

**W.P. No.25 of 2014**

**IN THE HIGH COURT AT CALCUTTA  
Constitutional Writ Jurisdiction  
Original Side**

**Asiatic Oxygen Limited  
Vs.  
The Deputy Commissioner of Income Tax,  
Circle-4, Kolkata & Anr.**

**Appearance:**

**Mr. R.N. Bajoria Sr. Advocate, Mr. R.K.  
Bhardwaj, Adv., Akhilesh Gupta, Adv.  
..Advocates for the petitioner**

**Ms. Smita Das Dey  
... Advocate for the Respondent**

**Heard On: - 18.09.2014**

**Judgement On: - 29.09.2014**

**I.P. MUKERJI, J.**

This writ asks for orders for quashing the notice under Section 148 of the Income Tax Act, 1961 dated 05<sup>th</sup> February, 2013 and the notices dated 12<sup>th</sup> December, 2013 issued in pursuance thereof under Sections 142 (1) and 143 (2) of the said Act.

Assessment of the writ petitioner's case for the assessment year 2006-2007 was sought to be reopened. The reasons accompanied a letter dated 25<sup>th</sup> November, 2013 of the department.

The reasons advanced were as follows:-

***“Information has been received from Director of Income Tax (I & CI), Chennai that the assessee company has received compensation and enhanced compensation from the Govt. of Tamil Nadu for acquisition of land for widening of the existing MTH Road, measuring 96.89 sqm [ as per the sale deed page 5] during the F.Y. 2005-06 which is liable to capital gain for A.Y. 2006-07. The assessee has computed indexed cost of acquisition (as per 2<sup>nd</sup> provision to sec.48) on 01/04/1981 at Rs. 2,61,86,482.70. According to the computation of ITO-II, (I & CI), Chennai-34 the cost of acquisition as per cost index on 01/04/1981 is Rs. 1,30,49,560/-.***

***The assessee company has claimed excess cost of acquisition by Rs. 13136923/- and income from Capital G Gain has been under assessed. Therefore, I have reasons to believe that income has escaped assessment.”***

The reasons are dated 05<sup>th</sup> February, 2013.

Under Section 151 of the Income Tax Act, 1961 if an assessment is sought to be reopened after four years it can be done on the satisfaction of the Chief Commissioner or Commissioner which has to be recorded. The satisfaction has to be to the effect that it is a fit case for issuance of such a notice.

It appears from annexure-D of the affidavit-in-opposition that by a letter dated 30<sup>th</sup> January, 2013 of the department it was stated that the Commissioner had accorded necessary approval for reopening of the assessment of the writ petitioner for the assessment year 2006-2007.

Mr. R.N. Bajoria, learned Senior Advocate pointed out that the reasons had been prepared after issue of the purported sanction by the Commissioner.

It appears from the reasons enclosed with the said letter dated 25<sup>th</sup> November, 2013 that they were extracted from the file. The relevant page of the file was photocopied and annexed to the notice.

Learned counsel argued that there could be no formation of an opinion by the Commissioner of Income Tax to issue such a notice under Section 148 of the said Act on 30<sup>th</sup> January,

2013 in the absence of cogent reasons, which were recorded later on 5<sup>th</sup> February, 2013. More curiously the notice under Section 148 of the Income Tax was also dated 5<sup>th</sup> February, 2013 is annexure P-2 at page 26 of the petition. A specific declaration in the notice that it was being issued after obtaining the necessary satisfaction of the Commissioner and Chief Commissioner of Income Tax was scored out. Mr. Bajoria submitted that there was every reason to believe that no permission of the Commissioner of Income Tax or the Chief Commissioner was obtained before issuing the notice.

I agree with the submissions of learned counsel that in the absence of reasons on 30<sup>th</sup> January, 2013, the Commissioner could not have recorded satisfaction under Section 151 of the said Act.

The next point of challenge were the reasons itself. The department cannot act beyond the reasons furnished. The only basis for reopening the assessment was error in computation of the “ indexed cost of acquisition on 1<sup>st</sup> April, 1981”. According to the assessee it was Rs. 2,61,86,482.70., according to the computation of ITO-II, (I & CI), Chennai-34 it was Rs. 1,30,49,560/-. If this variation was true, the assessee was liable to pay higher Capital Gains Tax.

Now, Mr. Bajoria challenges these reasons, very rightly, on the ground that they are based on the opinion of an officer posted in Chennai. It is stated in the body of the reasons that it is based on such opinion. Therefore the assessment of the case of the assessee was sought to be reopened not on the basis of non-disclosure of income or concealment of income or under assessment of income but on a change of opinion.

Learned counsel of the petitioner was right when he argued on the basis of ***Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income-Tax And Others (No.1)*** reported in ***268 ITR 322 (Bombay)*** and ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-Tax And Another*** reported in ***(2014) 362 ITR 403(Bom)*** both Division Bench judgments of the Bombay High Court that the formal reasons given in support of reopening the case cannot be added to or subtracted from or improved in the affidavit-in-opposition. In this case also the reasons dated 05<sup>th</sup> February, 2013 have been sought to be improved in the affidavit-in-opposition which is not permissible on the basis of the above decisions.

Furthermore, what is more important is that the assessment was sought to be reopened on a mere change of opinion, the change of opinion being with regard to estimation of the indexed cost of acquisition on 1<sup>st</sup> April, 1981. It has been

declared in the formal reasons that the justification for reassessment was to be found the view of the Income Tax Officer Chennai. On the face of the records the department was acting on a change of opinion.

It is settled law that an assessment can not be reopened on a change of opinion.

For all those reasons this writ application succeeds. I allow the same by passing orders in terms of prayers (a) and (b) of the writ petition.

Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

**(I. P. MUKERJI, J.)**