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

WRIT PETITION NO. 3638 OF 2021

Parinee Realty Pvt. Ltd.
102 & 103, Smag House,
Plot No.157-A, Sarojini Road Extension,
Vile Parle, Mumbai – 400 056. ….Petitioner

V/s.

1. Assistant Commissioner of Income Tax
Central Circle - 2(3)
Room No.803, 8th Floor,
Pratishtha Bhavan, Old CGO,
M.K. Road, Mumbai – 400 020.

2. The Union of India
Through the Secretary,
Government of India,
Ministry of Finance,
New Delhi – 110 001. …Respondents

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b Lumiere Law Partners for Petitioner.
Mr. Suresh Kumar for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : 19th JANUARY, 2022

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Petitioner is impugning a notice dated 30th March, 2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) seeking to re-open the assessment for A.Y. 2017-18 and the order dated 22nd June, 2021 rejecting petitioner's objections.

2. The re-opening is proposed to be made within four years of the end of the relevant assessment year. In such a situation even though proviso

to Section 147 of the Act would not apply, and the Assessing Officer has to only make out availability of tangible material, it is settled law that if the re-opening is based on mere change of opinion, the notice issued under Section 148 of the Act has to be set aside. Paragraph No.12 of the judgment dated 23rd November, 2021 ***Reserve Bank Officers Co-operative Credit Society Ltd. vs. The Income Tax Officer - 17(3)(1) and Ors.***[1] (unreported) reads as under:

> *12. Section 147 enables the Assessing Officer to assess or reassess any income chargeable to tax which he has reason to believe has escaped assessment for an assessment year. The proviso to section 147 imposes additional requirements where an assessment is sought to be reopened beyond a period of four years from the end of the relevant assessment year. In the present case, the exercise of power is within a period of four years and, therefore, the requirements of the proviso are not attracted. Where the Assessing Officer purports to exercise power under section 147 within a period of four years of the end of the relevant assessment year, the condition precedent to the exercise of the power, is the existence of a reason to believe that any income chargeable to tax has escaped assessment. We must keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. The reassessment has to be based on the fulfillment of certain conditions. It is settled law that if the concept of change of opinion is removed, then in the guise of reopening the assessment, the review would take place. The concept of change of opinion has been built in the statute to check abuse of power by the Assessing Officer. The Assessing Officer has the power to reopen only when there is tangible material to come to the conclusion that there is escapement of income from the original assessment. The test of "tangible material" has been enunciated in a judgment of the Supreme Court in CIT v. Kelvinator of India Ltd. 1 held thus (page 564):*
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> > *"... one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of*

1 Writ Petition No. 3332 of 2019

> *'mere change of opinion', which can-not be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre-conditions. If the concept of 'change of opinion' is removed, as contended on behalf of the Department, then the review would take place in the garb of reopening the assessment. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has the power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief…"*

3. We have considered the reasons recorded and communicated to petitioner on 19th April, 2021. The reasons indicate that the Jurisdictional Assessing Officer (JAO) has proceeded on incorrect facts and also he has proceeded on pure change of opinion. We say incorrect facts because the assessment order under Section 143(3) of the Act was passed on 21st December, 2019 determining total income of Rs.1,20,89,790/-. The JAO however states *"Subsequently, an information was received on 20.01.2019 in this case from Investigation Directorate, Mumbai ……. During the course of survey, it was found that assessee has taken interest bearing loan from various institutions in market and advanced part of loan so taken to group companies either at low interest rate or at NIL interest rate."* Therefore, the information on which reliance has been placed was received before the assessment order dated 21st December, 2019 was passed. On this

ground alone, we can safely conclude that the conditions precedent to the exercise of the powers to re-assessment, i.e., existence of a reason to believe that income chargeable to tax has escaped assessment has not been met.

4. We have to also note that after the information on 20th January, 2019 was received, as noted in the assessment order dated 21st December, 2019 five notices were issued by the Assessing Officer under Section 142(1) of the Act. In the notice dated 1st October, 2019 a specific query has been raised by which petitioner was called upon to provide party wise details alongwith address of the parties to whom loan and advances were given and details of interest received on such loans and also furnish the nature of the loans/advances. Petitioner responded by its letter dated 8th November, 2019 and 14th November, 2019. In the reply dated 14th November, 2019 at Item No.4, petitioner has provided party wise details alongwith address of the parties to whom loans and advances were given, interest received on such loans and the nature of the loans/advances. The list includes all the names given in paragraph no.3 of the reasons for re-opening.

These have been considered in the assessment order because in the assessment order there is reference to five notices issued under Section 142(1) of the Act and it is also noted that the assessee has filed details through ITBA Module in response to the notices issued from time to time which are placed on record.

5. Mr. Suresh Kumar submits that these cannot be said to have been subject of consideration of the Assessing Officer because the assessment order does not contain reference and/or discussion. We will have to reject the submissions of Mr. Suresh Kumar since this court has time and again held 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 even necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. [*Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax 2(1)*[2] *]*.

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.

