



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2435 of 2022.

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|---|---|----------------|
| 1. A&J Associates, |] | |
| A partnership firm duly registered |] | |
| Under the Indian Partnership Act, 1932 |] | |
| Having its office at 404, Niranjana, |] | |
| 99, Marine Drive, |] | |
| Mumbai - 400 002 |] | |
| | | |
| 2. Ajay Dilkhush Sarupria |] | |
| partner of Petitioner No.1 |] | |
| Residing at B-901, Quantum Park, |] | |
| Khar Gulab Nagar, |] | |
| Near Union Park, |] | |
| Khar (W), Mumbai |] | ...Petitioners |
| Versus | | |
| | | |
| 1. The Assistant Commissioner of |] | |
| Income Tax, Circle 23(1), Mumbai |] | |
| Having his office at, |] | |
| 113, 1 st Floor, Matru Mandir, |] | |
| Tardeo Road, Mumbai - 400 007 |] | |
| | | |
| 2. The Principal Commissioner of |] | |
| Income-tax, Mumbai-19 |] | |
| Having his office at |] | |
| 228, 2 nd Floor, Matru Mandir, |] | |
| Tardeo Road, Mumbai - 400 007 |] | |
| | | |
| 3. National Faceless Assessment Centre |] | |
| Having its office at, |] | |
| National e-Assessment Centre, |] | |
| New Delhi |] | |
| | | |
| 4. Union of India |] | |
| Through the Central |] | |
| Government Advocate, |] | |
| Aayakar Bhavan, |] | |
| Maharishi Karve Road, |] | |
| Mumbai - 400 020 |] | ...Respondents |

...

Mr. Jitendra Jain a/w. Mr. Ansh Agal i/by PDS Legal for the petitioners.

Mr. Akhileshwar Sharma a/w. Ms. Shilpa Goel for the respondents.

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CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.
RESERVED ON : 1ST MARCH 2023.
PRONOUNCED ON : 4TH MAY 2023.

J U D G M E N T

[PER: KAMAL KHATA, J.]

1. This Petition under Article 226 challenges notice under section 148 of the Income-tax Act, 1961 ('Act') dated 19th March 2021 issued by Respondent No.1 proposing to reassess the income for the assessment year ('AY') 2015-16 and the order dated 16th March 2022, rejecting the objections raised by Petitioner to the proposed action of reopening.

2. The reasons for opening are as under:

*"1. **Brief details of the assessee-** The assessee filed its return of income on 30.09.2015 for A.Y. 2015-16 declaring income at Rs. 11,59,34,180/- and the same was assessed u/s 143(3) on 19/12/2017 determining total income at Rs.12,07,27,060/-.*

*2. **Brief details of information received by the AO-** On perusal of assessment records it was observed that assessee **sold office premises** i.e., 302, 3rd Floor, building*

no.19, A-Wing, Pinnacle corporate Pane, BKC, **Bandra East**, Mumbai-400051 for a consideration of Rs.14,00,00,000/- on 02.05.2014. The assessee claimed to have **purchased commercial premises** i.e., 101, 1st Floor, Dev Plaza, **Andheri (W)**, Mumbai-58 for a total consideration of Rs.23,29,19,898/- on 31.03.2015. It was contended that since neither the WDV of the block of assets "Building" become Nil/Negative and there were some assets in the said block, hence, there were no capital gain arising u/s 45 of the act.

However, it is noticed from the copy of agreement for sale dated 31.03.2015 for the purchase of office premises No. 101 at Dev Plaza that the agreement for sale was registered with the office of the Registrar only on 04.04.2015. Also, out of the total consideration of Rs. 22,05,00,000/- Only part payment was paid to the vendor of the property till the execution of the said agreement.

