

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8010 OF 2022

Deepak Marda]
Age- 49 yrs., Occ: Business Management]
688, 110th Avenue, NE Apt,]
S 2403, Bellevue, WA 98004, USA]
PAN: AHXPM3130D] .. Petitioner

v/s.

1. The Income Tax Officer]
Ward – 1, Ichalkaranji]
Room No. 201, Veershaiv Bank Building,]
Hulgeshwari Road, Ichalkaranji,]
Tal. Hatkanangale, Kolhapur 416 115]
Email:]
ichalkaranji.ito1@incometax.gov.in]

2. The Income Tax Officer,]
Ward-1(4), Gurgaon]
Aayakar Bhawan, 4th Floor,]
HSIDC Building, Udyog Vihar,]
Phase-V, Gurugram 122 001]
Email:]
gurgaon.ito.1.4@incometax.gov.in]

3. The Union of India]
Through the Secretary (Revenue),]
Department of Revenue, Ministry of]

Finance, Room No. 128-A, North Block,]
New Delhi – 110001]
Email : rsecy@nic.in]
National Faceless]

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Mr. Mihir Naniwadekar a/w. Ms. Rucha Vaidya i/by Ms. Farzeen
Khambatta for the petitioner.

Mr. Suresh Kumar for the respondents.

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**CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.**

RESERVED ON : 18th JANUARY 2023.

PRONOUNCED ON : 15TH FEBRUARY 2023.

JUDGMENT: (PER KAMAL R. KHATA, J.)

1. This petition challenges the impugned notice under section (u/s) 148 of the Income Tax Act, 1961 (“Act”) dated 31st March 2021 and the impugned order on objection dated 10th June 2022 in addition to the impugned reassessment proceedings for Assessment Year (A.Y.) 2014-15.

Facts:

2. The petitioner was a director of Cinepolis India Pvt. Ltd., Gurgaon and was assessed to tax in Ichalkaranji, Kolhapur. In 2007 petitioner

had collaborated with the Cinepolis Group to set up Cinepolis India and had acquired certain shares and irrevocable vested rights to equity in Cinepolis India. In Financial Year (F.Y.) 2013-14, the petitioner transferred the equity shares and rights in Cinepolis India for Rs.33,55,12,980/- under a settlement agreement. The petitioner incurred an expense of Rs.1,31,87,400/- towards lawyers, Chartered Accountants, Escrow Agents etc. for the said transaction. The petitioner filed his return of income for A.Y 2014-15 on 31st July 2014 whereby the proceeds receipt from transfer of equity shares in Cinepolis India was disclosed under the head "Capital Gains" and claimed deduction of legal expenses under the head "Cost of Improvement", the said return was duly processed u/s. 143(1) of the Act. On 11th July 2016 a notice was issued to the petitioner u/s. 142(1) for scrutiny in exercise of power conferred u/s. 143(2) of the Act. By responses dated 23rd August 2013 and 24th August 2013, the petitioner submitted required information and documents with detailed explanation as regards the acquisition and transfer of equity shares in Cinepolis India. The Assessment Officer (AO) accepted the explanation and on being satisfied with the information and documents passed an order accepting the total income u/s. 143(3) of the Act.

3. On 31st March 2021, the petitioner was issued the impugned notice u/s. 148 of the Act to reopen the assessment AY 2014-15. The reasons recorded are as under :

2. Brief details of information collected/received by the AO:-

The information has been received from the ACIT., Circle 1(1) Gurgaon vide Letter No. ACIT Circle.1/GGN/2288/2017-18 dated 7/3/2018 has enclosed a letter from the CIT(A), /Gurgaon wherein it is mentioned that eduring the course of appellate proceedings in the case of Milan Saini for A.Y 2014-15 that Shri Deepak Marda and Shri Milan Saini were Directors in them/s Cinepolis India Pvt. Ltd. It was further seen that bothShri Deepak Marda and Shri Milan Saini received amount of ₹33,55,12,980/- each during the year under a settlement agreement. IN the case of Shri Milan Saini the appeal has since been decided by the CIT(A) Gurgaon the amount of ₹ 33,55,12,980/- received by Shri Milan Saini has been held to be taxable under the head Income from Salary. Thus amount of ₹ 33,55,12,980/- for A.Y. 2014-15 received by Shri Deepak Marda, the assessee is required to be tax under the head income from Salary.

3. Analysis of information collected/received :-

The information received has been analysed. On verification of the information, it is found that during the course of appellate proceedings in the case of Milan Saini for A.Y. 2014-15 that Shri Deepak Marda and Shri Milan Saini were Directors in them/s Cinepolis India Pvt. Ltd. It was further seen that both Shri Deepak Marda and Shri Milan Saini received amount of ₹33,55,12,980/- each during the year under a settlement agreement. In the case of Shri Milan Saini the appeal has since been decided by the CIT(A) Gurgaon the amount of ₹. 33,55,12,980/- received by Shri Milan Saini has been held to be taxable under the head income from Salary. Thus amount of ₹. 33,55,12,980/- for A.Y. 2014-15 received by Shri Deepak Marda, the assessee is required to be tax under the head income from Salary.

