

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

WRIT PETITION NO. 321 OF 2016

Framji Dinshaw Petit Parsee Sanatorium]
Through its Trustee Sir Dinshaw M. Petit,]
359, UCO Bank Building,]
Dr. D.N. Road, Fort,]
Mumbai 400 001.] .. Petitioner

Vs.

1. Income Tax Officer(Exemption) (2)(4),]
5th Floor, Parimal Chambers,]
Parel, Lalbaug,]
Mumbai - 400 012]

2. Director of Income-Tax)Exemption]
6th Floor, Piramal Chamber, Parel,]
Lalbaug, Mumbai - 400012]

3. Union of India,]
Through the Secretary,]
Department of Finance,]
Ministry of Finance, Govt. of India,]
North Block, New Delhi - 110 001] .. Respondents

...

Mr. J.D. Mistri, Senior Advocate with Mr. Madhur Agrawal i/b.
Mr. Atul K. Jasani, for the Petitioner.

Mr. Suresh Kumar, for the Respondents.

...

**CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, J.J.**

RESERVED ON : 1st FEBRUARY 2023

PRONOUNCED ON : 8th MARCH, 2023.

J U D G M E N T

[PER: KAMAL KHATA, J]

1. By this petition, notice under section 148 of the Act dated 20th March, 2015 proposing to reopen the assessment for assessment year (AY) A.Y. 2008-09 is challenged. The Petition also seeks to challenge the impugned order dated 2nd November 2015 whereby the Respondent No. 1 rejected the objections of the Petitioner, challenging the validity of their reassessment proceedings for the A.Y. 2008-09 being ex-facie illegal and contrary to the provisions of the Act.

THE FACTS OF THE CASE:

2. The Petitioner is a Public Charitable Trust registered with the Director of Income Tax (Exemption), Mumbai since 17th December, 1977 under section 12A of the Income Tax Act ('the Act' for short). The Petitioner addressed a letter dated 29th February, 2008 to the Assistant Director of Income-tax (Exemptions) I-(2) informing him that they would not be able to utilise 85% of the accumulated income for the year towards the expenditure on the objects of the trust and therefore, may be allowed to exercise the option under section 11(1) of the Act to

spend the unspent surplus in the next twelve months. On 30th September, 2008 the Petitioner filed its return of income for A.Y. 2008-09 declaring 'Nil income'. Rs. 89,17,868/- was claimed by the Petitioner being 15% of the gross income as deduction allowable under section 11 of the Act. A sum of Rs. 13,21,686/- was also claimed as depreciation. Since the amount expended on the object of the Petitioner Trust was more than the income, the Petitioner claimed deficit of Rs. 13,92,05,087/- as carry forward to be set off in the subsequent year. On 3rd November, 2010 the Petitioner received notice under section 142(1) of the Act asking the Petitioner to submit the following :

- (a) Detailed note on the objects of the Trust, and activities carried on during the year;
- (b) Details of investments made in movable and immovable assets;
- (c) Details of accumulation made under section 11(2) of the Act in the last 10 years and the details of utilization thereof over the last 10 years alongwith the copies of application in Form No. 10;
- (d) Whether the capital expenditure made in the fixed assets have been claimed as application of income in earlier years,

if so, justification for claiming depreciation in the year under assessment;

- (e) Complete details on the expenditure incurred on the objects of Trust; and
- (f) Earlier two years assessment orders under section 143(2) of the Act.

3. The Petitioner filed its submission by letter dated 3rd December, 2010 *inter alia* submitting that the note on object and activities of the Petitioner Trust; details of expenses on the object of Petitioner Trust; summary of accumulation / deficit in the last 10 years. The Petitioner received another show-cause notice dated 7th December, 2010 under section 142(1) of the Act requiring the Petitioner to file various other documents and details of certain capital expenditure incurred by the Petitioner. This was responded by the Petitioner vide letter dated 9th December, 2010 and 15th December, 2010. By an order under section 143(3) of the Act dated 28th December, 2010 for assessment year 2008-09, A.O. accepted returned income offered by the Petitioner. On 26th March, 2015, the Petitioner received notice under section 148 of the Act dated 20th March, 2015 with regard to the income chargeable to tax for A.Y. 2008-09 having

escaped assessment. In response to the impugned notice, by letter dated 6th April 2015, the Petitioner sought a copy of the reasons for issuance of the notice under section 148 of the Act and out of abundant caution also filed a copy of the income tax return for A.Y. 2008-09 alongwith copy of the computation of income and financial statements. By letter dated 30th April, 2015 the respondent No. 1 forwarded the reasons for reopening of the assessment that are as under :

“In this case the assessee has filed its return of income for A.Y. 2008-09 on 30.9.2008 disclosing total income of Rs. Nil. The assessment was completed u/s. 143(3) of the Act on 28.12.2010 assessing total income at Rs. NIL.

