

THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3535 OF 2019

Shriprakash Ramshringar Pandey
(PAN : ACLPP1025B),
Residing at 101, Onyx Onyz Housing
Co-operative Society, 36, Union Park,
Chembur, Mumbai- 400 071

...Petitioner

Versus

1. Income Tax Officer – 14(3)(4), Mumbai
having office at 455, 4th Floor, Aayakar
Bhavan, Maharishi Karve Road,
Mumbai-400 020
2. The Principal Commissioner of Income
Tax – 14, Mumbai having office at 415,
Aayakar Bhavan, Maharishi Karve Road,
Mumbai-400 020
3. The Union of Indian
Through the Secretary,
Ministry of Finance, Government of India,
North Block, New Delhi – 110 001

...Respondents

....

Mr. Devendra H. Jain, for Petitioner.
Mr. Suresh Kumar, for Respondents.

....

CORAM : K. R. SHRIRAM &
M.M. SATHAYE, JJ.

DATED : 12th JUNE, 2023

ORAL JUDGMENT (Per K.R. SHRIRAM, J.)

1. Rule. Rule made returnable forthwith. By consent of both counsel,
Petition taken up for final hearing at the admission stage.

2. By this Petition, Petitioner challenges the Notice dated 26.03.2019

issued under section 148 of the Income Tax Act, 1961 (the said Act) and the Order dated 20.11.2019 disposing Petitioner's objections to the reopening of assessment. Petitioner was Managing Director of a Company and earned income from salary, income from house property and income from other sources. For the assessment year 2012-13, Petitioner has filed income tax return on 27.07.2012 disclosing the total income of Rs.81,23,933. The assessment was completed under section 143(3) of the said Act. In the assessment order dated 31.12.2014, the income was assessed at Rs.82,07,933/-.

3. Petitioner received impugned notice dated 26.03.2019 under section 148 of the said Act informing Petitioner that there were reasons to believe Petitioner's income chargeable to tax for the assessment year 2012-13 has escaped Assessment within the meaning of Section 147 of the said Act. Petitioner was called upon to file return in the prescribed form which Petitioner did. Petitioner was also provided with the reasons to believe for reopening of assessment along with notice dated 20.09.2019 under section 142(1) of the said Act. Reasons to believe reads as under:

".....In this case assessee has claimed exemption fo capital gain of Rs.108,46,405/- U/s.54. However, it was noticed from the agreement for purchase that flat was purchased on 28.05.10 whereas capital gain arose on 05.09.11. Hence the flat was purchased more than one year before the date of capital gain arose. This has resulted in incorrect claim of exemption U/s.54B and underassessment of income of Rs.108,46,405/- and consequential short levy of tax of Rs.22,29,859/-.

As per the provision of S.54, if the capital gain arises from transfer of long term capital asset and assessee has within a period of one year before or two years after the date on which the transfer took place purchased or within a period of three years after that date constructed residential house,

then amount of capital gain shall not be charged to tax, if amount invested in new house is greater than capital gain.

From the information as gathered from the assessment record it is clear that the assessee has claimed exemption U/s.54 of the IT Act for long term capital gain even as the assessee was not eligible for the same.

The assessment records of the assessee were accessed and were used to enquire about the nature of the transaction in respect of both the properties.

From the assessment records it was seen that the assessee has claimed deduction by stating that the property was under-construction hence the time limit of buying the same not before one year of the date on which capital gains arose does not apply. However, the property mentioned to be under construction was purchased on 28.05.2010. As the property was purchased and not constructed therefore the time limit of not buying before one year of the date of capital gains. Therefore, I am of the firm opinion and have bona fide and valid reason to believe that the case is squarely fit to be reopened with reference to the provisions U/s.147/148 of the IT Act, 1961 so as to bring to tax the claim of exemption from capital gain tax made by the assessee of Rs.1,08,46,405/-.....”

