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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3019 OF 2016

M/s. Shivalik Ventures Pvt. Ltd. ..Petitioner

Versus

Deputy Commissioner of Income Tax
Central Circle -4(2) & Ors. ..Respondents

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Mr. J. D. Mistri, Senior Advocate, a/w Ms. Krupa Toprani i/b. M/s. PRH Juris Consults for the Petitioner.
Mr. Suresh Kumar i/b. Ms. Padma Divakar for Respondent no.2.

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CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.
DATE : 8th MARCH, 2017

P.C.

1. Heard. Rule.

2. Respondent no.2 waives service.

3. This petition challenges the notice dated 30.3.2016 under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen the assessment for A.Y. 2009-10. The regular assessment proceedings were completed on 31.3.2011 for Assessment Year 2009-10 under Section 143(3) of the Act. On the aforesaid facts the proviso to Section 147 of the Act is clearly applicable. Thus,

the Assessing Officer can issue a notice for reopening the assessment only if there is a failure on the part of the assessee to fully and truly disclose all facts necessary for assessment.

4. The reasons in support of the impugned notice are twofold :-

(a) The development rights held by it in its earlier avatar of firm M/s. Shivalik Ventures was its stock in trade and on its conversion into a private limited company under of the Companies Act is now shown as its capital asset; and

(b) The information received by the Assessing Officer which was verified from the website of Registrar of Companies indicates that M/s. SVI Realtors (P) Ltd. became its subsidiary only on 4.10.2008. As the transfer of development rights by the petitioner to M/s. SVI Realtors (P) Ltd. admittedly was on 21.4.2008 i.e. prior to M/s. SVI Realtors (P) Ltd. becoming its subsidiary company the benefit of exemption under Section 47(iv) of the Act in respect of transfer of development Rights to M/s. SVI Realtors (P) Ltd. is not available.

On the above facts, it is alleged that there was a failure to disclose truly and fully all material facts necessary for assessment. In response the petitioner filed its objections to the reasons in support of the impugned notice.

5. So far as the first ground for reopening is concerned, the petitioner in its objections placed reliance upon its letter dated 30.3.2011 addressed to the Assessing Officer during the regular assessment proceedings, wherein it was pointed out that the petitioner in its earlier avatar as a partnership firm had converted a part of its stock in trade i.e. 61,506 sq. mtrs. of land as a capital asset. Thus on conversion from a firm to a company, the petitioner continued to hold the same as capital asset. Without prejudice to the above, the petitioner also pointed out that there is no bar in a company even when converted from a firm to a company under the Companies Act to convert its stock in trade into its capital assets. The above objection was disposed of by an order dated 09.11.2016 by the Assessing Officer holding that it was not appropriately disclosed in the return of income filed by the petitioner in its avatar as a firm. However, we find this very issue was subject of inquiry during the regular assessment proceedings and the Assessing Officer was satisfied that the land admeasuring 61,506 sq. mtrs. is a capital asset in the hands of the petitioner while passing an assessment order dated 31.3.2011 for the subject assessment year under Section 143(3) of the Act. Thus prima facie the aforesaid ground would not justify the impugned notice as it is a case of change of opinion. In any case, prima facie there is no failure to disclose fully and truly all material facts necessary for assessment.

6. So far as the second ground is concerned, we note that the petitioner in its objections has pointed out that the M/s. SVI Realtors (P) Ltd. became a subsidiary of the petitioner on 10.4.2008. Alongwith other objections the petitioner had also enclosed share transfer forms indicating the transfer of share in M/s. SVI Realtors (P) Ltd. This transfer of shares led the petitioner to become the holding company of M/s. SVI Realtors (P) Ltd. Copies of the transfer forms were also furnished to the Assessing Officer under the cover of the letter dated 30.3.2011 during the course of regular assessment proceedings. The Annual return of M/s. SVI Realtors (P) Ltd. as exhibited on the website of Registrar of Companies showing the date of transfer of shares as 4.10.2008 is clearly a mistake committed by M/s. SVI Realtors (P) Ltd. while filing its annual return in respect of Annual General Meeting held on 24.7.2009 i.e. in the next year.

7. In particular, we note that the share transfer forms were presented on 4.4.2008 and the evidence of stamp duty paid in respect of three of the forms is dated 10.4.2008 and in one it is indicated as 15.4.2008. Thus transfer of shares in M/s. SVI Realtors Private Ltd in favour of the petitioner was subject of inquiry during the regular assessment proceedings as is evident from the petitioner's letter dated 30.3.2011 filed during the Assessment proceeding leading to order dated 31.3.2011 under Section 143(3) of the Act.

8. During the course of the hearing, our attention was invited to the annual return filed by M/s. SVI Realtors (P) Ltd. in respect to the Annual General Meeting held on 26.4.2008 i.e. the year to which the impugned notice relates. This annual report correctly records the transfer of its share in favour of the petitioners as having taken place on 10.4.2008. Further, it is to be noted that the annual return filed by M/s. SVI Realtors (P) Ltd. appears to contain incorrect dates in respect of Annual General Meeting held on 24.7.2009 contained dates as "4.10.2008" whereas in fact it had to be "10.4.2008". The share transfer forms also corroborate the fact that the transfer of shares did take place in April, 2008 and could not have been valid for transfer in October, 2008.

9. Therefore, in the above circumstances though one cannot dispute that the Assessing Officer can issue notice to re-open an assessment when he is prima facie of the view that income chargeable to tax has escaped assessment. Nevertheless, on receiving objections of the assessee which brings on record facts that the prima facie satisfaction of the Assessing Officer proceeds on a erroneous understanding of the facts, then in fairness the Assessing Officer must test his satisfaction on the basis of the objections filed. It must be borne in mind that filing of objection and its consideration is not an empty formality. The process /system of filing objection is to bring to the notice of the Assessing Officer amongst other things his erroneous understanding of facts leading to issuing notice for re-opening.

10. In this case, prima facie, we are of the view that the Assessing Officer proceeded on an erroneous fact i.e. by placing reliance upon the Annual return filed by M/s. SVI Realtors (P) Ltd. in respect of the Annual General Meeting held on 24.7.2009. This while ignoring the share transfer forms which indicated that the transfer of shares took place in April, 2008 coupled with choosing to ignore the annual report filed by M/s. SVI Realtors (P) Ltd. with the the Registrar of Companies, Ministry of Corporate affairs and available on its website in respect of the earlier year in respect of the Annual General Meeting held on 26.4.2008.

11. Further, prima facie we are of the view that in the present facts there was no failure on the part of the petitioners to truly and fully disclose material facts necessary for assessment. Thus the impugned notice is hit by the proviso to Section 147 of the Act. This Court in ***N.D. Bhatt, Inspecting Assistant Commissioner of Income Tax and Anr. vs. I.B.M.World Trade Corporation [1995] 216 ITR 811*** has observed that the obligation of disclosing true and basic facts on the assessee during the course of assessment proceeding is only of facts of which the assessee has knowledge. Prima facie the above decision applies to this case. In the present facts, the petitioner was not aware during its assesment proceedings of the Annual Report filed by

M/s. SVI Realtors Pvt. Ltd in respect of the Annual General Meeting held on 24.7.2009 indicating date of transfer as 4.10.2008. Thus prima facie the reopening notice being beyond a period of four years for the end of the relevant assessment year is hit by the proviso to Section 147 of the Act.

12. Therefore in the facts of the present case, prima facie, the impugned notice is without jurisdiction. Interim stay granted in terms of prayer clause (d).

(A.K.MENON,J.) **(M.S.SANKLECHA,J.)**