

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1021 OF 2022**

Meer Gems ... Petitioner
V/s.
Assistant Commissioner of Income
Tax, Central Circle 3 (1) and ors. ... Respondents

Mr.Sukhsagar Syal i/b Mr. Govind Javeri for the Petitioner.
Mr. Akhileshwar Sharma for the Respondent - Revenue.

**CORAM : K.R. SHRIRAM &
N.R. BORKAR, JJ.
DATE : APRIL 05, 2022.**

P.C.

1] Petitioner is impugning notice dated 31.03.2021 issued by respondent No.1 under section 148 of the Income Tax Act, 1961 (for short "the Act") for the Assessment Year (A.Y.) 2014-15 and the order dated 22.12.2021 rejecting the objections filed by petitioner to reopening.

2] Petitioner had filed it's return of income on 29.11.2014 for A.Y. 2014-15. The case was selected for scrutiny under CASS and assessment under section 143(3) of the Act was completed on 28.12.2016 assessing total income of Rs. Nil.

3] Thereafter, petitioner received notice dated 31.03.2021 asserting that respondent No.1 has reasons to believe that petitioner's income chargeable to tax for A.Y. 2014-15 has escaped assessment within the meaning of section 147 of the Act. Petitioner after filing fresh return of income requested respondent No.1 to provide copy of reasons recorded for reopening, which was provided by a letter dated 26.10.2021. The reasons read as under :

XXXXXX

"2. Basis of forming reasons to believe and details of escapement of income - While going through the case record, it is revealed that assessee had claimed deduction on account of notional foreign exchange loss amounting to Rs. on non payment on imports. The notional foreign exchange loss amount to Rs.5,41,21,398/-. It is also noticed that the notional exchange rate loss claimed as deduction the cost of funds which were extended as loans to other parties without gain of interest. Being the funds utilized for non business purposes, deduction on account of the notional loss exchange rate should have been disallowed."
XXXXXX

4] It is settled law, as held by this Court, apex Court and various other Courts, that reopening of assessment completed under section 143(3) of the Act cannot be based on change of opinion. Moreover since more than four years

have expired from the end of relevant assessment year, proviso to section 147 of the Act would apply. As per the proviso, there is a bar to reopening assessment unless petitioner has failed to disclose truly and fully material facts required for assessment.

5] Mr. Syal submits that as it could be seen from the reasons quoted above, it is a clear cut case of change of opinion and there is not even an allegation that there is failure on the part of petitioner to disclose truly and fully all material facts.

6] Mr. Sharma for respondents relied upon a judgment of this Court ***in Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax, Circle 6 (2)***¹ to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under sections 147 and 148 of the

1 (2015) 55 taxmann.com59 (Bombay)

Act. We would certainly agree with Mr. Sharma but as held in *Crompton Greaves Ltd. (Supra)*, this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled from the reasons in support of the notice seeking to reopen assessment, that will certainly not be fatal to the assumption of jurisdiction under sections 147 and 148 of the Act. The Court held "*However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act*".

7] Having considered the reasons, factum of failure to disclose cannot be culled from the reasons in support of the notice seeking to reopen assessment. Therefore, it will certainly be fatal to the assessment of jurisdiction under sections 147 and 148 of the Act.

8] Moreover, it is case of respondent itself that while going through the case record, it revealed that assessee has claimed deduction on account of notional foreign exchange loss which deduction should not have been disallowed during assessment proceedings. Mr. Syal submits that during the course of assessment proceedings there was a query raised regarding details of exchange loss which have also been provided by petitioner through it's Chartered Accountant's letters dated 16.12.2016 and 19.12.2016.

9] As held by this Court time and again and particularly in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax -2 (1)***² 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.

10] There can be no doubt in the present case that the very issue of foreign exchange loss was a subject matter of consideration of the Assessing Officer. It would therefore, follow that reopening of assessment by the impugned notice

2 (2014) 44 taxmann.com304 (Bombay)

dated 31.03.2021 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceedings. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

11] Therefore, petition allowed in terms of prayer clause (a) which reads as under:

“(a) this Hon’ble Court may be pleased to issue a Writ or 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 31st March, 2021 (Exhibit-E) issued by Respondent No.1 under section 148 of the Act seeking to reopen the assessment for the assessment year 2014-15 and the order dated 22nd December, 2021 (Exhibit-J) passed by Respondent No.1, disposing of the objections raised by the Petitioner”

12] Petition disposed.

(N.R. BORKAR, J.)

(K.R. SHRIRAM, J.)