IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.3079 OF 2022

Castrol India Ltd,
being a Company incorporated
under the Companies Act, 1956
and having its registered office at
Technopolis Knowledge Park,
Mahakali Caves Road, Chakala,
Andheri East, Mumbai – 400 093. **…Petitioner**

Versus

1. **Deputy Commissioner of Income-tax Circle-1(2)(1), Mumbai,**
having his office at Room No.535, 5th Floor,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020.

2. **Additional Commissioner of Income-tax Circle-1(2), Mumbai,**
having his office at Room No.530, 5th Floor,
Aayakar Bhavan, M.K.Road,
Mumbai- 400 020.

3. **Principal Commissioner of Income Tax-1,Mumbai,**
having his office at Room No.330, 3rd Floor,
Aayakar Bhavan, M.K.Road,
Mumbai – 400 020.

4. **National Faceless Assessment Centre,**
having access only by email

5. **Union of India,**
through the Secretary,
Department of Revenue,
Ministry of Finance, North Block,
New Delhi – 100 001. **…Respondents**

Mr. Percy Pardiwalla, Senior Advocate, with Mr. Nitesh Joshi, Mr. Aurup Dasgupta, Ms Sonam Ghiya and Ms Drishika Hemnani i/by Jhangiani, Narula & Associates, for Petitioner.
Mr. Suresh Kumar for Respondents-Revenue.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 5th March, 2024

JUDGMENT: (*Per Dr. Neela Gokhale, J.)*

1. **Rule**. Rule returnable forthwith. By consent of parties, taken up for final hearing.

2. A perennial question in income tax jurisprudence, whether reopening of a concluded assessment that is re-assessment under Section 147 of the Income Tax Act, 1961 ("**the Act**") following issuance of notice under Section 148 of the Act is legally sustainable or is bad in law, confronts us in the present matter.

3. Petitioner assails notice dated 27th March 2021 issued under Section 148 of the Act and order dated 21st December 2021 passed by the Income Tax Department rejecting the objections of Petitioner in the present petition. Petitioner is a company incorporated under the Companies Act, 1956 engaged in the business of manufacture and distribution of lubricating oils, greases, brake fluids and specialty products.

4. During the Assessment Year 2016-17, Petitioner incurred expenses of Rs.10,54,06,706/- towards Corporate Social Responsibility ("**CSR**") under Section 135 of the Companies Act, 2013. The return of income of Petitioner for the relevant assessment

year, as revised from time to time, declared total income of Rs.1051,29,97,660/-. A dis-allowance was made for the amount of CSR in the return of income in consonance with the Explanation 2 to Section 37 of the Act. Petitioner also claimed deduction of Rs.1,79,41,595/- (being 50% of the aggregate donation) under Section 80G of the Act as permissible in law.

5. Petitioner's return of income was selected for scrutiny. Pursuant to initiation of assessment proceedings, a notice dated 14th September 2019 was issued under Section 142(1) of the Act seeking details along with supporting evidence in respect of the claim of deduction. Petitioner replied by letter dated 30th November 2019 inviting another notice dated 14th November 2019 under Section 142(1) of the Act requesting proof of donation justifying claim for deduction, which was also replied on 30th November 2019. Assessment order dated 14th January 2020 was passed under Section 143(3) of the Act, which fully allowed the deduction claimed. However, Petitioner received notice dated 27th March 2021 under Section 148 of the Act conveying reasons to believe that income chargeable to tax for the relevant assessment year has escaped assessment and required Petitioner to deliver return for the said assessment year. Petitioner complied by filing its return on 27th April 2021, however, requesting the Assessing Officer ("**AO**") a copy of the reasons recorded for reopening assessment. The reasons to believe

escapement of income were provided by a letter dated 30th July 2021 to which Petitioner filed its objections on 28th August 2021. The AO rejected the objections by the impugned order dated 21st December 2021. It is this order along with notice dated 27th March 2021 alleging that income has escaped assessment which is the subject matter of challenge herein.