3. Analysis of information received- The assessee was only allowed permission to enter the said unit on specific request for carrying out. Fitments and refurbishing only. Hence, the said property was not in possession of the assessee as on 31.03.2015, which is also evident from para 2 and para 11 of the agreement. Since the assessee cannot claim that it has property as on 31.03.2015, the assessee cannot claim that it has completed part performance of the contract as stipulated under the provision of section 53A of the transfer of property act. It is also pertinent to mention here that, in response to notice u/s. 133(6) of the Act, Shri. Vijay Thakkar, the vendor of the impugned property, submitted that he had received Rs.20,50,00,000/- as an advance from the assessee and the property was sold in A.Y. 2016-17. Thus, the impugned transaction reached finality on 04.04.2015 and not as on 31.03.2015 as the same property could not be shown as an asset in the balance sheet of the vendor as well as the assessee as on 31.03.2015. **Therefore, it is not correct on the part of the assessee to show the new property purchased in the balance sheet as on 31.03.2015. Since the property was not in the possession of the assessee as on 31.03.2015, in the assessment order the amount of profit on sale of the property should be taxed as Short-Term Capital Gain.**

4. Basic of forming reason to believe and details of escapement of income- In view of the above specific information, I have reason to believe and am satisfied that amount of Rs. 4,65,87,479/- has escaped assessment in the hands of the assessee for A.Y. 2015-16. Therefore, assessment proceedings are required to be re-opened u/s

147 of the Income-tax Act, 1961 to bring the income escaping assessment to tax for the above said assessment year.

5. Applicability of the provisions of section 147/151 of the Fact of the case- *The case of the assessee for A.Y. 2015-16 needs to be re-opened u/s 147 of the Income Tax Act, 1961 to bring to tax the escaped income. More than four years but not more than 6 years have lapsed from the end of assessment year under consideration. Hence, the good self is requested to kindly accord necessary approval in this case to issue notice u/s 148 for AY 2015-16.*

6. *Put up for kind perusal and approval please.”*

3. The issues before the ITAT as seen from the Order of the ITAT dated 11th January 2022 are as under:

“11. Considered the rival submissions and material placed on record, we observed from the record that Ld. Pr.CIT set aside the Assessment Order by invoking three issues which are as under:-

“i) **Purchase of commercial property at Andheri** vide agreement dated 31st March 2015 registered on 4th April 2015 cannot be added to the block of asset and **therefore u/s 50, the sale of office premises at Bandra which forms part of the block would result into capital gain.**

ii) Income received on which no TDS is deducted.

iii) Genuineness of business promotion expenses.”

4. An examination and comparison of the reasons recorded in notice dated 19th March 2021 and the order dated 11th January 2022 of the ITAT indicates that they are the same only put in different words. The examination of the records indicates that the

objections to the notice were filed on 10th January 2022 i.e., a day prior to the order of the ITAT on 11th January 2022 and consequently it only contained an averment that the Appeal was pending. The ruling on objections rejecting them, by the impugned order dated 16th March 2022 does not consider the ITAT order in favour of the Petitioner.

5. The criteria for reopening of assessment after a period of four years are no longer *res integra* in view of the judgement of this Court in the case of ***Ananta Landmark P. Ltd v Dy. CIT*** wherein this Court held that where assessment was not sought to be reopened on the '*reasonable belief*' that income had escaped assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but was a case wherein assessment was sought to be reopened on account of change of opinion of AO the reopening was not justified. It is also held that where primary facts necessary for assessment are fully and truly disclosed the AO is not entitled to reopen the assessment on a change of opinion. It is held that while considering the material on record, one view is conclusively taken by AO, it would not be open for the AO to reopen the assessment based on the very same material and take another view.

6. In the present case, the Respondent No. 1 has relied upon the same information available from the assessment records there was no new tangible material available on record to conclude that income had escaped assessment. In our view it is clearly a '*change of opinion*'. Besides a perusal of the ITAT order dated 11th January 2022 evinces that the same contentions are rejected by the ITAT and have attained finality in favour of the Petitioner.

7. In view of the aforesaid, we are of the view that the AO ought to have considered the order passed by the ITAT and could not feign ignorance as late as on 16th March 2022 especially when the revenue (respondent/s) was a party to the proceeding. Even the reply filed on 13th June 2022 is silent on the effect of the ITAT order. It essentially states that the Petitioner has failed to disclose material facts fully and truly in the original assessment.

8. In our view, the Respondents ought to have offered to withdraw the notice and the impugned order at the inception of the hearing of the matter which they chose not to do and invited an order from this Court. The Respondents are also expected to come with clean hands and be forthright with the Courts, it's not an obligation solely for the assessee. Be that as it may the Petitioner would be entitled to succeed in this proceeding.

9. We, therefore, pass the following order-

i. The impugned notice dated 19th March 2021, the order dated 16th March 2022, issued by Respondent No.1 for AY 2015-16 are quashed and set aside.

ii. Rule made absolute in above terms.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)