6. There can be no doubt in the facts of the present case that the issue of loan being given to group companies either at low interest rate or no interest rate was a subject matter of consideration by the Assessing Officer during the original assessment proceedings. It would therefore, follow that the re-opening of the assessment is merely on the basis of change of opinion of JAO from that held during the course of assessment proceedings leading to the assessment order dated 21st December, 2019.

2 [2014] 44 taxmann.com 304 (Bombay)

This change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment.

7. According to the JAO, survey report submitted by DDIT investigation indicate that interest should be charged at 12% per annum on loan given to sister concern totaling to Rs.4,17,04,380/- and therefore income chargeable to tax has been under assessed by the said amount. According to the JAO this interest income of Rs.4,17,04,380/- has escaped assessment. We find it rather strange that such an opinion is formed by the JAO. It is an accepted position that petitioner has in fact not received any interest in respect of the loans/advances given to seven of its group companies in the assessment order 2017-18. When no income is received there is no question of paying any tax on income which respondent think should have been received but was in fact not received. Income which accrues to a person is taxable in his hands but we have not seen any provision of law which says that income which he could have earned but he has not earned is taxable as income accrued to him. It will be useful to reproduce paragraph no.7 of the judgment of this court in ***India Finance & Construction Co. (P.) Ltd. vs. B.N. Panda, Deputy Commissioner***[3] . The same reads as under :

> *7. The second transaction on the basis of which notice under section 148 is issued relates to a transaction entered into in May, 1982, under which the assessee-company advanced to M/s. C. R. Developers (P) Ltd. a sum of Rs.15 lakhs purporting to be an advance for the purpose of construction of a hotel. The advance is in the nature of a loan*

3 [1993] 200 ITR 710 (Bombay)

> *and no interest is being charged on this account. The respondents contend that the assessee-company should have received an interest income worth approximately income worth approximately Rs. 3 lakhs if interest had been charged on this advance. Hence, this interest income of approximately Rs. 3 lakhs has escaped assessment. Once again the reason which is recorded is beyond the scope of section 147. It is an accepted position that the assessee-company has in fact not received any interest in respect of this advance from M/s. C. R. Developers (P) Ltd. in the assessment year 1988-89. When no income is received there is no question of paying any tax on income which the respondents think, should have been received but was in fact not received. In the case of CIT v. A. Raman and Co. [1968] 67 ITR 11, the Supreme Court said that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have but has not earned, is not made taxable as income accrued to him. The Court also said that the High Court exercising Jurisdiction under article 226 of the Constitution has power to set aside a notice issued under section 147(b) if the condition precedent for the exercise of jurisdiction does not exist. It is open to the court to ascertain whether the ITO had in his possession any information and whether from the information the ITO have reason to believe that the income chargeable to tax has escaped assessment. In the present case, the reasons which are recorded clearly show that there is no material at all on the basis of which the Assessing Officer could have reason to believe that any interest income had escaped assessment. No such income had accrued during the assessment year in question.*

8. It will also be useful to reproduce paragraph nos.5, 6 and 7 of the judgment of the High Court of Delhi in ***Shivnandan Buildcon (P.) Ltd. vs. Commissioner of Income-tax***[4] .

> *5. On going through the said decision, it can be discerned that the Guwahati High Court held that there was nothing to show that the assessee had, in fact, received interest or that the company to whom the loan was given had, in fact, paid interest to the assessee. There was also nothing on record to show that the alleged interest was not reflected in the accounts. The only finding recorded was that the assessee "ought to" have charged interest. Referring to an earlier*

4 [2015] 60 taxmann.com 347 (Delhi)

> *decision of the Guwahati High Court, in Highways Construction Co. (P.) Ltd. v. CIT [1993] 199 ITR 702, the Court observed that their attention had not been invited to any provision of the Income-Tax Act empowering the income-tax authorities to include in the income, interest which was not due or not collected.*
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> *6. In similar vein, when we asked Mr Sahni, who is appearing for the respondent to point out some provision of the Income Tax Act, whereunder such 'notional' interest could be made the subject matter of tax, the only reference he made was to Section 144 of the said Act. However, we are clear that Section 144 does not at all apply to the present proceedings because the present proceedings originate from an assessment under Section 143(3) of the said Act.*
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> *7. In the absence of any specific provision under which the so called notional income on advances, could be brought to tax, we do not see as to how the impugned orders passed by the Commissioner of Income Tax can be sustained.*

9. As held by the Apex Court in the case of ***Indian & Eastern Newspaper Society, New Delhi vs. Commissioner of Income Tax, New Delhi***[5], even if it is an error that the Assessing Officer discovered, still an error discovered on a re-consideration of the same material does not given him power to re-open. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to

5 119 ITR 996 (SC)

reopen the assessment based on the very same material with a view to take another view.

10. In the circumstances, petition is allowed. The impugned notice dated 30th March, 2021 issued under Section 148 of the Act and the order dated 22nd June, 2021 rejecting petitioner's objections are quashed and set aside.

11. Petition disposed with no order as to costs.

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