6. Mr. Pardiwalla, learned Senior Advocate appearing for Petitioner challenged the reopening of assessment contending that the jurisdictional pre-conditions have not been fulfilled in the present case as the belief formed by the AO is based on an audit objection without fulfilling an objective criteria. He also submitted that the assessment cannot be reopened on the basis of a change of opinion and the belief so formed must be based on fresh and tangible material having a rational and a live nexus with the belief. Mr. Pardiwalla aligned the legal objections with the facts in the matter by pointing out the following:

(i) Petitioner has not claimed the deduction of CSR expenses as business expenditure.

(ii) Section 80G of the Act has no condition that such deduction shall not be allowed in respect of amounts spent out of CSR.

(iii) The AO has formed his belief regarding escapement of income based on an audit objection without an independent

application of mind and had earlier refused to accept the audit objection.

(iv) Petitioner had made adequate disclosure regarding expenditure by way of CSR and deduction under Section 80G of the Act is made in the annual accounts, the tax audit report, the computation of income which was already considered by the AO while passing the original assessment order. Deduction under Section 80G of the Act was specifically mentioned in the computation sheet which formed the part of the assessment order.

(v) The satisfaction of the Sanctioning Authority has not been provided to Petitioner which indicates that there is no such approval.

Mr. Pardiwalla thus, contends that the impugned notice and order is unreasonable and discloses an arbitrary exercise of power. He, thus, urges the Court to set aside and quash the same.

7. Mr. Suresh Kumar, learned counsel appears for the Revenue and justifies the impugned order by contending that since the deduction of CSR expenses are specifically disallowed under Section 37(1) read with Explanation 2 of the Act, the same cannot be allowed under Section 80G of the Act. While candidly admitting the audit objection, he however, asserts that the same itself is a source of

information and constitutes 'fresh tangible material'. Mr. Suresh Kumar further points out that although an amount of Rs.10,54,06,706/- appears in the profit and loss account showing debit on account of CSR expenses under the head 'other expenses', this includes donation expenses of Rs.3,58,83,189/-. This amount has not been separately debited in the profit and loss account which was never disclosed by Petitioner directly or indirectly. Mr. Suresh Kumar relies on the affidavit in reply filed by the Department to buttress the objectives of providing for CSR which is to share the burden of the government in providing social services by companies having a net worth.

8. Mr. Suresh Kumar has tried to unveil an alleged strategy by which Petitioner firstly incurs CSR expenses, without claiming any deduction since the same are disallowed as business expenditure, but thereafter adding back the expenditure in the computation of income. Thus, the CSR expenses are treated by Petitioner under two different heads, defeating the very public welfare purpose by converting the same as a tax saving tool. Mr. Suresh Kumar, thus, urges us to dismiss the petition.

9. We have heard both the parties and perused the records of the proceeding with the assistance of counsel.

10. It is seen that prior to the passing of the original assessment order, AO has raised queries vide notices dated 14th September 2019 and 14th November 2019, each of which were duly responded by Petitioner. Petitioner has explained that no deduction was claimed by it except that under Section 80G of the Act. Copies of receipts of donations were also provided as proof of donation. All these details were also included in the computation of income. It is seen from the revised statement of income that an amount of Rs.20,74,87,608/- is shown as inadmissible expenses under Section 37 of the Act in Schedule 1. Schedule 7 specifies the donee's details showing the 50% deductible amount to the tune of Rs.1,79,41,595/- of the qualifying amount of Rs.3,58,83,189/-. Petitioner has, thus, submitted detailed explanation along with supporting documents.

11. The documents on record also indicate that the Audit Wing of the Department raised certain objections to the original assessment order including the issue of deduction under Section 80G of the Act. It is seen that the AO justified the original assessment order to the audit party without accepting any adjustment to the same.

