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

WRIT PETITION NO. 1327 of 2013

Aroni Commercials Ltd .. Petitioner

vs.

The Assistant Commissioner of Income Tax 2 (1)
Mumbai & anr .. Respondents

Mr.Jehangir D.Mistry Sr.Counsel i/b Mr,A.K.Jasani for Petitioner
Mr.P.C.Chhotaroy for Respondents

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CORAM : M.S.SANKLECHA &
G.S.KULKARNI, J

DATED : 16 JULY, 2014

P. C.

This petition assails the notice dated 29.3.2012 issued under section 148 of the Income Tax Act,1961 (for short the Act) seeking to re-open the assessment for A.Y.2007-08.

2. At the very outset, when the matter was called out, Mr.Mistry learned senior counsel appearing for the petitioners stated that the issue

stands concluded by the decision of this Court in the petitioner's own case as identical facts and grounds for A.Y.2008-09 by order dated 11.2.2014 in the Writ Petition No.137 of 2014 rendered on 11.2.2014 reported in 362 ITR 403 in favour of the petitioner. The reasons furnished for reopening the assessment for A.Y.2007-08 (in this case) are as under :

> " It is observed that the assessee is only engaged in the business of share trading and regularly doing purchase and sale of shares. The assessee has manipulated the affairs in such a way that where script has been sold within twelve months, it is claimed as short term capital gains and taxed at a lower rate by applying section 111A. As assessee is engaged in share trading activity only, all the income/ receipts should be treated as business income including short term capital and long term capital gain. Reliance is also placed on the Board's circular No.4 dated 15.06.2007.
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> In view of the above, I have reason to believe that income chargeable to tax has escaped assessment for a,Y.2007-08 by reason of the failure on part of the assessee to disclose fully and truly the income under the correct head and all material facts necessary for the assessment of income resulting in the income being assessed at low rate/claimed exempt. Hence, the assessment is reopened by issue of Notice u/s 148."

The reasons furnished by reopening the assessment for A.Y.2008-09 (subject matter of challenge in W.P.No.137 of 2014 dated 11.2.2014) reported in 362 ITR 403 is as under :

> "It is observed that the assessee is only engaged in the

business of share trading and regularly doing purchase and sale of shares. The assessee has manipulated the affairs in such a way that where scrip has been sold within twelve months, it is claimed as short term capital gains and taxed at a lower rate by applying section 111A. As assessee is engaged in share trading activity only, all income/receipts should be treated as business income including short terms capital gain. Reliance is also placed on the Board's Circular No.4 dated 15 June 2007.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment for A.Y.2008-09 by reason of the failure on the part of the assessee to disclose fully and truly the income under the correct head and all material facts necessary for the assessment of income, resulting in the income being assessed at low rate/claimed exempt. Accordingly, the assessment for A.Y.20089-09 is reopened by issue of notice u/s 148 of the Income Tax Act, 1961."

The order dated 6.8.2012 disposing of the petitioner's objections for A.Y.2007-08 (in this case) is as under :

"The objection raised by the assessee are hereby disposed off as under :

The first objection of the assessee is regarding the reopening being done merely on the basis of change of opinion. It is observed that reopening is not due to any change of opinion but on the basis of clear observations by the AO that assessee did not carry out any business activity other than share trading and offered the income from share trading as Short Term Capital Gain @ 10% when sold within 12 months and claimed as Long Term Capital Gain as exempt when sold after 12 months. Therefore, it is a clear observation that income should have been treated as business and taxed at 30 % instead of taxing the same @10% or claiming as exempt. The AO

has a cause or justification to think that the income has been assessed under the wrong head at a lower rate/claimed exempt.

The second objection regarding exact failure on part of the assessee not brought out in the reasons recored is also not acceptable as the fact is clearly stated that the assessee failed to disclose the income under the correct head, resulting in the income being assessed at a lower rate/claimed exempt. Further, proviso 1 to Section 147of the Act states that no action should be taken under this section after the expiry of four years from the relevant assessment year, by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. In your case, the assessment has been reopened within the period of four years. Therefore, even if there is no failure on your part, the income can be reassessed.

As stated above the reopening of the case is not based on mere change of opinion. Therefore, the decisions quoted by the assessee does not apply to the facts of this case.

Thus the objections raised are not valid and devoid of any merits.

The order dated 20.11.2003 disposing of the petitioner's objections for A.Y.2008-09 subject matter of challenge by petitioner as reported in 362 ITR 402 are inter alia as under :

8) "The objection raised by the assessee are hereby disposed off as under :

8.1) & 8.2) .....

