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

WRIT PETITION NO. 918 OF 2016

Jolly Maker 1 Premises CHS, Trust .. Petitioner.
v/s.
Income Tax 17(2)
& Others .. Respondents.

Mr. Firoz Andhyarujina, Sr. Advocate with Mr. Sameer Dalal, for the Petitioner.
Mr. P.C.Chhotarary, for the Respondents.

CORAM: M.S.SANKLECHA, &
A.K.MENON, JJ.
DATE : 22nd JUNE, 2016.

P.C:-

Mr. Andhyarujina, learned Senior Counsel appearing for the Petitioner seeks leave to amend the cause title of the Petition by deleting the word "premises CHS" from the title of the Petition. Leave as sought for, is granted. Amendment to be carried out forthwith. Re-verification dispensed with.

2 This Petition under Article 226 of the Constitution of India, challenges the notice dated 16th March, 2015 issued under Section 148 of the Income Tax Act,1961 (the Act), seeking to re-open the Assessment for the Assessment Year 2008-09.

3 The Petitioner is a Trust. The sole trustee of the Petitioner is Jolly Maker 1 Premises Co-operative Housing Society (Society). The return of income of the Petitioner-Trust for the Assessment Year

2008-09, was processed under Section 143(1) of the Act. From the returns of income of the Society for the Assessment Year 2008-09, the Assessing Officer was of the prima facie view that income chargeable to tax in the hands of the Petitioner-Trust had escaped Assessment.

4 In the above view, the impugned notice dated 16th March, 2015 was issued, seeking to re-open the Assessment for Assessment Year 2008-09. The reasons in support of the impugned notice as communicated to the Petitioner, are as under:-

> *" The assessee Jolly Maker 1 Premises Coop Society Ltd. (AAAJJ0005E) has filed return of income for AY 2008-09 in the status of Co-operative Society declaring total income of Rs.5,09,05,320/- which comprises income from House property at Rs.5,18,29,574/- income from business or profession at Rs.99,01,239/- and income from other source at Rs.1,75,61,811/- Deduction u/s.80P has been claimed at Rs.1,84,86,065/-. Further, following information has been provided on record -*
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> > *" Jolly Maker 1 Premises Co-operative Society Ltd., as Trustee is representative assessee under sections 160/161/166 of the IT Act,1961 in respect of property income received/ entitled to be received on behalf and for the benefit of beneficiaries with determinate shares for property situated at Nariman Bhavan. The property income is independent from that of the Society and separate accounts are being maintained of the Society and the property held upon trust. However, technically, the Nariman Bhavan property continues in the name of the Society and is held in a fiduciary capacity by the Society since inception. Until separate documentation is executed giving full effect to the amendments to the Byelaws of the Society, the property income is being clubbed with that of the Society under section 60 of the Income Tax Act, 1961 without prejudice to the exclusive rights of the joint owners in the Nariman Bhavan property.*

In view of the above and without prejudice, returns are submitted, as under inter alia -

In the case of the Society, by including the property income under section 60 of the I. T.Act, 1961; and

In the case of Trust, declaring other income but excluding Property Income in view of inclusion of its property income in the return of the Society under sec. 60 of the I. T. Act, 1961.

Jolly Maker 1 Trust is a distinct and separate entity created under oral declaration of trust."

2.1 In the above information, it has been stated that property income from Nariman Bhavan belongs to Jolly Maker 1 trust, Jolly Maker Co-op. Society as trustee, is representative assessee u/s. 161 of the Act in respect of income from Nariman Bhavan Property. Further, security deposit has been received against letting out Nariman Bhavan propertyand interest income is being earned on this deposit. However, Co-op. Society as trustee has not filed any valid return of income for A. Y. 2008-09, in capacity of representative assessee u/s. 161 of the Act, declaring rental income and interest income from Nariman Bhavan Property. The society,being a trustee, is in receipt of income from trust and therefore was required to be assessed in its representative capacity for income in respect of trust. Since the representative assessee is a separate assessee, it has to be assessed separately. The Society during the year is in receipt of Rs.5,18,29,574/- as rental income and interest income at Rs.1,85,87,360/- from Nariman Bhavan Property. The above income belonging to trust has been declared in the return of income filed under the status and PAN of Co-op. Society which is not correct as per law. The amounts received as security deposit against letting out of Nariman Bhavan and rental income from Nariman Bhavan have been invested with other cooperative societies and deduction of Rs. 1,84,86,065/- u/s. 80P(2) has been claimed on interest income from this investment in the return filed in capacity of Cooperative Society. This claim of deduction u/s. 80P(2) is not allowable to the society, as the interest income is of trust and not *of society. As the rental income and interest income is of the trust, therefore both these incomes are to be considered in the case of trust, therefore both these incomes are to be considered in the case of trust and society being the trustee, was required to be submit separate return for income of trust, in the representative capacity.*

3. I, therefore, have reasons to believe that on account of failure to file return of income in representative capacity for income pertaining to trust. Income chargeable to tax to the extent of Rs.7,04,16,964/- (rental income of Rs.518,29,574/- and interest income of Rs.185,87,360/-) has escaped assessment. Issue notice u/s. 148 for AY 2008-09."

