

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

WRIT PETITION NO. 3027 OF 2015

Khubchandani Healthparks Pvt. Ltd.

.. Petitioner

v/s.

Income-Tax Office 6(3)(4)
Mumbai and Ors.

.. Respondents

Mr. B.V. Jhaveri for the petitioner
Mr. A.R. Malhotra a/w N.A. Kazi for the respondents
Mr. P.J. Pardiwalla, Senior Counsel as *Amicus Curiae*

**CORAM : M.S. SANKLECHA &
B.P. COLABAWALLA, J.J.**

DATED : 10th FEBRUARY, 2016

PC. :

1. Mr. Malhotra, learned Counsel for the respondent Revenue at the very outset raised a preliminary issue that the impugned reopening Notice dated 20th March, 2015 under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen assessment for Assessment Year 2010-11 cannot be subjected to challenge by the petitioner in this Court. This in view of the fact that during the regular assessment proceedings, the Return of Income Tax filed by the petitioner was accepted by virtue of Intimation under Section

143(1) of the Act. The Supreme Court in ***Deputy Commissioner of Income Tax Vs. Zuari Estate Development and Investment Co. Ltd. (2015) 373 ITR 661*** has set aside the order of this Court in Zuari Estate Development Co. Ltd. Vs. Dy. Commissioner of Income Tax , 271 ITR 269 to hold that reopening notice is valid in law and restored it to the Tribunal for disposal on merits. It is pointed out that this Court in Zuari Estate (Supra) had held that the reassessment Notice issued under Section 148 of the Act is without jurisdiction on account of the Assessing Officer having no reason to believe that income chargeable to tax has escaped assessment. However, in appeal, the Apex Court while setting aside the decision of this Court held that where the original Return has been accepted by Intimation under Section 143(1) of the Act, there could be no change of opinion. Further, it impliedly held that in such cases where assessment is completed by Intimation under Section 143(1) of the Act, there is no requirement for the Assessing Officer to have reason to believe that income chargeable to tax has escaped assessment, so as to exercise jurisdiction under Section 148 of the Act.

2. In view of the fact that the objections raised by Mr. Malhotra may have far reaching impact, we requested Mr. Pardiwalla, learned Senior Counsel of this Court to render assistance to us as an *amicus*, which he readily agreed to.

3. On hearing the parties, we find that the Apex Court in *Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd.* 291 ITR 500, had an occasion to deal with identical facts, namely reopening Notices issued under Section 148 of the Act where assessment is completed earlier by Intimation under Section 143(1) of the Act. In the above case, the Apex Court held that a Notice for reopening an assessment under Section 148 of the Act could only be justified if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. This decision of the Supreme Court in *Rajesh Jhaveri Stock Brokers P. Ltd. (Supra)* has not been disturbed by the Apex Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)*. In fact, the Supreme Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)* makes a specific reference to its decision in *Rajesh Jhaveri Stock Brokers P. Ltd. (Supra)* to hold that where the assessment has been

completed by Intimation under Section 143(1) of the Act, there can be no question of change of opinion.

4. We further find that the Apex Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)* has not dealt with the issue whether before invoking Section 148 of the Act, the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment, where the original assessment has been completed by Intimation under Section 143(1) of the Act. The Revenue is trying to infer that because the Apex Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)* has set aside the order of this Court and restored the issue to be decided on merits by the Tribunal, it must be inferred that the Apex Court had come to the conclusion that reason to believe was not necessary for issuing reassessment Notices where the regular assessment was completed under Section 143(1) of the Act. As rightly pointed out by Mr. Pardiwalla, it can equally be inferred that the Apex Court in the above case had come to the conclusion that there is reason to believe that income had escaped assessment and consequently restored the issue to the Tribunal to decide the reassessment proceedings on

merits.

