8th February 2022 and consequently erred in passing the order

1 (2003) 259 ITR 19

under Section 143(3) r.w.s. 147 of the Act. The learned counsel submits that respondent no.1 failed to take into consideration the objections filed by the petitioner dated 8th February 2022 apart from the two letters dated 30th March 2022 whereby the petitioner had given detailed reasons for setting aside the notice on account of non-compliance with the provisions of Section 147 of the Act. He submitted that the petitioner had filed the original return of income under Section 139(4) of the Act and submitted that the balance long term capital loss is not carried forward though allowed in the original Assessment Order that was filed by the petitioner in the original return of income. In view of the above, he submits that the petition be made absolute with costs.

6. The learned counsel brought to our attention the notice dated 1st February 2017 under Section 142(1) of the Act whereby the respondent no.1 had called upon the petitioner to produce all details in connection with the Assessment Year 2015-16. He drew our attention particular to clause (9) of the said notice which sought an explanation for sale consideration of the property on account of it being less in the

ITR than what was reported in the AIR. He submitted that by a letter dated 16th February 2017, the petitioner has specifically answered the queries and had sought a copy of the AIR to enable them to furnish the explanation in that regard. He also drew our attention to the letter dated 3rd May 2017 filed with the AO on 4th May 2017 on which the hearing was held. He submitted that in paragraph 6 and 9 of the said letter, the explanation sought by the respondent no.1 in notice dated 1st February 2017 was specifically answered in paragraph 6 along with the documents in that regard. He also drew our attention to the letter issued by the petitioners' Chartered Accountants dated 22nd May 2017 and more particularly the explanation with respect to the gain arising on account of the sale of the said non-agricultural land being the capital gain and not the business income, since it was sold after a period of nearly 12 years.

7. The learned counsel laid stress on the order dated 7th June 2017 passed under Section 143(3) of the Act and more particularly paragraph 5 to contend that the respondent no.1 had considered the effect of the long-term capital gain on the

sale of non-agricultural land in A.Y. 2014-15, as also paragraph 6 to show that he had accepted the loss as claimed by the petitioner. The learned counsel also pointed out the false statement recorded in the affidavit that no question was asked by the AO in any 142(1) notice which is clearly contrary to the record in as much as the notice dated 1st February 2021 clearly evinces such explanation sought for by the respondent no.1. He also submitted that the averment that no opinion has been expressed by the respondent no.1 under Section 143(3) is also false, as can be evinced by the order.

8. The learned counsel vehemently argued that whilst the respondent no.1 does not refute the receipt of the letter dated 3rd May 2017 but only raised a contention regarding absence of stamp of receipt by the department on the letter. He submitted that since the letter was submitted to the respondent by hand delivery on the date of hearing, consequently, no stamp of receipt was taken from the department. He accordingly submitted that the Petition be made absolute as prayed.

9. Per Contra, Mr. Kumar the learned counsel for the respondent, submitted that the objections filed by the petitioner through its letter dated 8th April 2021 have been duly disposed of by the letter dated 31st January 2022. He submitted that the notice under Section 148 and order under Section 147 r.w.s. 143 (3) was based on law and sound reasoning. He submitted that on perusal of the record, it could be seen that the issue mentioned in the reasons for reopening was not raised during the original assessment proceedings nor was it disclosed by the petitioner. He submitted that the said issue was not investigated in the earlier proceedings nor was any opinion expressed in that regard. He submitted that the reply dated 3rd May 2017 (which did not have the stamp of receipt by the department) did not amount to full disclosure. He submitted that, particulars mentioned in the table given in paragraph 4.5 at page 154 of the affidavit in reply dated 11th July 2022 clearly pointed what the petitioner failed to disclose. He submitted that the objection raised by the assessee by letter dated 8th April 2021 was rebutted/removed by the office order dated 31st January 2022. The contention of the petitioner that the

objections were not disposed of, was not correct and the same was done as per the guidelines of the Supreme Court in the case of *GKN Driveshaft (supra)*. He submitted that the introduction of capital in the firm ought to be as per Section 45(3) of the Act and the carry forward of capital loss of Rs.11.17 crores which was not claimed, ought not to be added to the total income. He submitted that these two issues were addressed at paragraph 8 & 10 of the Assessment Order passed under Section 147 r.w.s. 143(3) of the Act.

10. Learned counsel for the respondents relied upon the table to paragraph 4.11 at page 163 to submit that these facts were not part of the notices under Section 142(1) and reply of the assessee in the original proceedings that were culminated under section 143(3). He submitted that in view of the Assessment Order, the AO had rightly come to the conclusion that the assessee had failed to disclose the fully and truly all material facts and consequently the reopening of the assessment was justified. He submitted that the entire transaction of sale of shares of Shandilya Properties P. Ltd. at the price below the market value to a company in which the assessee had control was nothing but a colorful device to

generate long term capital loss to offset the capital gains. He accordingly submitted that the capital loss of Rs.14,00,31,941/- ought to have been disallowed. This was in his opinion is tangible material for reopening the assessment as per Section 147.