5 The Petitioner-Trust by its letter dated 26th October, 2015 objected to the impugned re-opening notice dated 16th March, 2015. The Assessing Officer by an order dated 27th November, 2015 rejected the Petitioner-Trust's objections to the impugned notice. This rejection of objections led to filing of this Petition and an ad-interim stay of the impugned notice was granted.

6 Mr. Andhyarujina, learned Sr. Counsel in support of the Petition submits that the impugned notice dated 16th March, 2015 is without jurisdiction for following reasons:-

(a) The impugned notice proceeds on a change of opinion;

(b) There was no failure to fully disclose all facts as is evident from the return of income filed by the Society;

(c) On identical grounds, a notice for re-opening of Assessment was issued to the Society in respect of this very income for the subject Assessment Year. However, same was withdrawn by the Revenue;

(d) The Returns filed by the Society had in fact disclosed all the income which is alleged to have escaped Assessment in the hands of the Petitioner- Trust. Thus, no income chargeable to tax has in fact escaped Assessment; and

(e) For the earlier and the subsequent Assessment Years, the escaped income on account of interest and rent from house property were all subjected to tax in the hands of the Society and not in the hands of the Petitioner-Trust. Therefore, on the principle of consistency, the same treatment should continue for the subject Assessment Year.

7 It is a settled position in law that where a return of income is processed under Section 143(1) of the Act, the Assessing Officer not having examined the same could not have formed any opinion. Thus, in such case, the re-opening notice cannot be assailed on the ground of change of opinion as there was no opinion formed in the first instance. Similarly, the first proviso to Section 147 of the Act, which provides as a condition precedent for issuing a notice beyond a period of four years from the end of the relevant Assessment Year, failure on the part of the Assessee to fully and truly disclose all material facts necessary for Assessment, will not apply, as the proviso only applies where an Assessment has been done under Section 143(3) of the Act. Further, as observed by the Apex Court in ***ACIT v/s. Rajesh Jhaveri 291 ITR 500*** at the stage of issuing of notice, the only question is whether there is reason to believe that income chargeable to tax has escaped Assessment. At the stage of issuing of the notice, it is not necessary that the Assessing Officer must have formed a conclusive view. In fact, this view of the Assessing Officer at the stage of re-opening of an Assessment is subject to

correction/ change during Assessment Proceedings after hearing the Assessee. Keeping the aforesaid broad principle in mind, we would now examine the validity of the impugned notice dated 15th March, 2015.

8 So far as first and second submissions of the Petitioner viz: change of opinion and no failure to disclose all facts are concerned, both are unsustainable. This is for the reason that no scrutiny Assessment was done of the Petitioner-Trust for the subject Assessment Year. The return of income was only processed under Section 143(1) of the Act. Therefore, there was no formation of opinion on the part of the Assessing Officer for change of opinion to take place. Similarly, the condition precedent in case of notices issued beyond four years of the end of the relevant Assessment Year viz: the failure to disclose truly and fully facts, would have no application as no Assessment under Section 143(3) of the Act, has been done in this case.

9 So far as the third submission of the Petitioner viz: a notice on identical grounds issued to the Society for the subject Assessment Year being withdrawn, it does not/ cannot enure for the benefit of the Petitioner-Trust. Each Assessee is independent and the reasons recorded for re-opening have to be independently examined in the context of the Assessee whose Assessment is sought to be re-opened.

10 The fourth submission of the Petitioner that income which is alleged to have escaped Assessment has already been disclosed in the return of the Society and tax paid on the same, therefore no income chargeable to tax, has escaped Assessment. This submission is not sustainable. This for the reason that it is the prima facie view of the Revenue that the deduction claimed under Section 80P of the Act by the

Society as a Co-operative is not available to the Petitioner-Trust. Thus the chargeability to tax has to be seen in the context of the Assessee whose income it is.

11 So far as the last submission of the Petitioner the principle of consistency applies is concerned, it is to be noted that the un-disputed position is that no scrutiny Assessment was carried out in the case of the Petitioner-Trust. The return was processed under Section 143(1) of the Act. In that view of the matter, there has been no occasion to consider the taxability of interest income and income from the house property on merits in the hands of the Petitioner-Trust. Thus, the Rule of Consistency may not apply to the present facts. This Rule of Consistency presupposes a decision on identical facts and law in an earlier and/or Assessment Year to that under consideration. This contention would require examination. This is to be done in adjudication proceedings. Therefore, it is open to the Petitioner-Trust to urge the same before the Assessing Officer in the re-assessment proceedings. This is not an issue which would make the impugned notice one without jurisdiction.

12 The view of the Assessing Officer at the time of issuing the impugned notice as found in the reasons recorded, is only a prima facie view. This view is subject to correction during the Assessment Proceedings after hearing the Petitioner-Trust. Further, the Petitioner-Trust is not remedyless. In case, the order of the Assessing Officer, is prejudicial to it, an appeal under the Act, is provided. Therefore, in the present facts, no interference is warranted.

13 Accordingly, **Writ Petition dismissed**. No order as to costs.

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