**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**ORDINARY ORIGINAL CIVIL JURISDICTION**
**WRIT PETITION NO.3983 OF 2021**

The Great Eastern Shipping Co. Ltd. ....Petitioner

V/s.

National Faceless Assessment Centre/
National e-Assessment Centre & Ors. ...Respondents

----

Mr. P. J. Pardiwalla, Senior Advocate a/w Mr. Jitendra Jain i/b Mr. Atul Jasani for Petitioner
Mr. Sham Walve for Respondents - Revenue

----

**CORAM : K.R. SHRIRAM &**
**R. N. LADDHA, JJ**
**DATED : 3rd JANUARY 2022**

**P.C. :**

1 Petitioner received a notice dated 17th March 2020 under Section 148 of the Income Tax Act 1961 (the Act) seeking to reopen the assessment for A.Y.-2015-2016. Petitioner replied to the said notice vide its letter dated 7th February 2021. The objections are rejected by an order dated 17th May 2021. Both the notice dated 17th March 2020 and the order on objection dated 17th May 2021 are impugned in this petition. Petitioner, inter alia, is engaged in the business of shipping, property development, financial operations, dealing in mutual funds and granting of loans and advances. Petitioner is regularly assessed to Income Tax. According to petitioner, notice issued under Section 148 is without jurisdiction for the following reasons:

(i) The issue on which reopening of the concluded assessment is sought was examined in detail during the course of the regular assessment proceedings for the year under consideration and hence the impugned proceedings are based on a mere change of opinion and a review of the original order passed under Section 143(3) of the Act.

(ii) There is no new tangible material which has come to the knowledge of respondents after the completion of the regular assessment proceedings, but on the contrary, it is an admitted position that the impugned proceedings are based on material already on record at the time of completion of the original assessment proceedings. Therefore, the impugned proceedings are without jurisdiction.

(iii) On a true and proper interpretation of Section 47 read with Section 47A of the Act, no prudent person could have formed a belief that any income has escaped assessment.

(iv) The reasons as initially furnished to petitioner and the purported reasons as reproduced in the order rejecting the objections and provided to petitioner thereafter are materially different and therefore the proceedings are illegal. Further, the purported reasons furnished are undated and unsigned.

(v) The purported reasons as furnished do not bear the date, signature and approval of the authority specified under Section 151 of the Act and alternatively and without prejudice the approving authority has sanctioned the impugned proceedings without application of mind to the reasons recorded and the assessment records of petitioner.

(vi) The issue is fully covered by several decisions of the Hon'ble Supreme

Court and of this Hon'ble Court and other Hon'ble High Courts wherein the view has been taken that if the jurisdictional conditions are not satisfied, the assessment cannot be reopened.

2 Mr. Walve for respondents submitted that the issue as to why long term capital loss of Rs.17,23,10,825/- should not be disallowed as transaction was not regarded as transfer within the meaning of Section 47(iv) and (v) of the Act, since the preference shares were acquired from the flagship company Greatship India Ltd. has not been proved by the Assessing Officer during the original assessment proceedings as is clear from the assessment order dated 29th December 2017, in which the Assessing Officer had clearly listed the items which has been proved and that does not include the capital loss issue. Mr. Walve submitted that, therefore, the jurisdictional Assessing Officer had sufficient reason to reopen the concluded assessment. On the submissions made by Mr. Walve, it is settled law that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. It is also settled law that change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. [***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax 2(1)***][1]

1 (2014) 44 taxmann.com 304 (Bombay)

After issuance of notice under Section 148 in response to petitioner's request to furnish them the reasons recorded prior to issuance of notice under Section 148, petitioner received a notice under sub Section (1) of Section 142 dated 28th September 2020 by which, petitioner was called upon to furnish explanation as to why long term loss of Rs.17,23,10,825/- should not be disallowed as the transaction not regarded as transfer within the meaning of Section 47(iv) and (v) of the Act since the preference shares were acquired from the flagship company Greatship India Ltd.

3 Petitioner thereafter filed its objections and submitted that the notice issued under Section 148 was bad, illegal and without jurisdiction because (a) the assessment for the year under consideration was completed under Section 143(3) of the Act vide order dated 29th December 2017, after making detailed inquiries and after obtaining several details from petitioner, (b) the details of the transfer of preference shares were duly furnished in the return of income and explained during the course of assessment proceedings, and (c) reassessment has been resorted due to change of opinion of the same set of fact which was not permissible in law. Petitioner once again filed detailed objections which were disposed by an order dated 17th May 2021 which is also impugned in this petition. According to jurisdictional Assessing Officer, from the statement of long term capital loss filed by petitioner, it was seen that petitioner had purchased 1,45,00,000 preference shares of Great Ship India Ltd. for a consideration of Rs.43,50,00,000/- during the F.Y.-2008-2009. Petitioner sold these

preference shares during A.Y.-2015-2016 for a consideration of Rs.59,30,50,000/-. After indexing the cost at Rs.76,53,60,825/- claimed long term capital loss of Rs.17,23,10,825/-. According to jurisdictional Assessing Officer, in petitioner's case redemption of preference shares cannot be treated as transfer in terms of Section 47(iv) and (v) of the Act. Jurisdictional Assessing Officer also rejected petitioner's contentions that there was change of opinion.

