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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 1001 of 2017

Zuari Foods and Farms Pvt. Ltd.,
373, DB Marg, Miramar,
Panaji
Goa – 403 001

... Petitioner.

Versus

1. Asst. Commissioner of Income-Tax
Circle 1(1), Panaji, Goa.

2. Commissioner of Income-Tax
having his office at Patto,
Panaji – Goa

... Respondents.

Mr. K. Gopal, Advocate with Mr. Shivan Dessai, Advocate for the
Petitioner.

Ms. Susan Linhares, Junior Standing Counsel for the Respondents.

***Coram : N. M. Jamdar,
Prithviraj K. Chavan, JJ.***

Date : 11 April 2018.

Oral Judgment (Per N. M. Jamdar, J)

Rule. Rule made returnable forthwith. Respondents
waive service. Taken up for disposal.

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2. By this Petition, the Petitioner has challenged the order passed by the Respondent no. 1 dated 3 October 2017 under Section 148 of Income Tax Act, 1961 and also sought writ of prohibition against the Respondent no. 1 from proceedings pursuant to notice under Section 148 of the Act, dated 28 September 2016.

3. The Petitioner is a private limited company incorporated under the Companies Act. The Petitioner is carrying on activity of mushroom farming. The Petitioner had filed return of Income Tax for the assessment year 2013-14 on 26 September 2013. A notice was issued by the Respondent authorities under Section 143(2) of the Act and the Petitioner was subjected to scrutiny assessment. Notice was issued on 27 July 2015 under Section 142(1) to the Petitioner to substantiate his claim. The Petitioner responded by letter dated 11 August 2015 and placed its explanation regarding the activity carried out by the Petitioner. Thereafter, the assessment order was passed on 27 August 2015 under Section 143(3) accepting the contention raised by the Petitioner and the Assessing Officer, from the perusal of the record and after hearing the Petitioner, held that the assessee is deriving an agricultural income, and the activity of mushroom farming is agricultural activity. On 28 September 2016, a notice was issued to the Petitioner under Section 148(1) of the Act on the ground that income chargeable to tax for the assessment year 2013-

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14 has escaped assessment. The Petitioner by letter dated 24 October 2016 submitted his objections to the notice. The Petitioner also sought for the reasons to issue notice under Section 148(1). The Respondent no. 1 furnished reasons by letter dated 31 August 2017, primarily stating mushroom farming is not agriculture, which was served on the Petitioner on 7 September 2017. The Petitioner submitted his objections which were rejected by the impugned order dated 3 October 2017. The Petitioner, thereafter, filed the present Petition for the above mentioned relief.

4. When the case of the Petitioner was taken up in scrutiny, the Petitioner submitted the material in respect of the queries raised by the Respondent authorities as to whether its income can be treated as agricultural income. The Assistant Commissioner of Income Tax while accepting the contention of the Petitioner that his income is to be treated as an agricultural income, in the order dated 27 August 2015 observed thus:

“2. In response to notices issued, Shri. Ashish Prabhu Verlekar, Chartered Accountant appeared from time to time and produced various details asked for and the case was discussed vis-a-vis assessee showing its income as Agricultural Income.

3. The assessee Zuari Foods and Farms Pvt. Ltd. is engaged in Mushroom farming activities in Cancona,

Goa, Mushroom grows from long fine white grey threads called mycelium which ultimately develop fruiting bodies when treated under specific/controlled conditions. Mushrooms are grown in a closed chamber and various other aspects of cultivation of Mushroom are discussed with Shri Verlekar, CA & AR of the assessee. He also produces various Certificates/Letters issued by different Govt. Authorities in support of assessee disclosing its income from Mushroom Cultivation as Agricultural Income. These include –

- a) Certificate from Directorate of Agriculture certifying that Mushroom growing is agricultural activity.*
- b) Registration Certificate from Ministry of Civil Supplies, Consumer Affairs and Public Distribution (Weight and Measures) stating the product to be fresh mushrooms (vegetable).*
- c) VAT assessment order confirming that the assessee is dealing in mushroom and that gross turnover is exempt from tax as per entry no. 23 (fresh vegetables and fruits) of Schedule D of VAT Act, 2005 being Agricultural Sale/Income.*
- d) Letter from Goa State Pollution Control Board stating that since growing and processing of tropical mushrooms is an agricultural activity, clearance from Board is not required.*

4. Hence from a perusal of details filed by the assessee in the course of hearing as well as facts of the case, it is

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5. The Petitioner objected to the reopening of the assessment and submitted that it was merely a change of opinion and there is no new tangible material that has come to light subsequently and therefore there is no jurisdiction that the Respondent authorities to proceed with the re-assessment. The Petitioner also gave explanation as to why the mushroom farming activity has been rightly considered as agricultural income in the earlier assessment order and the consistent view has been taken in respect of the Petitioner. The Petitioner also pointed out that the CBDT Circular no. 258 dated 14 June 1979 which was made basis of reopening the assessment on the grounds that tangible material, was not applicable as it has lost its relevance after promulgation of Section 80JJA and in view of the subsequent circular dated 27 March 2009.