4. Mr. Jain correctly submitted that since notice has been received after expiry of four years from the end of the relevant assessment year, the requirement of law to initiate proceedings under section 147 of the said Act would be only when there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. Mr. Jain submitted that reasons to believe dose not disclose that there was any such failure on the part of the assessee because the reasons to believe proceed on the basis “.....From the assessment records it was seen that assessee has claimed deduction by stating that the property was under-construction.....”

Mr. Jain further states the reason to believe says “.....*In this case assessee claimed deduction of capital gain of Rs.108,46,405/- under section 54 of the said Act. However, it was noticed from the agreement for*

purchase that flat was purchased on.....This has resulted in incorrect exemption under section 54B and underassessment of income.....”

Therefore, there was no failure to disclose.

5. Mr. Jain also submitted that in any event during the assessment proceedings a query was raised regarding the capital gain on sale of residential flat No.601 at Solitaire, Chembur which is the subject matter of the reopening and Petitioner had, by letter dated 31.10.2014, responded to the query and also provided the working note on computation of long term capital gain on sale of flat and exemption claimed under section 54 of the said Act along with copy of agreement of sale of flat. Copy of the reply along with working note has been annexed to the Petition. Consequently, an assessment order dated 31.12.2014 was passed. Of course, assessment order does not disclose anything about the said flat but the law on that is quite clear.

6. In the affidavit in reply, Revenue basically reiterated what is stated in the reasons to believe and denied that it was a case of change of opinion. Revenue stated that in the return of income various information was disclosed, but the requisite material facts were embedded in such a manner that material evidence could not be discovered by the Assessing Officer and could not have been discovered with due diligence. Mr. Suresh Kumar added there is no discussion in the assessment order about sale of flat.

7. In our view, the notice impugned as well as the order of disposing objections have to be quashed and set aside. We are in agreement with the submissions made by Mr. Jain. Admittedly, assessment was completed under section 143(3) of the said Act and assessment order dated 31.12.2014 came to be passed assessing Petitioner's income at Rs.82,07,933/- against disclosed income at Rs.81,23,993/-.

8. For the reasons to believe, the Assessing Officer has proceeded on the basis of records available with him and after considering the records as filed by Petitioner, the reasons to believe says *".....in this case assessee has claimed exemption of capital gain..... However, it was noticed from the agreement for purchase..... From the information gathered from the assessment record, it is clear that the assessee has claimed exemption..... The assessment records of assessee were accessed and were used to enquire about the nature of the transaction..... From the assessment record it was seen that the assessee has claimed deduction....."*

Therefore, the entire basis for reason to believe is accessed from Petitioner's record and there is nothing to indicate that there was any failure on the part of Petitioner to disclose fully and truly all material facts necessary for his assessment. Assessing Officer has made bald allegations that even though the assessee has produced books of account, profit and loss account balance sheet and other evidence, no requisite material facts,

as noted in the reasons for reopening, were embedded in such a manner that material evidence could not be discovered. In our view, this has been made only to get over the fetters as held in *Calcutta Discount Co. Ltd. V Income-Tax Officer*¹

9. Moreover undisputedly query was raised during the assessment proceedings and Petitioner has provided the details vide letter dated 31.10.2014 on capital gain of the sale of property. Just because the same is not referred to in the assessment order, it does not mean that the query raised was not the subject matter of consideration while completing the assessment. As held by the Division Bench of this Court in *Aroni Commercials Ltd. V Deputy Commissioner of Income-Tax-2(1)*², it is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of query raised.

10. This is a clear case where the reopening of the assessment is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

11. In the circumstances, Rule made absolute in terms of prayer clause (a) which read as under:

“(a) that this Hon’ble Court may be pleased to issue a Writ of

¹ [1961] 41 ITR 191 (SC)

² [2014] 44 taxmann.com 304 (Bombay)

*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 26.03.2019 ("**Exhibit E**") and the subsequent Order dated 20.11.2019 ("**Exhibit J**") disposing of Petitioner's objections on the issue of impugned notice."*

12. Petition disposed.

[M. M. SATHAYE, J.]

[K. R. SHRIRAM, J.]