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

WRIT PETITION NO. 683 OF 2012

Tata Sons Limited
a Company incorporated
under the Companies Act, 1913,
and having its registered office
at Bombay House, 24 Homi Mody Street,
Mumbai 400 001. ....Petitioner

Vs.

1. Deputy Commissioner of Income
Tax, Range 2(3), Mumbai
Room No. 555, Aayakar Bhavan,
M.K. Marg, Mumbai 400 020.

2. Assistant Commissioner of Income
Tax, Range 2(3), Mumbai,
Aayakar Bhavan, Mumbai.

3. The Commissioner of Income Tax,
Range 2, Aayakar Bhavan, Mumbai.
400 020.

4. Union of India,
through the Secretary,
Ministry of Finance. ...Respondents

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Mr.P.J. Pardiwalla, Senior Advocate a/w. Mr.Anil Wani i/b ANS Law Associates for petitioner.

Mr.Arvind Pinto for respondents-Revenue.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATE : 3rd FEBRUARY, 2022
(THROUGH VIDEO CONFERENCE)

JUDGMENT (PER N.J. JAMADAR, J.) :

1. By this petition under Article 226 of the Constitution of India, the petitioner assails the notice dated 31st March 2010 under section 148 of the Income Tax Act, 1961 ('the Act, 1961'), issued by the respondent No.1-Deputy Commissioner of Income Tax, Range 2(3), Mumbai seeking to reopen the assessment for the assessment year 2003-04, and the order dated 30th November 2010 passed by respondent No.1 rejecting the petitioner's objection to reopening of the assessment for the assessment year 2003-04.

2. The background facts, leading to this petition, can be stated in brief as under :

2.1) The petitioner is a company incorporated under the Companies Act, 1913. The petitioner is an investment holding company of Tata Group's Companies. For the assessment year 2003-04, the petitioner filed return of income on 28th November 2003 declaring total income of Rs.10,53,46,561/-. Along with the Return, the petitioner had, *inter-alia,* annexed the income tax summary containing details of the computation of income under each head of

income, the quantum of deduction claimed under sections 10A and 80HHE as well as the income from business, gross and net income. The petitioner had also annexed Audit Report, Director's Report and the Audited Accounts for the year ended 31st March 2003.

2.2) The petitioner's case was selected for scrutiny assessment. Multiple notices and questionnaires were served on the petitioner on a variety of issues, including the deductions claimed under section 10A, 80HHE and 80G, dis-allowance of interest etc. The petitioner claimed to have given explanations and furnished documents in support thereof.

2.3) On 21st March 2006, an assessment order was passed under section 143(3) determining a total income of Rs.858,87,52,290/-.

2.4) Being aggrieved, the petitioner preferred an appeal against the said assessment before Commissioner of Income Tax (Appeals)-XXXIII, Mumbai ('CIT-[A]'). The said appeal was disposed of by CIT-[A] by an order dated 16th March 2007.

2.5) The Assessing Officer-respondent No.2 passed an order in conformity with, and giving effect to, the order of CIT [A] and determined the revised total income of the petitioner at Rs.98,55,51,776/-.

2.6) On 23rd July 2008, the respondent No.2 issued notices under section 154 seeking to rectify the assessment order dated 26th April 2007 passed by the Assessing Officer. In the meanwhile, on 5th April 2010, the petitioner was served with the notice under section 148 of the Act issued by respondent No.1, purportedly dated 31st March 2010, to the effect that the Assessing Officer had reason to believe that income chargeable to tax for assessment year 2003-04 has escaped assessment within the meaning of section 147 of the Act, 1961, and, thus, it was proposed to reopen the assessment. Upon request being made, the respondent No.1 furnished reasons recorded for reopening the assessment.

2.7) The petitioner filed its objections on the reasons for the proposed reopening. By the impugned order dated 30th November 2010, the respondent No.1 disposed the objections filed by the petitioner.

