

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3203 OF 2022

Pushpa Nahata,
Age 52 years,
Occupation : Engaged in the Business
Of Fabrics,
259, 4th Floor, Johari Mansion,
Kalbadevi Road,
Mumbai 400 002.

... Petitioner

Versus

1. Income Tax Officer,
Ward 23(2)(6), Mumbai
Matru Mandir, Tardeo Road,
Mumbai – 400 007.
2. Principal Commissioner of Income Tax-19
Matru Mandir, Tardeo Road,
Mumbai – 400 007.
3. Additional/Joint/Deputy/
Assistant Commissioner of Income Tax/
Income Tax Officer,
National E-Assessment Centre,
Income Tax Department,
New Delhi
4. Union of India, through the
Secretary, Ministry of Finance,
North Block, New Delhi – 110 001.

...Respondents

* * * * *

Mr.Satish Mody with Ms. Aasifa Khan, Advocate for petitioner.

Mr.Akhileshwar Sharma, Advocate for respondents.

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

PRONOUNCED ON : 20th FEBRUARY, 2023.

: J U D G M E N T :

PER DHIRAJ SINGH THAKUR :

1. The petitioner challenges the notice under section 148 of the Income Tax Act, 1961 ('the Act') dated 30th March 2022 as also the order of assessment dated 22nd March 2022 passed under section 147 read with section 144/144B of the Act as bad and illegal and in excess of jurisdiction.

2. Briefly stated the material facts as under :

2.1 The petitioner filed its return of income for the assessment year 2014-15. The return was processed under section 143(3) of the Act by the Assessing Officer ('AO'). The issues pertaining to the petitioner's investment in NCL Research and Financial Limited were gone into, which investment was found to be bogus by the AO leading to an addition of Rs.27,27,657/-. It needs to be stated that the assessee had claimed in its return that it had purchased 2000 shares in a non-listed company, NCL Research and Financial Limited for a consideration of Rs.3,58,343/- and within a period of two years, had sold the same for a consideration of Rs.30,86,000/-.

2.2 The AO in its order, dated 22nd March 2022 held as under :

“13 Mr.Narendra Kumar Jain has stated in his statement that he took cash from the beneficiaries which after passing through a multiple layers of concerns controlled by him, was returned by cheques through brokers in the form of sale price of shares to the beneficiaries of the accommodation entry. The value of consideration claim is Rs.30,86,000/- whereas the cost of purchase paid by assessee is Rs.3,58,343/- which is given by cheque to show the purchases as genuine purchases. The sale price received as accommodation entry is nothing but the return of amount in lieu of cash that the assessee would have paid to hawala operators over and above Rs.3,58,343/- paid by the assessee by cheque at the time of purchase of penny stock in FY.

14. Therefore, a sum of Rs.27,27,657/- represents the unexplained investment made by the assessee in cash to obtain the equivalent amount as bogus profit on sale of shares. Alternatively, it can also be concluded that the sum of Rs.27,27,657/- is taxable to income of the assessee and not in nature of capital gain. Penalty proceedings u/s.271(1)(c) are initiated as the assessee has furnished inaccurate particulars of its income.

3. A notice under section 148 dated 30th March 2021 came to be issued by the AO seeking to reopen the assessment for the said assessment year 2014-15 on the ground that income chargeable to tax had escaped assessment within the meaning of section 147 of the Act.

4. Reasons supplied to the petitioner for the reopening of the assessment read as under :

Brief details of the assessee :

The assessee filed its return of income for the AY 2014-15 on 30.09.2014 declaring total income of Rs.9,65,850/-. Scrutiny assessment u/s 143(3) of the Income Tax Act, 1961 was completed on 28/12/2016 assessing total income at Rs.37,08,293/-.

Brief details of information collected by the AO :

It is seen from the assessment record that assessee has purchased shares of the scrip NCL Research & Financial Ltd. For Rs.3,58,343/- and later sold it for a consideration of Rs.30,86,000/-. The assessee has claimed in the return of income long term capital gain as exempt income u/s.10(38) to the tune of Rs.27,15,475/-.

3 Analysis of information collected :

It was held in the assessment order that the entire transaction of purchase and sale of shares of the scrip 'M/s. NCL Research & Financial Ltd' was part of accommodation entry and represents the unexplained investment made by the assessee in cash to obtain the equivalent amount as bogus profit on sale of shares. Therefore, the long term capital gain was held as unexplained investment/income from other sources and not in the nature of capital gain as claimed by the assessee.

