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

WRIT PETITION NO. 3604 OF 2022

PIEM Hotels Limited
a company incorporated in India,
having registered office at 90
Vivanta President, Cuffe Parade,
Mumbai – 400 005. ….Petitioner

V/s.

1. Assistant Commissioner of Income Tax
3(2)(2), Mumbai
Room No. 608, Aaykar Bhavan, M.K. Road,
Mumbai – 400 020.

2. Joint Commissioner of Income Tax,
Range 3(2),
Room No. 605, Aaykar Bhavan, M.K. Road,
Mumbai – 400 020.

3. National Faceless Assessment Centre,
2nd Floor, E-Ramp, Jawaharlal Nehru Stadium,
Delhi – 110 003.

4. The Union of India
Through the Secretary, Ministry of
Finance, Government of India,
North Block, New Delhi – 110 001. …Respondents

Mr. J.D. Mistri, Senior Advocate i/b Mr. Dharan V. Gandhi for Petitioner.
Mr. Akhileshwar Sharma for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 30th APRIL 2024

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Since the pleadings in the petition are completed, we have decided to dispose the petition at the admission stage itself.

2. Rule. Rule made returnable forthwith.

3. Petitioner filed its return of income for Assessment Year (A.Y.) 2016-17 and the assessment was finalized on 13th December 2018 under Section 143(3) of the Income Tax Act, 1961 (the Act) assessing petitioner's income at Rs.40,84,75,860/-.

4. Thereafter, Respondent No.1 issued a notice dated 30th March 2021 under Section 148 of the Act which petitioner says they never received. Mr. Sharma states it was delivered to petitioner. The reason to believe escapement of income from assessment was made available to petitioner alongwith the approval under Section 151 of the Act. Paragraph Nos. 2.1 to 2.4 of the reasons to believe read as under :

> *2.1 The assessee had filed the return of income on 29/11/2016 declaring income at Rs. 40,62,06,850/-. The case was selected for Compulsory Manual Selection scrutiny. The assessment was completed u/s 143(3) on 13/12/2018 determining assessed income of Rs.40,84,75,860/-.*
>
> *2.2 On perusal of the records of the assessee, it is seen from perusal of the notes to return of income for AY 2016-17 attached with the computation of income revealed that assessee had made expenses of Rs.99,83,000/- towards Designing fees which was capitalised (as work in progress) in earlier year. Further, assessee contended that since such expenditure was in nature of expansion of existing business and was claimed as revenue expenditure in current year. The said contention was accepted and expenses was allowed by the department.*
>
> *2.3 In this case, it is seen that assessee itself admitted that such expense was capitalised in the books of account, hence the same was in nature of capital. It is pertinent to mention here that it was assessees view that designing fees which was part of expansion of assessees business was required to be taken as capital expense in books of account. Hence, in view of the provision of Section 37(1) of I.T. Act, such expenses was not to be allowed as revenue expense*

> *and should have been capitalised (to the respective head) and required to be disallowed and added back.*
>
> *2.4 As per provisions of Section 37(1) of the Income Tax Act, any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business, is allowable as deduction in computation of income chargeable under the head Profits and gains of Business or Profession. Omission to disallow expenses of Rs.99,83,000/- has resulted in under assessment of income of Rs.99,83,000/-.*

5. From the reasons recorded it appears that the Assessing Officer (A.O.) had reason to believe escapement of income under two heads, i.e., expenses of Rs.99,83,000/- towards designing fees which was capitalized and a sum of Rs.4,98,00,000/- that assessee paid towards concession fee to Punjab Urban Development Authority (PUDA).