8.3) The third objection of the assessee is regarding the reopening being done merely on the basis of change of opinion. It is observed

that reopening is not due to any change of opinion but on the basis of clear observations that assessee did not carryout any business activity other than share trading and offered the income from share trading as Short Term Capital Gain @ 10% when sold within 12 months and claimed as Long Term Capital Gain as exempt when sold after 12 months. Therefore it is a clear observation that income should have been treated as business income and taxed @ 30% instead of taxing the same @ 10% or claiming as exempt. The AO has a cause or justifications to think that the income has been assessed under the wrong head at a lower rate/claimed exempt."

8.4) The fourth objection regarding exact failure on the part of the assessee not brought out in the reasons recorded is also not acceptable as the fact is clearly stated that the assessee failed to disclose the income under the correct head, resulting in the income being assessed at a lower rate/claimed exempt. Further, proviso 1 to section 147 of the Act states that no action should be taken under this section after the expiry of four years from the relevant assessment year, by reason of their failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. In your case the assessment has been reopened within the period of four years. Therefore even if there is no failure on your part, the income can be reassessed.

As stated above the reopening of the case is not based on mere change of opinion. Therefore, the decisions quoted by the assessee do not apply to the facts of this case."

3. As the reasons for reopening of assessment and of the order disposing of objections are identical for A.Y.2008-09 and 2007-08 we were inclined to allow this petition for A.Y.2007-08 by following our earlier decision in petitioner's own case for A.Y.2008-09 reported in 362 ITR 403. However, the above proposed course of action was very strongly and

vehemently opposed to by Mr.Chotaroy learned counsel appearing for the Revenue. It is submitted by Mr.Chotaray learned counsel for the Revenue that the decision rendered in the petitioner's own case reported in 362 ITR 403 for the A.Y.2008-09 would not apply to the present facts on the following grounds :

(i) This petition should be dismissed as it suffers from laches. According to him the objections to the reasons were rejected by the Assessing Officer on 6.8.2012 and the Writ Petition was filed on 4.12.2012.

(ii) The Court should not exercise its jurisdiction under Article 226 of the Constitution of India as held by a common judgment rendered by the Madras High Court in Appeal No.347 of 2014 and 57 other connected Writ Petitions. (A copy of the unreported decision as tendered) In the above case, the Madras High court had refused to entertain the petitions challenging re-opening of assessment on the ground that the same can be agitated before the authorities and carried up in appeal under the Act. This decision it is submitted lays down the correct law and should be followed by us;

(iii) In this case, unlike the decision rendered by this Court in petitioner's case reported in 362 ITR 403 the facts stated in the affidavit would establish that the petitioners had misrepresented the facts during the assessment proceedings under section 143 (3) of the Act. In particular the affidavit draws attention to the profit and loss account submitted by the petitioners which indicates that trading is their only business because other income is only on account of interest and dividends; and

(iv) The reply dated 29.7.2009 filed by the petitioners during the

proceedings under Section 143 (3) of the Act was identical to replies filed for all the assessment years and no factual particulars of the nature of their business was pointed out. Thus there was no occasion for the Assessing Officer to consider the facts which is the basis of the grounds for re-opening the assessment for A.Y. 2007-08.

4. We now consider the above objections of the Revenue for not following our earlier order dated 11.2.2014 in respect of the same assessee for A.Y.2008-09 reported in 362 ITR 403 in seratiam.

5. The first objection to entertain this petition is laches on the part of petitioner. It is emphasized that the objections to grounds for issuing impugned notice were rejected on 6.8.2012 and this petition was filed only on 4.2.2012. In the meantime, notices were sent for personal hearing on 7.1.2013, 15.1.2013 and 28.1.2013 to the petitioner. This delay according to the Revenue is fatal. In support reliance is placed upon a decision of this Court in Patel KNR JV vs. Commissioner of Income Tax & ors reported in (2014) 362 ITR 351 (Bom). The aforesaid decision dealt with the challenge to a transfer of a case from Bombay to Hyderabad and was concerned with Section 127 of the Act. In the above case, this Court refused to interfere with the order of transfer on the ground that there was

inordinate delay on the part of the petitioner in moving the Court to obtain any interim or ad interim reliefs stalling the transfer of the case. Resultantly, there was no bar for the Deputy Commissioner of Income tax Hyderabad issuing notices for reopening the assessment for A.Y 2009-10 to 2012-13. It is at that point of time that the petitioners therein had moved this Court seeking a stay of the transfer of the case dated 31.8.2012. It was in the aforesaid circumstances, that the Court held that there were laches on the part of the petitioner in moving this Court as the assessing authority in Hyderabad had already initiated proceedings for reopening assessment before they sought ad interim and interim reliefs from this Court. The facts of that case were completely different. So far as the three notices for personal hearing in this case are concerned, we are informed that no personal hearing was held and neither did the petitioner submit to the jurisdiction of the Assessing Officer in respect of his attempt at reopening of assessment for A.Y.2007-08. Therefore, the mere issue of notices by the Revenue will not bar the petitioners for moving this Court in its writ jurisdiction.