2. On perusal of the records, it is noticed that the assessee declared deficit of Rs. 13,92,05,087/- after claiming accumulation u/s. 11(1)(a) of Rs. 89,17,868/-.

2.1 Exemption u/s. 11(1)(a) of Rs. 89,17,868/- (15% of gross income) which was not in order. As the assessee has shown deficit of Rs. 13,92,05,087/- after claiming exemption u/s. 11(1)(a) of Rs. 89,17,868/- during the year. Therefore, the exemption u/s. 11(1)(a) has not been allowed as there was a deficit in the assessment year. Therefore, the exemption u/s. 11(1)(a) was required to be restricted to nil (being 15% of total income or to the extent of income available for accumulation) instead of Rs. 89,17,868/- as per the above quoted provision. This has resulted in excess allowance of accumulation of Rs. 89,17,868/- involving total potential tax effect of Rs. 30,31,183/-.

3. The deficit claimed by the assessee of Rs. 13,92,05,087/- should not be allowed to carry forward and set-off in the subsequent assessment years as the Act does not contain any provision as to carry forward and set-off to expenditure/application made during the year in subsequent years.

4. There is a failure on the part of the assessee to make full and true disclosure of the relevant material facts in the relevant assessment year, as far as the above issue is concerned. Therefore, I have a reason to believe that the income has escaped assessment and action u/s. 147 is

necessary.”

4. The Petitioner by letter dated 14th May, 2015 challenged the validity of the re-assessment proceedings. In response, the respondent sent notice under 143(2) of the Act dated 24/7/2015 seeking certain information with respect to the assessment from the petitioner. By order dated 2nd November, 2015, the Petitioner's objections were rejected. By letter dated 23rd November, 2015, the Petitioner sought certified true copy of the reasons recorded by the respondent No.1 and the sanction from the appropriate authority obtained, if any. Aggrieved by the unlawful assumption of jurisdiction by Respondent No. 1, this Petition is filed.

5. Mr. J.D. Mistri, learned Senior Counsel for the Petitioner submits that the original assessment order under section 143(3) was passed in conformity with the view taken for the past number of years, whereby the Petitioner was allowed deduction of 15% on the gross profit and carry forward of deficit has also been allowed in the earlier year to be set off in the subsequent year. Learned Counsel relies on the Judgment in the case of *CIT v/s. Institute of Banking Personnel Selection (IBPS)*¹ wherein it was held that the

¹(2003)131 Taxman 386(Bombay)

Petitioner is entitled to carry forward and set off the current year's deficit with the subsequent year's income tax. The learned Senior Counsel submits that the question of whether the Petitioner is entitled to carry forward and set off the deficit is required to be considered in the year of set off, and cannot be considered in the relevant year i.e. the year of deficit and therefore, cannot be the reason to come to the conclusion that the income has escaped the assessment. He submits that the impugned notice is a case of change of opinion, which is not permissible under section 147 of the Act, inasmuch as the issue on which the assessment is proposed to be reopened was considered during the course of the assessment proceedings and the order under section 143(3) of the Act was passed. He submitted that the Assessing Officer had considered computation of income and the submissions of the Petitioner while passing an order under section 143(3) accepting the claim of the Petitioner. He submits that there is no mention about any tangible material that has come to the notice of the respondent No. 1 that has been recorded in the reasons recorded. In fact, the reasons recorded clearly averred "on perusal of records" and consequently it can be concluded that there was no fresh and tangible material to justify the reopening of the assessment. He further submits that it is evident that the

respondent No. 1 has referred to assessment order for A.Y. 2012-13 for reopening of the assessment. He consequently submits that a different view in the subsequent year cannot justify the reopening of the assessment for the earlier assessment years. He submits that there is no failure to fully and truly disclose any material fact as alleged in the reasons recorded. He lastly submitted that the Petitioner have not been provided a copy of the approval from the appropriate authority under section 151 of the Act. In view of the above, he prays that the Petition be made absolute with costs.

6. Mr. Suresh Kumar, learned Counsel for the Respondents submits that the notice under section 148 of the Act was issued after following due procedure by A.O. having recorded reasons. He submits that certain facts were discovered during the assessment proceedings for A.Y. 2012-13 where the Petitioner's claim of deficit to be carried forwards for set off in the subsequent year was disallowed by A.O. He placed reliance on the decision of this Court in the case of *Multiscreen Media (P) Ltd. v/s. Union of India*², wherein it was held that reassessment on the basis of the additional material discovered in the assessment proceedings of a subsequent year is justified. According to him, the case was

²[2010 324 ITR 54(BOM.)

reopened for two reasons. One for carry forward of deficit which issue was pending before the Apex Court when the case was reopened; and secondly, wrong claim of exemption under section 11(1)(a). He submitted that if the Assessing Officer on account of mistake or lapse does not examine a particular entry or a note in the return, it can be said that there was no application of mind and thus, not a case of change of opinion. He submits that the word used in Explanation 2 (c)(iv) is “computed” shows that after the insertion of the said explanation even where assessment has been made after due application of mind, there is no estoppel for reopening the assessment under section 147 of the Act where excessive loss or depreciation allowance or any other allowance under this Act has been computed. He relied upon the Judicial pronouncements in the following cases :