6. Mr. Sharma submitted that the Assessment Order dated 13th December 2018 passed under Section 143(3) of the Act there is no discussion regarding these two items and hence it cannot be stated that it was a subject of consideration. Mr. Sharma further states that the proposed reopening is within four years from the end of the relevant assessment year and therefore the A.O. has to only make out a case of tangible material which he has done in the reasons to believe. Therefore, the court should not interfere. Mr.Sharma states that petitioner has also passed reassessment order under Section 143(3) of the Act and Assessment Order under Section 147 read with Section 144B of the Act and an appeal has been preferred and petitioner should be directed to pursue the appeal.

7. On this last submission of Mr. Sharma, Mr. Mistri submitted that if the notice issued under Section 148 of the Act based on reasons to believe does not constitute any justification to believe that income chargeable to tax has escaped assessment, such a notice is bad in law and petitioner should not be directed to pursue the appeal.

8. It is petitioner's case that the reason to believe escapement of income chargeable to tax from assessment is based on change of opinion and therefore it does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. We will agree with Mr. Mistri and we do not have to go too far to explain this finding. The reasons made available itself shows that it was a clear case of change of opinion. On the first item, i.e., expenses of Rs.99,83,000/- towards designing fees, which was capitalized, the A.O. states "the said contention was accepted and expenses was allowed by the department". In Paragraph No. 2.3 it is stated "such expenses was not to be allowed as revenue expense and should have been capitalized and required to be disallowed and added back". Therefore, it is a clear case of change of opinion.

9. So also for the amount of Rs.4,98,00,000/- paid towards concession fee to PUDA, in Paragraph No.3 it is stated that it is arising out of the contractual obligation between assessee company and PUDA, the same had been claimed as deduction while computing income. The said deduction

was accepted and deduction was allowed to assessee. In Paragraph No. 3.1 it is stated that "…….. such expense was also required to be capitalized as work in progress in the books of accounts of assessee and should have been disallowed." Therefore, this is also a clear case of change of opinion

10. Moreover, during the course of assessment proceedings petitioner had also received a notice dated 16th October 2018 under Section 142(1) of the Act calling upon to furnish various materials under different heads including details of designing fees expense with copy of ledger and party wise details as also details regarding concession paid to PUDA. By its letter dated 29th October 2018 petitioner provided all the details. Therefore, these two items were also subject of consideration during the assessment proceedings.

11. As held by this Court in ***Aroni Commercials Limited v. Deputy Commissioner of Income Tax–2(1)***[1] once a query is raised during the assessment proceedings and assessee has replied to it, it follows that the query raised was a subject of consideration of the A.O. while completing the assessment. It is also not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Therefore, the reopening of the assessment, in our view, is merely on the basis of change of opinion of the A.O. from that held earlier

1 (2014) 44 taxmann.com 304 (Bombay)

during the course of assessment proceedings and this change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment. Paragraph No.14 of *Aroni Commercials Limited* (supra) reads as under :

> *14. We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr.Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter*

> *dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."*

12. Since the reasons to believe itself indicate as noted above that the reopening is based purely on change of opinion, as held in *Aroni Commercials Limited* (supra) this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

13. In the circumstances, we are not inclined to direct petitioner to pursue the appeal. Further, if petitioner wants a stay of the proceedings he may have to deposit part of the tax payable on the allegedly escaped income. That would certainly cause hardship to petitioner when the reopening itself is unjustified.

14. In the circumstances, we make Rule absolute in terms of prayer clause – (a) which reads as under :

> *(a) that this Hon'ble Court may be pleased to issue a Writ of 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 said notice under section 148 of the Act dated 30 March 2021 ("Exhibit D"), the impugned*

> *assessment order passed under section 143(3) read with section 147 and 144 B of the Act dated 30 march 2022 (Exhibit P1) and the impugned notice of demand dated 30 March 2022 (Exhibit P2) as well as the impugned show-cause notice for levy of penalty dated 30 March 2022 ("Exhibit P3").*

15. The consequential notice of demand and proceedings are also quashed and set aside.

16. Petition disposed.

17. Petitioner's undertaking to apply to withdraw the appeal within two weeks is accepted.

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