2024:BHC-AS:12454-DB

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3780 OF 2022

Jean Ibrahim Somji **...Petitioner**
Versus
The Income Tax Officer (International Taxation), Ward-4, Pune & Anr. **...Respondents**

Mr. Mihir Naniwadekar, with Mr. Rohan Deshpande, i/b. Ms. Farzeen Khambatta, for Petitioner.
Mr. Suresh Kumar, for Respondents-Revenue.

CORAM: K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED: 12th March 2024

PC:-

1. Petitioner, a non-resident Indian individual, is challenging a reopening notice dated 31st March 2021 issued under Section 148 of the Income Tax Act, 1961 ("**the Act**") as also an order dated 19th January 2022 by Respondent No.1 rejecting Petitioner's objections.

2. Petitioner and her spouse were joint owners of a flat at G-1102, One North, Pune ("**the Said Flat**"). During the Assessment Year under consideration, i.e., AY 2015-16, the flat was sold and after taking into account the indexed cost of acquisition and cost of improvement, the composite long term capital loss in the case of Petitioner and her spouse was computed at Rs.34,62,446/-. In the return of income ("**ROI**") and computation filed by Petitioner, Petitioner's 50% share in the long term capital loss was duly disclosed at Rs.17,31,224/-.

3. It is also Petitioner's case, and admittedly so, that Petitioner's case was selected for scrutiny assessment and an assessment order dated 29th November 2017 was passed under Section 143(3) of the Act. During the course of assessment proceedings, Petitioner was issued notice dated 27th July 2016 under Section 143(2) of the Act informing Petitioner that the Department has decided to conduct a limited scrutiny with regard to interest income and mismatch in income/capital gain on sale of land or building. Petitioner was also issued another notice dated 26th September 2017 seeking clarification on various points/issues, one of which was details regarding sale/purchase of immovable property during the Financial Year 2014-15.

4. Petitioner, by Chartered Accountant's letters dated 3rd October 2017 and 11th October 2017 provided all the details. With regard to the capital loss booked on sale of the said flat, detailed explanation was given in the communication dated 11th October 2017. Subsequently, an assessment order dated 29th April 2017 came to be passed in which the Assessing Officer ("**AO**") has dealt with the sale of the said flat and the capital loss booked by Petitioner and her spouse. The AO has accepted the loss as booked by Petitioner and her spouse.

5. Thereafter Petitioner received a notice dated 31st March 2021 under Section 148 of the Act alleging that there were reasons to believe Petitioner's income chargeable to tax for AY 2015-16 has escaped assessment. The reason for such a belief was also provided to Petitioner and it relates only regard to the capital loss booked by Petitioner. The AO was not agreeing with the indexed cost disclosed by Petitioner in the ROI. According to the AO, instead of a loss of Rs.34,62,446/- in the sale of the flat, there is a capital gain of Rs.88,277/-. We have considered the reason to believe and it is based on records filed by Petitioner. The reason itself begins with the words "*……….on going through the records, it is noticed that a short term capital gain of Rs.88,277/- was remained to add in the total assessed income…….on perusal of records……*".

6. We agree with Mr. Naniwadekar that in this case since the notice under Section 148 of the Act was issued after the expiry of four years of the assessment year and the assessment under Section 143(3) of the Act having been completed, as per the proviso to Section 147 of the Act, only if there was a failure on the part of Assessee to disclose truly and fully material facts, the assessment could be reopened. The AO has taken a stand that by virtue of the Taxation and Other Loss (Relaxation of Certain Provisions) Ordinance, 2020 and the notifications issued thereunder, the proviso to Section 147 of the Act will not be applicable. It is an incorrect

stand because the AO in the notice issued under Section 148 of the Act states that it has been issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, ("**CIT**") Pune. If it was within four years, he would not have taken the approval of the CIT and he would have taken the approval only of the Joint Commissioner of Income Tax.

7. Moreover, in this case the issue regarding the capital loss on the sale of the said flat was subject of assessment proceedings. It is evident from the assessment order itself. Therefore, it is a clear case of 'change of opinion' and that cannot be the basis for reopening an assessment.

8. In the circumstances, we allow the Petition in terms of prayer clause (a), which reads as under:

> *"(a) Issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order of direction under Article 226 of the Constitution of India, quashing the Impugned Notice u/s 148 of the Act dated 31st March 2021 (Exhibit A) and the Impugned Order on objections dated 19th January 2022 (Exhibit C) and the impugned reassessment proceedings for AY 2015-16 as being wholly without jurisdiction, illegal and arbitrary;"*

9. Petition disposed.

(DR. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**