4. Enquiries by the Assessing Officer as sequel to information collected as received:-

On verification of the ITBA data, it is found that the assessee has filed returned income for AY 2014-15 on 31.07.2014 declaring total income of ₹ 32,78,25,700/- It is further seen that the

assessee's case has been completed u/s143(3) on 8.12.2016 accepting the returned income.

5. Findings of the Assessing Officer:-

The assessee has filed return of income on 31/07/2014 declaring total income of ₹ 32,78,25,700/- for AY 2014-15. Assessment has been completed on 8/12/2016 u/s/143(3) determining total income of ₹ 32,78,25,700/-. The CIT(A) Gurgaon wherein it is mentioned that during the course of appellate proceedings in the case of Milan Saini for A.Y. 2014-15 that Shri Deepak Marda and Shri Milan Saini were Directors in them/s Cinepolis India Pvt. Ltd. It was further seen that both Shree Deepak Marda and Shri Milan Saini received amount of ₹ 33,55,12,980/- each during the year under a settlement agreement. In the case of Shri Milan Saini the appeal has since been decided by the CIT (A), Gurgaon the amount of ₹ 33,55,12,980/- received by Shri Milan Saini has been held to be taxable under the head Income from Salary. Thus amount of ₹. 33,55,12,980/- received for A.Y. 2014-15 by Shri Deepak Marda the assessee is required to be tax under the head income from Salary.

6. Basis of forming reason to believe and details of escapement of Income:-

In view of the facts mentioned in para no 2 to 5 above and information as available on record of this office, I have reason to believe that the income chargeable to tax which has escape assessment amounts to or is likely amount to one lakh rupee or more for A.Y. 2014-15 has escaped assessment as per section 147 of the IT Act. I am, therefore, satisfied that it is a fit case for initiating the proceedings u/s 147 of the IT Act, 1961. to assess the escaped income and to assess any other income which may come to the notice during the assessment proceedings u/s 147 of the IT Act,1961.

4. By letters dated 7th April 2021, 10th April 2021 and 6th May 2021 the petitioner filed his objections *inter alia* on the ground that the impugned notice was issued on borrowed satisfaction of another AO was issued beyond period of four years from the completion of the regular assessment without demonstrating any failure on the part of the

petitioner to disclose any material facts truly and fully. On 21st April 2021 and 22nd April 2021, the respondent no.1 disposed of the objections of the petitioner stating that the assessee is required to be taxed under the head income from salary and should have disclosed the income under the head income from salary. With regard to the objection based on sanction for issuance of the impugned notice in terms of Section 149(1)(b) and Section 151 of the IT Act, the order stated that section 151 (1) was applicable and necessary approval of the PCIT had been taken online. The order however, failed to demonstrate any failure on the part of the petitioner to disclose material facts.

5. On 3rd May 2021, the PAN of the petitioner was unilaterally transferred from the jurisdiction of respondent no.1 to respondent no.2 without giving any hearing before affecting the said transfer. The petitioner was intimated about the said transfer by respondent no.1 letter dated 18th June 2021. By the said letter the petitioner also informed that the objections' dated 26th May 2021 was pending on account of the transfer of PAN to respondent no.2. The petitioner preferred Civil Writ Petition no. 3707 of 2022 challenging the order on objection as well as the impugned notice. By an order dated 13th April 2022, this Court quashed the order on objections and remanded the

matter directing the Jurisdictional Assessing Officer (JAO) to pass a reasoned order dealing with objections of the petitioner and also directed the respondent no.1 to provide the letter dated 7th March 2018, copy of the settlement agreement and appeal memorandum and the order passed by the Ld. CIT(A) in the case of Milind Saini all of which were relied upon by the respondent no.1. On 6th May 2022, the petitioner filed detailed objections having received all the documents from the respondent no.1 in Mr. Milind Saini's case. In the said response, the petitioner raised grounds that the assessment could not be reopened beyond three years in absence of failure to disclose material facts and also challenged the unilateral from respondent No.1 to respondent no.2 without granting a hearing to the petitioner. Despite the explanation given at the personal hearing as well as detailed objections raised the respondent no.2 passed the impugned order dated 10th June 2022 holding that there was a failure on the part of the petitioner to disclose material facts and therefore, the reopening of assessment for year 2014-15 was warranted.