3. The petitioner has thus invoked the writ jurisdiction of this Court. The principal grounds of challenge are, firstly, the assessment is proposed to be reopened beyond the period of six years from the end of assessment year 2003-04. Though, the notice under section 148 purports to have been issued on 31st March 2010, yet it was dispatched on 3rd April 2010. On this count alone, the impugned notice and the consequent action deserve to be quashed and set aside. Secondly, there was no tangible material which would justify the recourse to the provisions contained in section 147 of the Act, 1961. Thirdly, there is no allegation much less cogent material to demonstrate that the income escaped assessment on account of suppression of material facts on the part of the petitioner. Fourthly, the reasons recorded by the Assessing Officer *ex-facie* indicate that they are not sufficient to form the belief that the income escaped assessment and, conversely, the entire exercise is influenced by a mere change of opinion on the same material. Lastly, since there was not only scrutiny assessment under section 143(3) of the Act, 1961 but also, a further consideration at the level of CIT [A], and the assessment order was finalized pursuant to the order of CIT [A], there was no justifiable reason to resort to the provisions

contained in section 147 of the Act, 1961 as all the issues were considered threadbare not once but twice.

4. On 15th October 2012, Rule was issued.

5. An affidavit-in-reply was filed on behalf of respondent Nos.1 and 2. The respondent Nos.1 and 2 have endeavoured to justify the impugned action. It was specifically denied that the notice was issued after six years. Controverting the claim of the petitioner that the notice was dispatched on 3rd April 2010, and not on 31st March 2010 (which date the notice bears), the respondent No.1 sought to bank upon an extract of the dispatch register which indicates that the notice was dispatched on 31st March 2010 by EMS Speed Post, Churchgate Post Office. On merits, the respondents have contended that the reasons recorded by the Assessing Officer justify the invocation of the power contained in section 147 of the Act, 1961.

6. We have heard Mr.Pardiwalla, the learned Senior Counsel for the petitioner and Mr. Pinto, the learned counsel for the respondents-Revenue.

7. We have perused the material on record, especially the reasons recorded for the proposed reopening of the assessment,

the order disposing the objections, and the resistance sought to be put-forth by the respondents by way of affidavit-in-reply.

8. Mr.Pardiwalla submitted that the petitioner is in a position to demonstrate that the impugned notice was not dispatched on 31st March 2010, as claimed by the respondents. Attention of the Court was invited to the postal-tracking report which, *inter-alia*, shows that the article in question was booked on 3rd April 2010. Mr.Pardiwalla, however, submitted that the petitioner has a strong case on merits and, therefore, the petitioner may not be required to solely bank upon the technical objection on the point of limitation.

9. Mr. Pardiwalla would urge that from the bare perusal of the reasons recorded by the Assessing Officer, it becomes explicitly clear that there was no reason to form the belief that income has escaped assessment. The Assessing Officer, according to Mr. Pardiwalla, made no endeavour to refer to any tangible material, which would justify recourse to section 147 of the Act, 1961. Nor the Assessing Officer claimed that there was any suppression of material facts attributable to the petitioner. Since the assessment

was done under section 143(3) of the Act, 1961, and that too pursuant to the order passed by CIT [A], and the assessment was sought to be reopened beyond four years of the end of assessment year 2003-04, the jurisdictional condition for reopening of the assessment, namely, escapement of income on account of non-disclosure of material facts by the assessee, must be fulfilled. In the case at hand, according to Mr.Pardiwalla, there is no assertion much less proof of the suppression of material facts.

10. The legal position as regards the exercise of power of reassessment under section 147 of the Act, 1961 is fairly crystallized. Existence of reason to believe that income chargeable to tax has escaped assessment is a jurisdictional condition for invoking the power under section 147 of the Act, 1961, both within and beyond a period of four years from the end of relevant assessment year. In case the assessment is proposed to be reopened beyond the period of four years, where the assessment was completed under section 143(3) of the Act, an additional condition is required to be satisfied, namely, recording a satisfaction that the income has escaped assessment on account of failure on the part of the assessee to disclose fully and truly all

material facts necessary for assessment. Whether these jurisdictional conditions are satisfied, has to be ascertained from the reasons recorded by the Assessing Officer. The existence of reasons which propel the formation of belief that income has escaped assessment is further qualified by the fact that those reasons should be based on tangible material. A bald assertion by the Assessing Officer that he has reason to believe that income has escaped assessment un-substantiated by tangible material, is of no avail.

11. Moreover, the reasonable belief so recorded should not partake the character of a mere change in opinion in respect of the same material and facts, which were already considered at the time of original assessment. The reason is not far to seek. The power is of reassessment and not review. It is thus postulated that where the primary facts necessary for assessment are fully and truly disclosed and the Assessing Officer took a conclusive view thereon, it is impermissible to reopen the assessment based on the very same material on the premise that the said material sustains a different opinion.