6. Be that as it may, we must point out that it is a settled position in

law that Limitation Act per see is not applicable to petitions under Article 226 of the Constitution of India. However, a petition filed after a long delay is not entertained on the ground of laches not as matter of rule but a factor to be considered while deciding whether or not to exercise our discretion to entertain the petition. The dismissal on ground of laches is not a rigid rule of law but, a rule of prudence. The exercise of discretion would depend on the facts of each case and merely because the petition for transfer of a case was rejected on the ground of laches to submit that this petition challenges a reopening notice should also be dismissed is unacceptable. In the present facts, we are of the view that the petition has been filed with reasonable dispatch. In any case in the present facts there is no such delay which would justify dismissing the petition on ground of delay/laches.

7. It was next contended that this Court should not exercise its writ jurisdiction under Article 226 of the Constitution of India and the petitioner should be left to avail of the statutory remedies including an appeal available under the Act. In support reliance was placed upon an unreported decision dated 4.2.2014 of the Madras High Court in Joint Commissioner

of Income Tax vs Kalanithi Maran being Writ Petition No.347 and 57 other petitioners. It was emphasized by Mr.Chotarey learned counsel for the Revenue that in the aforesaid case the Hon'ble Madras High Court did not entertain the writ petitions filed challenging the notices under Section 148 of the Act for reopening assessment and he submits we must do the same. The decision of the Hon'ble Madras High Court proceeded on the basis that the dispute urged before it were with regard to adjudicatory facts and not with regard to jurisdictional facts as raised in this petition. The Hon'ble Madras High Court in the aforesaid decision itself points out that that when an assessment sought to be reopened by an Officer who is not competent to do so or where on the face of it it would appear that the re-opening is barred by limitation or lacks inherent jurisdiction, the court would certainly entertain a challenge to the reopening notice in its writ jurisdiction. The Hon'ble Madras High Court itself drew a distinction between the adjudicating facts and jurisdictional facts. It was in the above context that challenges to the reopening notice under Sections 147 and 148 of the Act was not interfered with by the Hon'ble Madras High Court as the challenge before it appears to have been with regard to adjudicating facts as contrasted with the jurisdictional facts raised in this case.

Jurisdictional facts are those facts which gives jurisdiction to enter upon enquiry, while adjudicatory facts come up for consideration after validly entering upon enquiry i.e. having jurisdiction. In this case, the challenge is based on lack of jurisdiction in issuing the impugned notice by the Assessing Officer on the ground that the pre-condition for issuing notice under Section 147 of the Act is not satisfied i.e. notice should not be on account of the change of opinion. It is only when jurisdictional facts are satisfied will the Assessing Officer acquire the authority to deal with the matter on adjudicatory facts. The decision of the Madras High Court relied upon by Mr.Chhotaroy learned counsel for the revenue is of no avail in the facts of the present case. It may be pointed out that there could be occasions where jurisdictional facts could itself be a matter of factual enquiry. i.e. leading of evidence and appreciation of facts. In such a case even if the challenge is with regard to jurisdictional facts, yet the Court in its discretion may not entertain the petition as it could be best left for determination before the authorities under the Act.

8. Mr.Mistry learned senior counsel for the petitioners pointed out decisions of this High Courts and of the Supreme Court to contest the

submissions on behalf of Revenue. However, we do not see any need to deal with them in view of the fact that the decision of the Hon'ble Madras High Court itself does not prohibit a petitioner from challenging a reopening notice under the Act if it is without jurisdiction. We have on identical facts and grounds entertained and disposed of a challenge in the petitioner's own case reported in 362 ITR 403.

9. Mr.Chhotaroy learned counsel for the Revenue next contends that in the earlier decision in the petitioner's own case reported in 362 ITR 403 there was no affidavit in reply leading to the order dated 11.2.2014. However, in this case an affidavit is filed by the Revenue and reliance is placed upon the internal audit Report (a copy of which is not annexed) which according to him has led to the examination of the records by the Assessing Officer.