4 Section 2(47)(ii) of the Act defines transfer in relation to capital asset includes the extinguishment of any rights therein. In the second set of reasons provided to petitioner, respondents accept that the Apex Court in *Anarkali Sarabhai Vs. CIT (1996) 224 ITR 422 (SC) and Kartikeya Sarabhai Vs. CIT (1997) 228 ITR 163 (SC)* has held that redemption of preference shares has to be considered as transfer within the meaning of Section 2(47) of the Act, and loss on redemption thereof is an allowable long term capital loss. Respondent has, however, carved out exception to petitioner because according to respondents, in petitioner's case redemption of preference shares cannot be treated as transfer in terms of Section 47(iv) and (v) of the Act.

5 On a plain reading of Section 47(iv) read with Section 47A of the Act, it is apparent that Section postulates that the capital asset which is the subject matter of transfer continues to remain in existence even after the transfer of capital asset. On the redemption of preference shares, the shares are cancelled and the capital asset is extinguished and ceased to exist and,

therefore, in our view, the provisions of Section 47(iv) are not applicable to the transaction of redemption of preference shares. Transfer for the purpose of Section 47(iv) of the Act would mean transfer otherwise than by way of extinguishment of asset and rights therein.

6 Having considered the reasons, there is also no tangible material coming into existence after conclusion of regular assessment proceedings and before recording of the reasons on the issues stated in the reasons recorded for reopening the case. The reasons itself suggest that there is no new tangible material post the assessment proceedings and reassessment is stated to be made on the material already on record and considered at the time of passing the original assessment order under Section 143(3) of the Act. In fact, by its letter dated 7th August 2017, petitioner had placed on record during the regular assessment proceedings a statement giving details of the long term capital loss incurred on the redemption of preference shares of Greatship India Ltd. during the year ended 31st March 2015 and the factum of Greatship India Ltd being a wholly owned subsidiary. The fact that Greatship India Ltd was wholly own subsidiary was expressly stated in the balance sheet filed by petitioner and also in the letter dated 19th September 2017 addressed by the Assessing Officer. Therefore, it cannot be stated that any new fact or material has come to light to alter this position.

7 One more point which is required to be mentioned is, it is trite that only the reasons as furnished to assess can be looked into for testing the validity of reassessment proceedings. In this case, one set of reasons was

provided to petitioner and when objected to by petitioner, respondents justify the reopening by producing an undated and unsigned reasons which was never furnished to petitioner at any point of time prior thereto. We have considered both the reasons and we do observe that the reasons as furnished to petitioner vide letter dated 28th September 2020 and the reasons as reproduced in the order dated 17th May 2021 rejecting petitioner's objections, are different. In the first set of reasons as furnished with letter dated 28th September 2020, it is stated that the long term capital loss cannot be disallowed as the transaction is not regarded as transfer within the meaning of Section 47(iv) and 47(v) since preference shares were acquired from Greatship India Ltd. Of course, the reasons also does not record that any income has escaped the assessment because it does not state the loss has arisen because of redemption of preference capital but indicate that the loss has arisen since preference shares were acquired from the flagship company. A capital loss can never arise on the acquisition of shares but only on the transfer or sale of shares. In the second set of reasons as reproduced in the order rejecting the objections, it is stated that petitioner has sold preference shares resulting into long term capital loss. As noted in the earlier part of this order, petitioner has not sold the preference shares but the shares were redeemed by Greatship India Ltd. and since on redemption there was a transfer of shares due to "extinguishment of rights therein" the capital loss was claimed in the return of income. In our view, without appreciating or understanding the correct facts notice has been issued under Section 148 of the Act and that itself is enough for us to conclude that the jurisdictional conditions are not satisfied before the issuance of notice under Section 148 of the Act.

8 For the reasons as noted earlier, in our view, the impugned notice and the order have to be quashed and set aside. Petition is, therefore, allowed in terms of prayer clause (a), which reads as under:

> *"(a) this Hon'ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the notice dated 17th March 2020 (Exhibit H) issued by respondents under Section 148 of the Act seeking to reopen the assessment for the assessment year 2015-2016 and order rejecting objections dated 17th May 2021 (Exhibit Q)."*

9 Petition disposed.

**(R. N. LADDHA, J)** **(K.R. SHRIRAM, J.)**