



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.2095 OF 2022

Geopreneur Realty Private Limited)
 having its office at 1001, 10th Floor, First)
 Avenue, Above Mercedes Benz Showroom,)
 Goregaon Mulund Link Road, Malad West,)
 Mumbai – 400 053, Maharashtra)Petitioner

V/s.

1. Union of India)
 Through the Secretary, Ministry of Finance,)
 Department of Revenue, North Block,)
 Secretariat Building, New Delhi – 110 001)
 2. The Deputy Commissioner of Income Tax)
 – Circle 1(3)(1), Mumbai having his office)
 at Aaykar Bhawan, M.K. Road, Mumbai –)
 400 020)
 3. The Additional/Joint/Deputy/Assistant)
 Commissioner of Income Tax/Income Tax)
 Officer National Faceless Assessment Centre,)
 having his office at Room No.401, 2nd Floor,)
 E-Stamp, Jawaharlal Nehru Stadium, Delhi)
 – 110 003)
 4. The Principal Commissioner of Income)
 Tax – 1, Mumbai having office at Aaykar)
 Bhawan, M.K. Road, Mumbai – 400 020)Respondents

Ms. Neha Anchlia a/w. Ms. Ujjwala Chaturvedi for petitioner.
 Mr. Suresh Kumar for respondents.

**CORAM : K. R. SHRIRAM &
 DR. NEELA GOKHALE, JJ.
 DATED : 15th JANUARY 2024**

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) for Assessment Year 2017-2018.

2 Petitioner is engaged in the business of real estate development and construction. For Assessment Year 2018-2019 petitioner filed its return of income on 30th October 2017, which was revised on 1st June 2018, declaring a total loss of Rs.1,41,16,482/-. Petitioner's case was selected for scrutiny assessment and notices were issued under Section 142(1) read with Section 129 of the Act. Petitioner responded to the notices and also filed documents. An assessment order dated 20th December 2019 came to be passed in which petitioner's loss was assessed at Rs.1,05,42,877/-.

3 Subsequently petitioner received a notice dated 30th March 2021 under Section 148 of the Act that there are reasons to believe that petitioner's income chargeable to tax for Assessment Year 2017-2018 has escaped assessment. Petitioner was also provided reasons for reopening of assessment. The reasons read as under :

REASONS FOR REOPENING OF ASSESSMENT

In the above mentioned case, the assessee has e-filed its return of income of A.Y. 2017-18 on 30/10/2017 declaring total loss of Rs.(-) 1,42,40,038/-. The case was selected for scrutiny and assessment u/s 143(3) of the Act was completed on 20.12.2019 assessing total loss at Rs.(-) 1,05,42,877/-.

2. On perusal of the assessment records of the assessee for A.Y. 2017-18, it is seen that the assessee has taken short-term/long term borrowings in F.Y. 2015-16 which is still outstanding of Rs.362825259/- on 31st March, 2017. The assessee has not commenced the project as stated in Notes to Accounts that due to delay in commencement of a project with finance cost, the net worth of the company as on 31.03.2017 has become negative and management is quite confident on completion of the said project to continue its business as a going concern. During the year under consideration, the assessee has debited financial costs of Rs.5,67,95,525/- in Profit and Loss Account and arrived business loss of Rs.(-) 1,41,16,482/- due to above

expense. Since there is no business activity during the year under consideration and project is yet to be commenced, hence the amount of financial cost of Rs.5,67,95,525/- along with depreciation of Rs.19,03,026/- and other expenses of Rs.18,02,593/- should be capitalized as preliminary expenses under the head work in progress. The fact was not verified by the assessing officer while finalizing the assessment. The same has not been brought to the notice of the assessing officer by the assessee with a view to conceal the above facts from the assessing officer

3. In view of the above, amount of financial cost of Rs.5,67,95,525/- has to be disallowed and added to the total income of the assessee.

4. Hence, it is clear that there is failure on the part of assessee to disclose fully and truly all material facts necessary for the assessment for the year in question within the meaning of First provision to section 147(1) of the Act.

5. In view of the above, I have reason to believe that income chargeable to tax to the tune of Rs.5,67,95,525/- has escaped assessment within the meaning of section 147 of the Act for the A.Y. 2017-18. It is therefore proposed to issue notice u/s 148 of the Income-tax Act, 1961 for A.Y. 2017-18 to reassess such income and also any other income chargeable to tax which has escaped assessment and which may come to notice subsequently in the course of proceedings under this section.

4 Petitioner's case is the issue of petitioner's short term/long term borrowings and non commencement of project, the financial cost, etc. came up for discussion during the assessment proceedings.

5 Ms. Anchlia submitted that the entire basis of reopening could be change of opinion because once the Assessing Officer has raised query and petitioner has responded that would mean that it was under consideration of the Assessing Officer during the proceedings and, therefore, on the same basis there cannot be reopening of assessment. Ms. Anchlia submitted that even if the queries raised does not find a

mention in the assessment order, it would still mean it was under active consideration of the Assessing Officer and relies upon *Aroni Commercials Limited V/s. The Deputy Commissioner of Income Tax*¹.

6 Mr. Suresh Kumar in response submitted that since there was no business activity during the year under consideration and the project was yet to be commenced, the financial cost alongwith depreciation and other expenses should be capitalised as preliminary expenses under the head work in progress. Mr. Suresh Kumar also submitted that even though a query has been raised during the assessment proceedings, the same has not been discussed in the assessment order and, therefore, there is no question of change of opinion. Mr. Suresh Kumar stated that in the order disposing the objections, the Assessing Officer has relied upon certain judgments.

7 During the assessment proceedings, petitioner received a notice dated 21st June 2019 in which petitioner was called upon to provide working of depreciation claimed as per the IT Act and partywise details (name, address and amount) of interest on unsecured loan claimed at Rs.96,32,590/- alongwith details of TDS compliance. Petitioner was also asked to provide partywise details of unsecured loans alongwith compliance to requirement of Section 68 of the Act and also partywise details of loan from NBFCS/others. Petitioner responded to the same and provided the details. Subsequently, petitioner received another notice dated

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

4th September 2019 under Section 142(1) of the Act calling upon petitioner to provide details of the loans, advances and deposits received and given in the format prescribed and also details of all expenses above Rs.1 lakh debited under each head of Profit and Loss account alongwith comparative analysis with previous year's figures. Petitioner provided these details.

8 It is true that in the assessment order there is no elaborate discussion regarding these items but there has been disallowance on interest on TDS amounting to Rs.1,22,956/- debited to Profit and Loss account. This is an indication that the subject matter of financial cost and other expenses has been discussed during the assessment proceedings.

9 Moreover, as held in *Aroni Commercials Limited* (Supra), 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. 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. Therefore, it is obvious that the reopening of the assessment by impugned notice dated 30th March 2021 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

assessment order dated 20th December 2019. This change of opinion does not constitute justification and/or reasons 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 ASN 18/23 WP-137-14 .sxn 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 ASN 19/23 WP-137-14 .sxw 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.

10 In the circumstances, we are inclined to allow the petition in terms of prayer clause – (a) which reads as under :

(a) that this Hon'ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ under Article 226 of the Constitution of India, calling for records pertaining to the impugned notice u/s 148 of the Act dated 30.03.2021 for AY 2017-18 by the Respondent No.3 and after going into the validity and legality thereof to quash and set aside the same.

11 Petition disposed.

(DR. NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)