10. We do find that the affidavit seeks to add reasons which were furnished to the petitioners in support of the impugned notice dated 29.3.2012. In our earlier decision rendered on 11.2.2014 the very same submission made by Mr.Chhotaroy before us was considered viz that the

new material facts was the audit report furnished by the audit department, a copy of which was then tendered. We hold in this case, like in the earlier case (362 ITR 403) the reasons furnished to the petitioners did not disclose the material obtained from the audit department nor do they indicate that the re-opening is based on the audit report. This Court has held in the case of Hindusthan Lever Ltd vs R.B.Wadkar Asst.Commissioner of Income Tax 268 ITR 332 that the challenge to the re-opening of assessment proceedings can be resisted only on the basis of the reasons recorded at the time of issuing the notice and no further reasons can be added to or supplemented to support reasons recorded while issuing the impugned notice. Thus, we see no reason to look beyond the reasons furnished to the petitioners to test the validity of the impugned reopening notice dated 29.3.2012 in seeking to reopen the assessment for A.Y.2007-08.

11. The next contention in the affidavit is that the examination of the Profit and Loss Account would indicate that trading of shares is their only business. This aspect of the matter was subject to examination during the original proceedings under section 143 (3) of the Act. In the present case also the petitioners have similar to facts in the earlier decision in 362 ITR

403 has drawn the attention of the Court to the fact that during the assessment proceedings under section 143 (3) of the Act for A.Y.2007-09 the Assessing Officer had specifically asked of the petitioners to explain as to why the sale of investments should be treated as “capital gains” as claimed by the petitioner and not as “business profits”. The petitioners responded to the same by their reply dated 29.7.2009 placing reliance upon a CBDT circular. It was thereafter that the assessment order was passed accepting the petitioner's contention. Mr.Chhotaroy learned counsel for the revenue submits that the aforesaid letter dated 29.7.2009 is a letter which is bereft of facts. It merely states the law on the subject. Firstly, we find that the reply does rely upon the CBDT circular which lays down the parameters to make a distinction between the shares held by the assessee as investments and shares held as stock-in-trade. Besides, the satisfaction which is required of the Assessing Officer and in case the Assessing Officer was of the view that the explanation was not sufficient, it was open to the Assessing Officer to call for further information. We do not find any merit in this objection raised by Mr.Chhotaroy learned counsel for the revenue.

12. Lastly, Mr.Chhotaroy learned counsel for the revenue mentioned that

the profit and loss account of the assessee as furnished by the petitioners would clearly indicate that the Assessing Officer had not applied his mind to the same. This non-application of mind by the Assessing Officer at the stage of passing the assessment order is the view of Mr.Chhotaroy. There is no basis for coming to this conclusion. Once a query had been raised with regard to a particular issue, it must follow that the Assessing Officer had duly applied his mind to the queries raised and taken a view on the matter. Therefore, we do not accept the submissions of Mr.Chhotaroy that this is not a case of change of opinion on the part of the Assessing Officer in issuing the impugned notice. Mr.Chhotaroy placed strong reliance on the decision of this Court in the matter of Electronics Corporation of India Ltd vs. Additional C.I.T. reported in 350 ITR 651. In the aforesaid decision, this Court has held that when the assessment is re-opened for less than 4 years, it is permissible for the Assessing officer to rely upon the material which were a part of the original proceedings for assessment before the Assessing Officer However, for the Assessing Officer to rely upon the material which was available during the section 143 (3) proceedings, it must be clearly be established that the Assessing Officer had not applied his mind to the tangible material available on record. In this case, the

controversy is whether the profit would be chargeable to tax as "business income" or not as "capital gains." This was the issue which was raised by the Assessing Officer during the assessment proceedings and the petitioner submitted its reply dated 29.7.2009 to the above query. It must follow that the Assessing Officer was satisfied with the explanation as furnished by the petitioner. Therefore, the decision of our Court in the matter of Electronics Corporation of India Ltd (supra) would have no application to the facts of the present case.

13. We don't find any substance in the distinction sought to be made by the Revenue for not following the decision rendered by this Court on 11.2.2014 in the petitioner's own case for the A.Y.2008-09 as reported in 362 ITR 403.

14. Accordingly, we hold that there is no reason for the Assessing Officer to have a reasonable belief that the income is chargeable to tax has escaped assessment. Accordingly, we set aside the impugned notice dated 29.3.2012 issued under section 148 of the Act in respect of A.Y.2007-08 as well as order dated 6.8.2012 disposing of the petitioner's objections to the

reasons for reopening.

15. Accordingly, the petition is allowed. No order as to costs.

(G.S.KULKARNI, J) (M.S.SANKLECHA, J)