5. It is settled position in law that the decision of the Court has to be read in the context of the facts involved therein and not on the basis of what logically flows therefrom as held by the Supreme Court in ***Ambica Quarry Works Vs. State of Gujarat, 1987(1) SCC 213.*** The Apex Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)* not having dealt with the issue of reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer in cases where regular assessment was completed by Intimation under Section 143(1) of the Act, it would not be wise for us to infer that the Supreme Court in *Zuari Estate Development and Investment Co. Ltd. (Supra)* has held that the condition precedent for the issue of reopening notice namely, reason to believe that income chargeable to tax has escaped assessment, has no application where the assessment has been completed by Intimation under Section 143(1) of the Act. The law on this point has been expressly laid down by the Apex Court in the case of *Rajesh Jhaveri Stock Brokers P. Ltd. (Supra)* and the same would continue to apply and be binding upon us. Thus, even in cases where no assessment order is

passed and assessment is completed by Intimation under Section 143(1) of the Act, the sine qua non to issue a reopening notice is reason to believe that income chargeable to tax has escaped assessment. In the above view, it is open for the petitioner to challenge a notice issued under Section 148 of the Act as being without jurisdiction for absence of reason to believe even in case where the Assessment has been completed earlier by Intimation under Section 143(1) of the Act.

6. Accordingly, the objection raised by the Revenue is not acceptable. We place on record our appreciation for the assistance rendered by Mr. Pardiwalla, Senior Counsel as an *amicus curiae*.

7. We thereafter heard the petition on its challenge to the reopening Notice dated 20th March, 2015 under Section 148 of the Act, seeking to reopen the assessment for the Assessment Year 2010-11.

8. Rule.

9. The reason in support of the impugned Notice proceed on the basis that the regular Return of income was assessed by Intimation under Section 143(1) of the Act and no scrutiny assessment was done. In the above view, to ascertain the nature and the justification for charging share premium, the Assessing Officer has reason to believe that charging of share premium over and above the intrinsic value of the share is income which has escaped assessment. The Notice itself does not indicate the approximate amount of income, which the Assessing Officer has reason to believe has escaped assessment nor does it quantify the extent to which the share premium received was in excess of intrinsic value, which has escaped assessment. It gives no reasons to indicate the basis of coming to the conclusion that share premium is excessive and, therefore, income. Moreover, the Notice also does not dispute that this is a share premium but seek justification for charging the share premium over and above intrinsic value of the share premium. *Prima-facie*, we are of the view that the basis of the impugned Notice stands concluded by the decision of this Court in ***Vodafone India Services Ltd. Vs. CIT 368 ITR 01***, wherein it has been held that the share premium being on the capital amount cannot be subjected to tax as

income.

10. Mr. Malhotra, learned Counsel for the Revenue submits that *Vodafone India Services Ltd. (Supra)* will not apply and places reliance upon the decision of this Court in ***Major Metals Ltd. Vs. Union of India & Ors. 359 ITR 450*** and the decision of this Court in ***M/s. Alliance Space Pvt. Ltd. Vs. The Income Tax Officer 6(1)(1), Mumbai & Ors. (Writ Petition (L) No. 735 of 2015)*** rendered on 27th March, 2013. *Prima-facie*, both the decisions do not take the Revenue's case any further as they are inapplicable. So far as decision in the case of *Major Metals Ltd. (Supra)* is concerned, it turned on its own facts and was rendered at a point of time prior to that of *Vodafone India Services Ltd. (Supra)*. Besides, it arose out of an order of the Settlement Commission and was not arising on challenge to a reopening Notice. The test in a challenge to a reopening notice on the issue of jurisdiction is whether the reasons recorded do indicate a reasonable belief that income chargeable to tax has escaped assessment. *Prima-facie*, we do not find it so recorded. So far as the decision in *Alliance Space Pvt. Ltd. (Supra)* is concerned, Mr. Malhotra, places reliance on paragraph 24 thereof

which states that all cases of share premium cannot be considered to be covered by the decision of this Court in *Vodafone India Services Ltd. (Supra)* as well as the Circular issued by the CBDT consequent to the decision of *Vodafone India Services Ltd. (Supra)*. There can be no quarrel with the above preposition. Each case has to be decided on its own merits and so far as reopening is concerned, the same has to be viewed on the touchstone of reason to believe as recorded while issuing the notice. *Prima-facie*, we observe that the decision in the case of *Vodafone India Services Ltd. (Supra)* would apply to the facts of the present case.

11. In the above view, there shall be interim relief in terms of prayer clause (d).

12. Mr. Malhotra, learned Counsel for the Revenue waives service. The Petition to be placed on board for final hearing along with Writ Petition No.418 of 2015 .

(B.P. COLABAWALLA, J.)

(M.S. SANKLECHA, J.)