Conclusion :

11. We have heard both counsel at length. We find merit in the Writ Petition.

12. In the case of *ITO v/s. Lakhmani Mewal Das*² the Supreme Court held that the duty of the assessee does not extend beyond making a true and full disclosure of the primary facts. Once he has done that his duty ends, it is for the Income Tax Officer to draw the correct inference through primary facts. It is not responsibility of the assessee to advise the Income Tax Officer with regard to the inference which he should draw from the primary facts. If the Income Tax 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

² (1976) 103 ITR 437 (SC)

assessment.

13. In the present case the notice u/s 142 (1) of the Act r.w.s 129 for AY 2015 -16 was issued to the petitioner on 1st February 2017 whereby at item 9 page 52 an explanation was sought for the said property. The details were offered by letter dated 3rd May 2017 at item 6 page 60 (which letter is purportedly admitted as not stamped as received by the department). However, the item no. 5 at page 66 r.w. 5 (h) at page 68 of the section 143 (3) order dated 7th June 2017 clearly evince that the issue was considered by the AO. Furthermore, the reasons recorded in paragraph 2 of notice dated 28th January 2022 at page no. 77 evince that the reopening is based on '*verification of case records*' and on second last paragraph at page no. 78 evince "*Based on the discussion at above and perusal of available record*" clearly show that there was no fresh material with the AO that could justify reopening of the assessment. It is apparent that the reason for reopening is on account of a "*change of opinion*" in as much as all the material had been placed before the AO.

14. It would be appropriate to refer to the case of ***Ananta***

Landmark (P.) Ltd. vs. Deputy Commissioner of Income-tax, Central Circle 5(3), Mumbai ³ in regard to “AO’s duty to mention” in his reasons :

“... the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee.”

15. Therefore, based upon the reasons recorded, one needs to scrutinize whether there was any tangible material with the Assessing Officer justifying reopening of the assessment or can it be said to be a case of ‘review’ and ‘change of opinion’ by the said officer. On the perusal of the papers and the reasons mentioned in the notice for reopening we find that AO has not mentioned what was the new tangible material to justify the reopening and what was the material fact which was not truly and fully disclosed.

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16. In the present case the AO had passed an order u/s 143 (3) on 7th June 2017. Therefore, the passage in ***Kelvinator of India Limited*** (Supra), would be relevant. A Full Bench of the 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.”

17. The respondent has failed to show why the presumption should not be applied in the present case. Further, it can also be seen from the reasons recorded that there was no new material which had come to the notice of the Assessing Officer and the entire reference in the reasons recorded is only to the material on record.

18. Testing the facts of the present case on the touchstone of

the judgments (Supra), it can be seen that there was no new material in the possession of the Assessing Officer. Nothing new had happened, neither was there any change in the applicable law, which would have warranted the reopening of the case. It clearly suggests that in the garb of reopening the assessment, the Assessing Officer was reviewing the earlier order of assessment. In the absence of any new tangible material available with the Assessing Officer, and in view of the fact that there is a general presumption that an order of assessment under section 143(3) has been passed after proper application of mind and considering the fact that in the present case, the Assessing Officer had sought clarification with regard to the details of sale of property and transfer of shares, details whereof were submitted during the course of the proceedings, it certainly goes to show that the issue with regard to transactions with all parties had been gone into by the said Assessing Officer. There is no failure on the part of the petitioner to disclose any material facts and consequently the reopening is invalid in view of the proviso of Section 147 of the IT Act.

19. In this regard reliance is placed on ***Tata Sons v/s, DCIT***⁴ where the Court held that "*when there is a discretion in the assessment order connected with the issue for which the reassessment is initiated, the reopening was struck down as being without jurisdiction on the ground of change of opinion.*"

20. In the case of ***Joint Commissioner of Income Tax v/s. Cognizant Technology Solutions India Pvt. Ltd.***⁵ the decision of the Court holding that in cases where queries were asked on the issue during the original assessment proceedings, even though there is no discussion in the assessment order and where it could be shown either positively or by necessary implication that the AO had applied his mind to the issue, the reopening should be struck down as being without jurisdiction on the ground of change of opinion, was upheld by the Supreme Court whilst dismissing the SLP with a speaking order.

21. In our view, once the facts and claims were enquired into during the original assessment, a notice on the same would be construed as a *change of opinion*, for the purposes of

4 (2022) 286 Taxman 587 (Bombay)

5 (2023) 146 taxman.com 197 (SC)

reopening of the assessment.

22. In the present case, the petitioner has disclosed all the primary facts to the respondent as can be evinced from the responses to the original proceedings. We are, accordingly, of the opinion that the original assessment was completed with, after having considered all the facts and material.

23. In view of the above, the impugned notice u/s 148 of the Act dated 31st March 2021 and assessment order passed u/s 143 (3) r.w.s. 147 of the Act dated 31st March 2022 are quashed and set aside and all consequent actions in furtherance thereto are stayed.

24. The petition is allowed with no order as to costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)