12. The notice providing the reasons to believe itself is based on verification of the profit and loss account and computation of income showing the amount of CSR expenses debited under the head 'other expenses' and the said amount being added back and claimed as deduction under Chapter VA as donation. The notice further goes on

to say that during the course of original assessment proceedings, neither the AO has asked for any details and information on this issue from Assessee nor has Assessee volunteered any details. The relevant portion of the notice providing the reasons to believe escapement of income reads thus:

> *"2. On verification of profit and loss account and computation of income, it is seen that an amount of Rs.10,54,06,706/- was debited on account of CSR expense in Other expenses head. Further, the aforesaid amount was added back by the assessee in its computation of income as CSR Expenses and again claimed as deduction as donation of Rs. 1,79,41,595/- under chapter VA as donation.*
>
> *In this connection, it is submitted that as per the amendment made vide Finance Act, 2014, CSR expenses is not allowable as business expenditure. Hence, the same is required to be disallowed and added to the total income of the assessee.*
>
> *3. From the above, it is clear that the assessee has claimed expenses, which is not allowable as business expenditure and has escaped assessment by reasons of failure on the part of the assessee to disclose fully and truly all material facts and accordingly the same was required to be added to the total income shown by the assessee. It is also seen that during the course of assessment proceedings in this case, the A.O. has not asked any details and information on this issue from the assessee nor the assessee has submitted any details in respect of the same……"*

13. From the perusal of the documents, two glaring facts emerge. One is that all material/documents necessary for computing the income were disclosed and submitted by Petitioner during the course of assessment proceedings leading to an irrefutable conclusion that there was no failure on the part of Petitioner to disclose fully and truly all material facts. Secondly, there is a notable absence of any fresh tangible material coming to the knowledge of the AO and the reopening of assessment is purely on a re-examination of the very

same material on the basis of which the original assessment order was passed.

14. It is a well settled principle of law that an AO has no power to review and this power is not to be confused with the power to re-assess. The Apex Court in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd.,***[1] has reiterated that mere change of opinion cannot be a ground for reopening concluded assessment. The observations made in paragraphs 6 and 7 read as below:

> *"6. 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 fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.*
>
> *7. 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 1-4-1989, the assessing officer has 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 live link with the formation of the belief……"*

15. As held by this Court in ***Aroni Commercials Limited v. Deputy Commissioner of Income Tax–2(1)***[2] once a query is raised during the assessment proceedings and Assessee has replied to it, it follows that the query raised was a subject of consideration of the AO while completing the assessment. It is also not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Therefore, the reopening of

1 (2010) 2 SCC 723.
2 (2014) 44 taxmann.com 304 (Bombay).

the assessment, in our view, is merely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings and this change of opinion does not constitute justification and/or reason to believe that income chargeable to tax has escaped assessment. Paragraph 14 of *Aroni Commercials Limited (supra)* reads as under:

> *"14. We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view 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. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the*

> *assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."*

16. We have also noted the contents of the impugned order rejecting the objections of Petitioner. An identical and common place assertion is seen in various such orders rejecting the objections of Assessees. The Department routinely relies upon an observation of the Supreme Court in the case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.***,[3] which reads as follows:

> *"At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction."*

17. However, Assessing Officers without appreciating the true import of the aforesaid decision of the Supreme Court, continue to reopen assessments on the ground of income having escaped assessment despite the fact that all the material and information was already available with him while passing the original assessment

3 (2008) 14 SCC 208.

order. Furthermore, while conclusive proof of escapement of income may not be necessary to reopen an assessment, the least that is required is a requisite belief based on fresh and tangible material which was not accessible to the AO or that which was deliberately withheld by Assessee, which then would amount to non-disclosure of relevant information. The finding of the Apex Court in *Rajesh Jhaveri (supra)* must not be used by AO to reopen assessments to review the original assessment order on the basis of a change of opinion of the AO, as done in the present case. Further, the reasons to believe notice itself indicates that the AO was already seized with information prior to passing of the original assessment order and as such, there is no tangible information on the basis of which he has allegedly formed the requisite belief.

18. In these circumstances, we have no hesitation in holding that the notice dated 27th March 2021 under Section 148 of the Act in respect of income having escaped assessment and the order dated 21st December 2021 passed by the AO rejecting the objections of Petitioner impugned herein, are untenable and cannot be sustained in law. The Petition is allowed.

19. Rule is made absolute in terms of prayer clause (A) which reads as under:

> *"A. that 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 of the Impugned Notice dated 27.03.2021 issued under Section 148 of the Act (being EXHIBIT "J" hereto) and the Impugned Order dated 21.12.2021 (being EXHIBIT "N" hereto) quash and set aside the same;"

20. There is no order as to costs.

(DR. NEELA GOKHALE, J.) (K. R. SHRIRAM, J.)