
(2023) 02 BOM CK 0109
In the Bombay High Court
Case No : Writ Petition No. 3307 Of 2022

Vibrant Securities Private Limited

APPELLANT

Vs

Income-Tax Officer And Others

RESPONDENT

Date of Decision : 23-02-2023

Acts Referred:

Income Tax Act, 1961 — Section 142(1), 143(2), 143(3), 147, 148

Citation : (2023) 02 BOM CK 0109

Hon'ble Judges : Dhiraj Singh Thakur, J;Madhav J. Jamdar, J

Bench : Division Bench

Advocate : P.J. Pardiwalla, Madhur Agrawal, Fenil Bhatt, Upendra Lokegaonkar, Suresh Kumar, Mohinee Chougule

Final Decision : Allowed

Judgement

Dhiraj Singh Thakur, J

1. The petitioner challenges the notice under section 148 of the Income Tax Act, 1961 ('the Act') dated 31st March 2021 for the assessment year 2014-15 seeking to reopen the assessment for the said year on the ground that the Assessing Officer had reasons to believe that income chargeable to tax for the assessment year 2014-15 had escaped assessment within the meaning of section 147 of the Act. The petitioner also challenges the order dated 8th February 2022 rejecting the objections of the petitioner to the validity of the notice under section 148 of the Act.

2. Briefly stated the material facts are as under :

2.1 The petitioner is stated to be engaged in the business of stock broking services as well as Undertaking Stock Trades (Pro-Trade) on BSE and NSE in derivative and cash segments which constitutes its business activity.

2.2 It is stated that the resultant Profit/Loss arising from such Pro-trade activity of the petitioner is offered to tax as 'business income/loss' in its return of

income. It is stated that delivery based transactions in the nature of purchase and sales of equity shares in the cash segment, as also the sales and purchase of shares on Intra-day basis undertaken on the stock exchanges and sale of futures and options undertaken on the derivative segments on BSE and NSE are subjected to Security Transaction Tax ('STT') which is levied and recovered by the exchanges on a daily basis.

2.3 Return of income was filed by the petitioner for the assessment year 2014-15 on 24th September 2014 declaring a total income of Rs.2,74,720/-. The case of the petitioner was selected for scrutiny assessment by issuing notice under section 143(2) of the Act, dated 28th August 2015.

2.4. By virtue of notice dated 7th July 2016 under section 142(1) of the Act, the petitioner was asked to give details of the business activity and file the basic documents like computation of income, audit reports etc. which details, the petitioner claims were provided vide letter dated 22nd August 2016.

3. By virtue of notice under section 142(1) of the Act, dated 7th November 2016, the petitioner was asked to inter-alia file the following details :

(i) Reconciliation of TDS claimed as per certificates and the income offered in the profit and loss account.

(ii) Statement reflecting separately, trading account of delivery based/non-delivery based share transactions and derivative transactions

(iii) Complete details of STT along with the return.

(iv) Details of the information received through AIR and the corresponding bank entries and sources/utilization thereof.

Vide communication dated 21st November 2016, the petitioner states that a response was filed giving the relevant details. Vide communication dated 2nd December 2016, details of STT and the reconciliation with the Annual Information Report (AIR) were submitted.

Finally, the Assessing Officer passed the order of assessment on 28th December 2016 under section 143(3) accepting the income disclosed by the petitioner.

4. On 31st March 2021, notice under section 148 of the Act was issued by the Assessing Officer seeking to reopen the assessment for the assessment year 2014-15 on the ground that the income had escaped assessment for the said year. Reasons were furnished to the petitioner, which read as under :

In this case, assessee has e-filed return on 24.09.2014 declaring total income at Rs. 274720/- and assessment u/s.143(3) was completed on 28.12.2016.

In this case, information is received with regard to the fact that assessment has entered into sale/purchase of equity share with or without actual delivery in recognized stock exchange, the details are under :

SL

Information Code

Description

Amount (in Lakh)

1

STT-01

Purchase of equity share in a recognized stock exchange

471.49

2

STT-02

Sale of equity share in recognized stock exchange

333.03

3

STT-03

Sale of equity share (otherwise than by actual delivery)in recognized stock exchange

2257.78

4

STT-04

Sale of option in securities (derivative) in recognize stock exchange

483.38

5

STT-05

Sale of Future (derivative) in recognized stock exchange

1181.31

6

194A

Interest other than interest on securities

57.53

7

194C

Payment to contractors

0.75

8

194H

Commission /Brokerage

0.14

9

194J

Professional/ Technical service fee

0.60

Total

4786.01

In view of the above facts and after due application of mind after analyzing all the relevant information in the case of the assessee in totality, I have reason to believe that income of Rs.4786.01/-Lakh has escaped assessment for A.Y.2014-15 and the same is therefore required to be reopened for scrutiny assessment.

A notice u/s.148 r.w.s. 147, is, therefore, being proposed to be issued to assessee such income and also any other income chargeable to tax which has escaped assessment which comes to notice subsequently in the course of the assessment proceedings.