- a) A.L.A. Firm V/s. CIT (Mad) 102 ITR 622**
- b) Ess Kay Engineering Co. (P) Ltd. V/s. CIT (SC)
247 ITR 818**
- c) Revathy C.P. Equipments Ltd. V/s. DCIT and
ors. (Mad.) 241 ITR 856.**
- d) EMA India Ltd. V/s. ACIT (All) 30 DTR 82.**

7. He further relied on the Judgment of the Supreme Court in the case of Sri Krishna Pvt. Ltd. (87 Taxman 315), which held that even in respect of an issue accepted u/s 143(3), proceedings U/s. 147 can be initiated. He submitted that an enquiry at the stage of examining the validity of a reassessment notice is only to see whether there are reasonable grounds for the A.O. and not whether the omission/failure and the escapement of income is established. He submitted that there was no statutory requirement for fresh material to be available for reopening of the assessment. He submitted that it would be an omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the Assessee could have uncovered but did not, and that it would be the duty of the Assessee to bring it to the notice of the A.O. He further submitted that reassessment is permissible even if the information is obtained after proper investigation from the materials on record or from any enquiry or research into facts or law. He lastly submitted that an alternative remedy in the form of submissions before the A.O. during the reassessment proceedings would be available to the Petitioner. Moreover, if the Petitioner was aggrieved by the reassessment order, the

Petitioner had a remedy of an appeal before CIT(a), ITAT etc. In view of the aforesaid, he submitted that the Petition deserves to be dismissed.

Conclusion:

8. We heard both the learned Counsel at length. We find merit in the Petition.

9. It would be appropriate to mention about the case of *CIT v/s. Institute of Banking Personnel Selection (IBPS) (cited supra)* which held that income derived from the trust property has also got to be computed on commercial principles and if the commercial principles are applied then the adjustment of expenses incurred by the Trust for charitable and religious purposes in the earlier years against income earned by the Trust in the subsequent year will have to be regarded as application of income of the Trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under section 11(1)(a) of the Act.

10. It is further well settled in the case of *Director of Income-tax(Exem) v/s. MIDC reported in Income Tax Appeal No. 2652 of 2011* where this Court had allowed the assessee's claim to carry forward the deficit relying on the decision of this Court in the matter of *CIT v/s. Institute of Banking reported in 264 ITR 110*. The above proposition of law is now well settled by the Supreme Court in the case of *Director of Income-tax v/s. Society for Applied Microwave Electronic Engineering & Research*,³ upholding the decision of the Bombay High Court which held that the Tribunal was justified in upholding the decision of the CIT(A) to allow carry forward of deficit on account of excessive expenditure and directing the A.O. to carry forward deficit on account of excess expenditure without appreciating the fact that this would have the effect of granting double benefit to the assessee, first as "accumulation" of income under Section 11(1)(a) or as corpus donation under section 11(1)(d) in the earlier years/current year and then as 'application' of income under section 11(1)(a) in the subsequent years.

11. In the present case, the AO had recorded in the assessment order u/s 143 (3) of the Act dated 28th December 2010 for AY 2008-09 that the petitioner was registered with the Director of

³(2019)106 taxman.com 204

Income- Tax exemption - Mumbai, under section 12A of the Act and that during the year the Petitioner had claimed exemption u/s 11 of the Act. The reasons recorded in the letter dated 30th April 2015 evince that the AO has come to the conclusion that income has escaped assessment 'on the perusal of the records'. Consequently, there is no question of any failure to disclose any material fact necessary for assessment as held in the case of ***Income-tax Officer vs. Lakhmani Mewal Das***⁴. The impugned notice by the respondent no. 1 is clearly a case of change of opinion as held by this Court in the case of ***Aroni Commercials Ltd. Vs DCIT - 2 (1)***⁵. Furthermore, AO's the reason to believe must be based on some new tangible material which was not available at the time of passing the original Assessment Order as held in the case of ***Lalitha Chem Industries (P) Ltd. Vs. DCIT - 9 (2)***⁶.

12. In our view, the petitioner had rightly claimed carry forward and set off of deficit. Consequently, the impugned order dated 2nd November 2015 rejecting the objections deserve to be set aside.

13. Be that as it may, the impugned notice dated 20th March 2015 and the impugned order dated 2nd November 2015 are

⁴[1976] 103 ITR 473 (SC)

⁵[2014] 44 taxmann.com 304

⁶[2014] 45 taxmann.com 451

quashed and set aside and consequential actions in furtherance thereto are stayed.

14. The Petition is allowed with no order as to costs.

[KAMAL KHATA, J.]

[DHIRAJ SINGH THAKUR, J.]