12. The aforesaid principles are deducible from the judgments of the Supreme Court in the case of ***Commissioner of Income-Tax Vs. Kelvinator of India Ltd. & Anr.*** [1] wherein the concepts of "tangible material" and "change of opinion" were enunciated, and a Division Bench of this Court in case of ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-tax 2(1)***[2], wherein the legal principles were culled out.

13. On the aforesaid touchstone, re-adverting to the facts of the case, first and foremost, it is imperative to note that the reasons recorded for the proposed reopening are conspicuously silent on the aspect that the income escaped assessment on account of failure to make full and true disclosure of all material facts relevant for the assessment, by the assessee. An assertion that the petitioner suppressed facts is singularly lacking. What accentuates the situation is the fact that after initial scrutiny assessment under section 143(3) of the Act, 1961, the petitioner preferred an appeal before CIT [A] and thereafter pursuant to the order passed by CIT [A], the assessment was finalized on 26th April 2007. In this context, the assertion of the petitioner that it had

1 [2010] 320 ITR 561 (SC)
2 [2014] 44 taxmann.com 304 (Bombay)

furnished explanation and submitted documents in response to the multiple notices at the stage of initial assessment could not be controverted. To add to this, in the reasons for the proposed reopening, there is not a whisper about the non-disclosure on the part of the petitioner. Since the assessment order was sought to be reopened beyond four years and post-assessment under section 143(3) of the Act, 1961, failure to demonstrate that there was a failure on the part of the petitioner to make a true and full disclosure of all material facts, erodes the legality of the exercise of power under section 147 of the Act, 1961.

14. We find substance in the submission of Mr.Pardiwalla that the case at hand is nothing but an instance of mere change of opinion. A bare perusal of the reasons indicates that the exercise was influenced by a mere change of opinion. To start with, it is imperative to note that the Assessing Officer has commenced the recording of reasons with the expression, *"On perusal of records, it is seen that 10% of the eligible profits under section 10A were not fully taxed and yet, set off of the losses of local units to the extent of Rs.54,27,79,336/- was allowed and this resulted in short levy of tax."* Evidently, this assessment of the Assessing

Officer betrays an intent to question the original assessment on the strength of very same material, by substituting his view for the conclusion recorded by the Assessing Officer at the time of initial assessment.

15. The alleged escapement of the income articulated under second head "Correct computation of Business Income" also suffers from the same vice of mere change of opinion. The third head under which the income allegedly escaped assessment, under the caption, 'Excess DIT Relief' stands on a much weaker foundation. The Assessing Officer explicitly refers to the availability of two options for computation of deduction under section 10A and 80 HHE, namely, (i) exclusive method; and (ii) alternatively, profit of 10A units shall form part of calculation of 80 HHE and export turnover of 10A is to be excluded therefrom. According to the Assessing Officer, the choice of the second method by the department resulted in escapement of income as excess DIT relief to the extent of Rs.3,67,31,204/- had been allowed. This inference is a classic example of change of opinion as it is rooted in expediency of exercise of one option over another.

16. The conspectus of the aforesaid consideration is that the

impugned notice and the consequent action is legally unsustainable as the Revenue fails to satisfy the twin tests. Firstly, there is no assertion, much less material to indicate, that the income escaped assessment on account of failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment, and, secondly, the reasons recorded by the Assessing Officer should not fall within the ambit of "mere change of opinion" on the very same material. Consequently, we are persuaded to hold that there was no material to justify the formation of a reason to believe that income escaped assessment and invoke the power under section 147 of the Act, 1961. The petition, therefore, deserves to be allowed.

17. Hence the following order :

O R D E R

The petition stands allowed in terms of prayer clause (a), which reads as under :

> *(a) For a writ of certiorari or a writ, direction or order in the nature of certiorari or any other appropriate writ, direction or order under Article 226 of the Constitution of India calling for the records of the case pertaining to the impugned notice dated 31.3.2010 issued by the Respondent No.1 under Section 148 of the said Act to reopen the assessment for the assessment year 2003-04 and the order dated 30.11.2010 rejecting the*

objections of the Petitioner to the issuance of the notice under section 148 of the said Act and after considering the legality thereof quashing and setting aside the same."

No costs.

Rule made absolute in the aforesaid terms.

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**