6. While dealing with the objections the Assistant Commissioner of Income-Tax – Respondent no. 1, reiterated the objections raised and sought to base its order on the premise that mushroom farming cannot be considered as Nursery, neither it can be considered as agricultural income and in view of the circular dated 14 June 1979, which ought to have been considered, the reassessment proceedings need to be continued. With this reasoning the Respondent no. 1 passed the impugned order.

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7. We have heard Mr. K. Gopal, the learned Counsel for the Petitioner and Ms. S. Linhares, the learned Standing Counsel for Respondent no. 1.

8. Mr. Gopal, learned Counsel for the Petitioner relied upon the decision of the Apex Court in the case of *Commissioner of Income Tax vs. Kelvinator of India Ltd*¹ and on decisions of the Division Bench of this Court in the case of *NYK Line (India) Ltd. vs. Deputy Commissioner Income-Tax (No. 2)*², *B. M. Associates vs. Assistant Commissioner of Income-Tax*³. Mr. Gopal submitted that as regard reopening the assessment within four years, the law has been settled by the Apex Court in the case of *Kelvinator of India Ltd* and has been subsequently followed in various decisions of the High Courts. He submitted that in the case of *NYK Line (India) Ltd.*, the Division Bench has categorically stated the jurisdictional requirements for reopening the assessment is the new information or material brought on record which was not available when the assessment order was passed earlier. Mr. Gopal submitted that in the present case no fresh material has come before the Revenue in the course of the relevant assessment year which can justify reopening of the assessment. He submitted that since this jurisdiction requirement

1 [2010] 320 ITR 561 (SC)

2 [2012] 346 ITR 361 (Bom)

3 [2018] 90 taxmann.com 162 (Bombay)

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is lacking, the writ of prohibition needs to be issued against the Respondent no. 1 and the impugned order needs to be quashed and set aside.

9. Ms. Linhares, the learned Standing Counsel for the Respondent submitted that new tangible material on the basis of which reassessment can be proceeded, is the fact of non consideration of the CBDT circular dated 14 June 1979. According to Ms. Linhares, this Circular ought to have been pointed out by the Assessee and once it has come to light that this Circular has been ignored, gives jurisdiction to the Respondent no.1 to proceed to reopen the assessment.

10. In rejoinder, Mr. Gopal submitted that firstly, the Circular of CBDT, which is binding on the Respondent authorities, cannot be considered as a new tangible material. Secondly, he submitted that even otherwise the Circular of 1979 has only dealt with certain exemptions and the circular was no longer valid after promulgation of Section 80JJA in the year 1984 as it stood and subsequent Circular of 27 March 2009. He submitted that these categorical assertions by the Petitioner, both in the objections to the notice and the petition, have gone unanswered, even assuming the Circular is to be considered as tangible material.

11. In the present case the reopening of assessment is sought to be made within a period of four years. The Sections 147 and 148 deal with Section of reopening of assessment. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. In respect of the reopening of Assessment after period of four years, Section 147 states that no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, reopening is sought before four years and therefore the proviso will not apply.

12. The mandate of Section 147 however is that the

Assessing Officer must have a 'Reason to Believe'. The meaning and connotation of the phrase 'Reason to Believe' arose for consideration of the Apex Court in the case of *Kelvinator India Ltd.* The Bench of the three learned Judges of the Supreme Court emphasized on the difference between Review and Power to Reassess. The Court held that the Assessing Officer has no power to Review, but he has the power to Reassess. The phrase 'Reason to Believe' has to be given schematic interpretation failing, which Section 147 would give arbitrary power to the Assessing Officer to reopen assessments on the basis of mere change of opinion, which cannot be *per se* reason to reopen the assessment. Reassessment has to be based on fulfillment on certain preconditions and the concept of change of opinion has to be treated as a test to check abuse of power by the Assessing Officer. The Court laid down that the reasons must have live link with the formation of belief. It was noted that, by Direct Tax Laws (Amendment) Act, of 1997, the Parliament had deleted the words 'Reason to Believe' from Section 147 and there were various representations from all over the country against the deletion. The Parliament reintroduced the words 'Reason to Believe' and deleted the word 'opinion'. Circular 549 dated 31 October 1989 explains the reintroduction of the word 'Reason to Believe' stating that omission might give arbitrary powers to reopen past assessments on mere change of opinion. Thus, the reintroduction of the words