Findings of the AO :

Since it was held in the assessment made that the entire transaction was part of accommodation entry, the entire sale consideration of Rs.30,86,000/- ought to have been held as unexplained investment/income from other sources and no deduction on account of purchase cost of Rs.3,58,343/- ought to have been allowed. Similarly, commission @ 0.5% on Rs.30,86,000/- which works out to Rs.15,430/- ought to have been held as unexplained expenditure u/s.69C of the Act instead of Rs.13,638/-. In view of these facts, the sum of Rs.3,60,135/- ought to have been disallowed in addition to Rs.27,41,295/-. Omission to do so, resulted in underassessment of income to the tune of Rs.3,60,135/-[Rs.3,58,343/- + Rs.1,792/-].

5 Basis of forming reason to believe and details of escapement of income :

Considering the facts of the case as mentioned above, I have reason to believe that income to the extent of Rs.3,60,135/- chargeable to tax has escaped assessment in the hands of the assessee. The case of the assessee clearly falls in the provisions of Explanation 2(c) to Section 147 of the I.T. Act, 1961.

In this case, more than four years have lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/s.148 of the Act for the A.Y.2014-15 is sought from the Principal Commissioner of Income Tax-19, Mumbai as per the provisions of Section 151(1) of the I.T.Act, 1961.

5. Objections were filed by the petitioner which specifically stated that the reopening was *void ab-initio* as the issue had already been considered at length by the AO and that the reopening was nothing but a change of opinion, and therefore, impermissible in view of the Apex Court Judgment in the case of ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.***¹. Finally, an order of assessment came to be passed under section 147 read with section 144/144D of the Act on 22nd March 2022. By virtue of this order of assessment, the AO added to the income of the assessee an amount of Rs.3,58,343/- under the head 'income from other sources' under section 68 of the Act representing the difference between the alleged sale consideration of Rs.38,86,000/- and Rs.27,15,475/-

1 (2010) 320 ITR 561 (SC)

which was earlier added back to the income of the assessee during the 143(3) proceedings.

6. The main ground urged by learned counsel for the petitioner that the entire reassessment proceedings are unsustainable as the AO has reviewed the earlier order passed under section 143(3) of the Act.

7. Counsel for the respondents, on the other hand, generally supported the action of the AO in reopening the assessment leading to the passing of the order of assessment which is impugned in the present petition.

8. We have heard learned counsel for the parties.

9. Admittedly, this is a case where the assessment was sought to be reopened beyond the period of four years from the end of the assessment year in which the order of assessment was passed. The AO had to be satisfied on two conditions. Firstly, that there was any failure on the part of the assessee to disclose truly and fully any material fact necessary for his assessment for that assessment year, and secondly, that there ought to have been some tangible

material before the AO, based upon which, he would form his reason to believe that income had escaped assessment.

10. From the record, it would be very clear that the issue with regard to the petitioner's investment in the scrip of NCL Research & Financial Ltd. had not only been specifically gone into by the AO but the same had been found to be bogus leading to an addition of Rs.27,27,657/- to the income of the assessee. All the relevant material facts were, therefore, before the AO, which led to such an addition.

11. In the reasons recorded, the AO, in the reassessment proceedings, has not stated as to what was that material which had not been disclosed by the petitioner during the regular assessment proceedings. Nor do the reasons recorded even allege that there was any failure to disclose material facts fully and truly. This was one of the pre-conditions as has already been held by this Court in *Clear Media (India) Private Limited Vs. Deputy Commissioner of Income-tax & Ors.* ².

² Writ Petition No.2031 of 2022 dated 10.01.2023

12. The Apex Court in *ITO Vs. Lakhmani Mewal Das*³ had an occasion to interpret the erstwhile provision of section 147 of the Act and observed thus :

“.....We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax Officer with regard to the inference which he should draw from the primary facts. If an 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 assessment.....”

13. From the reasons recorded, it does not appear that there was any fresh tangible material which has come to the notice of the AO between the date of the passing of the order under section 143(3) of the Act and the date of issuance of notice under section 148 of the Act. The AO has only tried to re-visit and reconsider the decision rendered in the earlier regular assessment proceedings on the ground that the addition ought not to have been limited only to Rs.27,27,657/- and ought to have been extended to Rs.3,60,135/-. This, in our opinion, was nothing but a change of opinion on the part

3 [1976] 103 ITR 437

of the AO, and therefore, impermissible in law. We have, therefore, no hesitation in holding that jurisdictional conditions with regard to section 147 of the Act have not been satisfied in the present case, which makes the order impugned unsustainable in law. For the reasons mentioned herein, we allow this petition. Order of assessment, dated 22nd March 2022, notice of demand dated 22nd March 2022, and penalty notice dated 22nd March 2022 shall also stand quashed. No order as to costs.

[VALMIKI SA MENEZES, J.]

[DHIRAJ SINGH THAKUR, J.]