5. Objections were filed on 30th December 2021 to the reopening which were rejected by virtue of order dated 8th February 2022.

6. Learned Senior Counsel for the petitioner challenges the reassessment proceedings on the ground that the jurisdictional requirement for reopening had not been satisfied in the present case. It was urged that the Assessing Officer having failed to state in the reasons recorded that there was any failure on the part of the assessee to disclose fully and truly the material facts necessary for assessment, could not have proceeded to reopen the assessment. This, it was stated, was the jurisdictional pre-condition, which has not been satisfied.

7. The second argument urged was that there was no new tangible material with the Assessing Officer, based upon which, the Assessing Officer could support his 'reason to believe'. It was stated that the reassessment proceedings were nothing but 'a change of opinion' as the entire issue with regard to the transactions with regard to the stocks had been gone into by the Assessing

Officer during the scrutiny assessment, and therefore, reassessment could not be initiated in the absence of there being any new tangible material.

8. Reply affidavit has been filed which essentially reiterates the stand of the revenue in the reasons recorded. What has been stated in the counter affidavit is that the transactions reflected in the reasons recorded were not genuine and that no actual delivery had taken place in the recognized stock exchanges as per information received from the Investigation Wing of the department on 15th March 2021.

9. We have heard learned counsel for the parties.

10. It is settled law that the validity of reassessment proceedings have to be tested on the touchstone of the reasons recorded by the Assessing Officer, which reasons can neither be added nor substituted by pleadings.

11. Admittedly, the assessment is sought to be reopened beyond the period of four years from the end of the relevant assessment year 2014-15. Since this is a case where an order under section 143(3) of the Act had been passed for the relevant assessment year, the Assessing Officer, in addition to satisfying the jurisdictional conditions of 'reason to believe' that income chargeable to tax had escaped assessment, had to show that there was failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings.

12. A reference to the reasons recorded would clearly show that not a whisper has been made by the Assessing Officer that there was any such failure on the part of the assessee. The consequence is clear that the Assessing Officer had not satisfied himself on this important jurisdictional aspect and therefore must be deemed to have arbitrarily proceeded to initiate the reassessment proceedings by issuing the notice impugned, which makes it unsustainable.

13. In *Hindustan Lever Ltd. V/s. R. B. Wadkar*, Assistant Commissioner of Income-Tax and Ors. 2004 ITR 332 Vol.268, it was held :

".....The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment."

14. This Court in the aforementioned judgment proceeded to allow the petition

and set aside the notice impugned therein only on this ground that the jurisdictional requirement of proviso to Section 147 of the Act had not been complied with by the Assessing Officer. In the judgment *Supra*, this Court had noticed that the Assessing Officer had nowhere stated that there was failure on the part of the assessee to disclose fully and truly all material facts necessary of assessment for that assessment year.

The notice impugned under section 148 of the Act is thus liable to be set aside on this ground alone.

15. Apart from above, it is clear that the material which was referred to in the reasons recorded in the shape of transactions, securities, etc. do not reflect that the said material was not available with the Assessing Officer during the scrutiny assessment proceedings. The Assessing Officer appears to have relied solely upon the said information obtained from the Investigation Wing of the department without, in the least, verifying as to whether the said issue had been gone into or disclosed by the assessee during the scrutiny assessment proceedings. The petitioner, on the other hand, has placed on record details of notices and the replies submitted thereto, as referred to in the preceding paragraphs which would show that the information with regard to all transactions had been sought for and supplied by the petitioner.

16. In *Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-tax-2(1)* [2014] 44 Taxmann.com 304 (Bombay), it was held :

"14.....We are of the view that at once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of

opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/ or reasons to believe that income chargeable to tax has escaped assessment."

17. Since an order under section 143(3) had been passed after eliciting various information from the petitioner, which was responded to by the petitioner, it must be presumed that the Assessing Officer, while passing the order under section 143(3) of the Act, had considered all issues pertaining to the queries raised as also issues in regard to which the information was sought and therefore, if the matter is deemed to have been considered, any subsequent reassessment on the same issue would be nothing but a 'change of opinion'.

18. The Assessing Officer in the reasons recorded was also supposed to establish the live link between the information received by him and the formation of his belief that income had escaped assessment which is conspicuously missing in the present case. What was held by the Supreme Court in Commissioner of Income Tax V/s. Kelvinator of India Ltd. [320) ITR 561 SC is as under :

"The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

19. In our opinion, the jurisdictional conditions have not been met with in the present case and that reassessment proceedings are nothing but a 'change of opinion', and therefore, would not furnish a sound basis to the Assessing Officer in the formation of his belief that income had escaped assessment.

20. Be that as it may, the present petition is allowed. Order impugned, dated 8th February 2022 rejecting the objections so also the impugned notice dated 31st March 2021 under section 148 of the Act are held to be unsustainable and are accordingly set aside. No order as to costs.