'reason to believe' by the Parliament has been taken note of by the Apex Court in the decision of *CIT vs. Kelvinator India Ltd.*, to emphasize that the assessments cannot be reopened on a mere change of opinion.

13. In the case of *NYK Line India Limited* the assessee before the Bombay High Court was a wholly owned subsidiary of a non-resident shipping line. Under an agreement dated April 1, 1993, the assessee was under a contractual obligation to render services to its foreign principal including, inter alia, in relation to vessel operations and towards collection and remittance of freight. The assessee collected container detention charges which were levied upon importers on behalf of the foreign principal. Under the agreement, the assessee was entitled to a commission for services rendered to its foreign principal. For the assessment year 2006-07, the assessee had filed its return. The assessee had not allocated for its use certain container detention charges in accordance with the RBI circular. This fact was disclosed in the returns. The order of assessment contained a specific discussion on items in respect of which the Assessing Officer made disallowances. However, as regards the submission of the assessee on an amount representing US dollars of the container detention charges, the Assessing Officer did not make any specific observation. A notice of reassessment was issued

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on the ground that in the assessment for the year 2007-08 this amount had been added to the income of the assessee. With this factual backdrop the question that arises for consideration before the Division bench was whether the assessment of the Assessee therein could be reopened under Section 147 of the Act within the period of four years. It was contended on behalf of the Assessee that there is no tangible material on the basis of which reassessment is sought to be reopened and full disclosure was made and all the material was placed before the Assessing Officer. The Division Bench upheld the conclusion that there should be tangible material to come to the conclusion that there is escapement of income from assessment. The Division bench followed the decision of the Apex Court in the case of *Kelvinator India Ltd.* These decisions have been followed subsequently in various decisions of this Court.

14. Thus, even though power of the Assessing Officer to reopen the assessment exist and that it is wider within a period of four years, there are certain jurisdictional requirements that must exist before this power is exercised. The reintroduction of the phrase 'Reason to Believe' on the Statute book has been construed as a check on the arbitrary powers. The phrase 'Reason to Believe' cannot be considered as a mere change of opinion. The Assessing Officer does not have power to Review on the basis of the same material which

was available earlier. Ultimately, what is required for reopening the assessments is that there must be tangible material to come to the conclusion that there has been escapement of income from assessment. There cannot be a mere change of opinion on the part of the Assessing Officer, but the Revenue must demonstrate that, subsequently some new information or material had been brought on record which was not available when the assessment order was passed earlier. If no fresh material was before the revenue in the course of assessment subsequently, the revenue cannot justify reopening of the assessment. This is the position of law as regard the jurisdiction of the Assessing Officers to reopen the assessment.

15. In the case of *GKN Driveshafts (India) Ltd., v Income Tax Officer and others*⁴ the Apex Court has laid down that unless jurisdictional requirements are met, the Assessing Officer cannot proceed to reopen the assessment. If the Assessing Officer proceeds without jurisdiction then the Assessee can approach the constitutional courts invoking the writ jurisdiction to seek writ of prohibition and also a writ of certiorari to quash such an exercise. This law laid down by the Apex Court is followed by all the High Courts in the country and it is now a firmly established principle of law in the matters of reopening of assessment.

⁴ 2002 Supp(4) SCR 359

16. It is in this background, that the facts of the present case will have to be evaluated. We have reproduced the order passed by the Assessing Officer dated 27 August 2015. The issue whether the activity of the Petitioner is agriculture or not clearly arose before the Assessing Officer. The Assessing Officer considered the aspect of mushroom cultivation. The Petitioner had produced various certificates and letters including that of the Pollution Control Board stating that growing and processing tropical mushroom in Goa is not an agricultural activity. Based on this material the Assessing Officer accepted the case of the Petitioner and recording a categorical finding treated the income as an agricultural income.