6. Mr. Naniwadekar learned counsel for the petitioner submitted that the reopening of the assessment vide impugned notice dated 31st March 2021 is made beyond four years from the end of the relevant

assessment year 2014-15 without demonstrating any failure on the part of the petitioner, to disclose material facts and consequently is vitiated in terms of the first proviso to section 147. He submitted that the statutory requirements under the section 147 i.e. the assessee failed to disclose, truly and fully, any material facts necessary for the assessment is not established inasmuch as no such allegation is made either in the impugned notice or in the reasons recorded. On the contrary, the Assessment Order dated 8th December 2016 u/s 143 (3) of the Act explicitly mentions the acceptance of the total income disclosed by the petitioner in the return after due verification and examination of the information furnished. He submitted that the reopening was initiated solely on the basis of information received from the ACIT, Gurgaon without application of mind. He submitted that no new material is mentioned in the notice apart from the purported information from the ACIT, Gurgaon. He accordingly prayed that the petition be made absolute.

7. Mr. Kumar learned counsel for the respondents raised a preliminary objection submitted that the petitioner should have made the concerned AO i.e. ITO Wd.I (4), Gurugram a party to this petition since the JAO Gurugram has passed an order dated 10 June 2022

instead of ITO Ward.1 Ichalkaranji. He submitted that the expression “reason to believe” cannot be read to mean that the AO should have finally ascertained the fact by evidence or conclusion. At the stage of issue of notice, the only question was with the relevant material a reasonable person could have formed a requisite belief of escapement of income and been satisfied. He submitted that the initial agreement dated 6th October 2007 was not furnished by the petitioner and was noticed only during the appellate proceedings in the case of Shri Milan Saini another director who also received a similar consideration from the same company. He submitted that the AO has analyzed the records along with additional information received from the order of CIT(A), Gurugram. In support of his contentions, he placed reliance on the judgment in the case of Phool Chand Bajrang Lal v ITO¹. It was submitted that the petition deserved to be dismissed.

Conclusion:

8. We agree with Mr. Naniwadekar, that it is a clear case of change of opinion. The Supreme Court in **Kelvinator of India Ltd.** (Supra) had upheld the Full Bench decision of Delhi High Court in **Commissioner of Income-tax Vs. Kelvinator of India Ltd.** In the said judgment, a Full Bench of Delhi High Court has held :

¹ [1993] 203 ITR 456 (S.C)

“ We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi- judicial function to take benefit of its own wrong.”

9. We have no hesitation to hold that there was no failure on the part of the assessee to disclose fully and truly the material facts, nor there was any tangible material with the A.O. which would have otherwise justified the reopening of the assessment by issuing the notice impugned. In the case of ***South Yarra Holdings vs Income Tax Officer 16(1)(1)(4), Mumbai***² this court held:

“It is settled position in law that re-opening of an assessment has to be done by an AO on his own satisfaction. It is not open to an AO to issue a reopening notice at the dictate and/or satisfaction of some other authority. Therefore, on receipt of any information which suggests escapement of income, the AO must examine the information in the context of the facts of the case

² [2019] 104 taxmann.com 216/ [2019] 263 Taxman 594 (Bombay)

and only on satisfaction leading to a reasonable belief that income chargeable to tax has escaped assessment, that re-opening notice is to be issue.”

10. In the present case, the AO has not specifically mentioned in the order, what was the tangible material, to conclude that there was an escapement of income. The AO has also failed to aver what material fact the assessee has failed to disclose fully and truly. It is evident that based on the case of Milan Saini who had disclosed his income under the head ‘income from salary’ that the AO sought to reopen the case of the assessee. Apart from different heads on which the assessee’s have offered their income to be taxed i.e. there is no other ground based on which the AO is seeking to reopen. It is clearly the very same material on which a different view is being taken. The case of Phool Chand Bajrang Lal (supra) relied upon by Mr. Kumar can be differentiated on the facts, in as much as the managing director of the Calcutta company Mr. Surana had made a confession about his business activity being that of a name lender and had not advanced any loan to the assessee in that case. However, in the present case there is a full and true disclosure by the petitioner, which transaction has been accepted under the head claimed by the petitioner. Consequently, merely because another director of the same company had disclosed the income received differently, cannot be a ground for reopening and the same is evidently a change of opinion

not only based on conjectures and surmises but also a case of blindly relying on information and borrowed satisfaction which is not permitted for reopening. As observed in ***Aroni Commercials Ltd. v DCIT-2(1)***³

6. It is axiomatic that the law declared by this Court is binding on all authorities functioning within the jurisdiction of this Court. It is not open to the Assessing Officer to feign ignorance of the law declared by this Court and pass orders in defiance of the law laid down by this Court.

It is an imperative duty of the authorities to be updated with the law and to apply it to the case at hand before taking decisions and passing orders. Feigning ignorance of law by authorities only increases the burden of the Courts.

11. In view of the above, petition is allowed. The impugned notice dated 31st March 2021 and order dated 10th June 2022 are set aside with no order as to costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)

³ [2014] 44 taxmann.com 304 (Bombay)/[2014] 224 Taman 13 (Bombay)