17. When the impugned notice was served on the Petitioner and reasons were supplied, the Respondent no. 1 -Commissioner stated in the reasons that mushroom cultivation cannot be treated as agricultural activity as it has no connection with land. Apart from the comments on the manner of cultivation, as it can be seen from the reasons given and which is also the argument of Ms. Linhares, substantial emphasis was placed on Circular of the year 1979. When the Petitioner submitted his explanation to the Reasons, the Petitioner pointed out that there was no tangible material before the Respondent Assessing Officer and what is sought to be done is mere change of opinion. While rejecting the objections the Assessing

Officer has only referred to the Circular dated 14 June 1979 again.

18. In view of the settled position of law referred to above the limited question that would arise as to whether there was any new tangible material which was discovered by the Respondent No.1. It is the contention of Ms. Linhares that the Circular of the year 1979 would be such new tangible material. We are unable to agree with this submission. In the facts of the present case when the Petitioner had categorically asserted both in the reply to the reasons as well as in the present petition that the Circular dated 14 June 1979 has no relevance, the contention of the Petitioner that this Circular was issued in context of Section 80JJA of the Act which was in operation prior to insertion of explanation 3 to Section 2(1A) and it had no relevance, has not been dealt with by the Respondent at all, except stating that it cannot be ignored. If by subsequent amendments, the Circular had lost its efficacy and that it was substituted by another circular dated 27 March 2009, the same cannot be considered as new and tangible material. Whether the Circular has lost its relevance and is substituted by a subsequent Circular has not been explained in the order rejecting the reasons, neither in the affidavit of reply. How a preexisting Circular amounts to discovery of new tangible material is also not explained.

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19. Therefore, what is before us is only a change of opinion of the Assessing Officer, without any new material. The Petitioner had placed the material before the Assessing Officer. The Assessing Officer is supposed to apply law, including the Circulars, to the material placed before him. The Assessing Officer took a particular view and the Respondent no. 1 has merely on a change of opinion sought to reopen the proceedings. Since the criteria for exercise of the jurisdiction are not met, the action of the Respondent no.1 is without jurisdiction and will have to be set aside.

20. Before parting we must address a concern expressed by Mr. Gopal. Mr. Gopal has drawn our attention to the concluding paragraph of the impugned order where the Respondent No.1- Assistant Commissioner of Income-Tax has observed as under:

“The Income-Tax Act provides a complete machinery for the assessment-reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper order passed by the revenue authorities. The law says that, it is mandatory, to first exhaust all avenues under the Income-Tax Act (which are equally effective) before filing a Writ Petition (WP) before the Hon'ble High Court, and no assessee can bypass the alternate remedies availabel under the Income-Tax Act and file WP to bring interim order, to short circuit and circumvent the statutory procedure in

finalization of the “re-assessment” order. It is, therefore clear, that, the assessee cannot be permitted to abandon the alternate remedies available to it, and to invoke the jurisdiction of the High Court under article 226 of the Constitution, and thus the Writ Court should not entertain the writ Petition.. Hence, you are not eligible to file writ petition **at this stage**, to get interim stay before the finality of re-assessment proceedings. Courts also do not encourage such short-cut methods to jeopardize re-assessment proceedings, as explained above.”

The underlining and emphasis is supplied by the Respondent No.1- the Assistant Commissioner himself.

21. The above observations made by the Assistant Commissioner of Income-Tax are highly objectionable and are bordering on contempt. We however, give him the benefit of doubt of being oblivious to law. We had, in fact, in an earlier Writ Petition No. 1000 of 2017, after noticing that the very same Assistant Commissioner of Income Tax had passed series of order reopening assessments in ignorance of legal position, had requested the learned Standing Counsel to furnish the compilation of judgments of reassessment proceedings to the learned Commissioner to study the same. The position of law regarding the writ remedy is so settled, that it is understood even by the law students. Registry is

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directed to forward copy of this order and the order passed in Writ Petition no. 1000 of 2017 to the Principal Chief Commissioner of Income Tax, Karnataka & Goa Region, CR Buildings, Queens Road, Bangalore – 560 001, to be delivered to him directly for his perusal, more particularly the observations made by the Respondent No.1, which we have reproduced.

22. In the circumstances, the Writ Petition is allowed in terms of prayer clauses (a) and (c) and the notice under section 148 issued by the Respondent No. 1 dated 28/09/2016 being Exhibit-”D” and the order dated 03/10/2017 being Exhibit “H” are quashed and set aside. Rule is made absolute accordingly. No costs.

Prithviraj K. Chavan, J

N. M. Jamdar, J.