# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## ORDINARY ORIGINAL CIVIL JURISDICTION
## WRIT PETITION NO. 3246 OF 2022

Mira Bhavin Mehta )
143A, Kalpatru Residency CHS Ltd. )
Kamani Marg, Sion (East) )
Mumbai 400 022 ) ...Petitioner

Versus

1 Income Tax Officer Ward 6 (3) (1) )
Aayakar Bhavan, Maharshi Karve )
Road, Mumbai 400 020 )

2 Principal Commissioner of Income )
Tax-6, Aayakar Bhavan, Maharshi )
Karve Road, Mumbai 400 020 ) ...Respondents

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Mr. K. Gopal a/w Ms Neha Paranjpe and Mr. Akhilesh Deshmukh for Petitioner.
Mr. Suresh Kumar for Respondents.

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CORAM : K. R. SHRIRAM &
Dr. NEELA GOKHALE, JJ.
DATED : 13th FEBRUARY 2024

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

1 Rule. Rule made returnable forthwith and heard. As the pleadings are completed, this court, by consent of the parties has taken up the matter for final hearing.

2 Petitioner, an individual, filed return of income on 28th August 2018 for AY-2018-19 declaring total income of Rs.26,26,220/-. Petitioner, thereafter, received a notice dated 28th September 2019 issued under Section 143(2) of the Income Tax Act 1961 (the Act) stating that return of

income has been selected for limited scrutiny with regard to investments in immovable property, capital gains / income on sale of property. Petitioner was called upon to submit evidence with regard to the two issues raised. Thereafter, petitioner received a notice dated 12th December 2019 issued under Section 142(1) of the Act calling upon petitioner to provide documents and details with regard to capital asset that was sold during the assessment year. Petitioner vide its Chartered Accountant's letter dated 11th December 2020, provided details of the property sold, consideration received, etc., the property being Flat No.802, 8th floor of Boulevard-III, Ghatkopar (West), Mumbai 400086 (the said flat). Later, petitioner received one more notice dated 16th February 2021 issued under Section 142(1) of the Act, seeking details with regard to same property. Once again, vide petitioner's Chartered Accountant's letter dated 17th February 2021, petitioner provided all details and documents.

3 An assessment order came to be passed on 28th April 2021, in which, it is stated that the case was selected for limited scrutiny assessment on the issues relating to investments in immovable property, capital gains / income on sale of property and in view of material available on record, no addition on the issues is made. The assessment order also states that the assessment is passed accepting the income computed as per order under Section 143(1) of the Act.

4 Almost a year later, petitioner received a communication dated 11th

March 2022 being an inquiry under Section 148A(a) of the Act seeking details of the sale of the residential property, which was the subject matter of the scrutiny assessment. Petitioner replied vide its Chartered Accountant's letter dated 15th March 2022 and provided all details and documents called for. This was followed by a notice dated 22nd March 2022 issued under Section 148A(b) of the Act, wherein paragraph 3 reads as under:

> *"3. On perusal of submission it is seen that you have purchased a residential property vide registered agreement dated 17.10.2017 and sold the said property vide registered agreement dated 27.10.2017 and thus the said immovable property is short term capital Asset and gain arising from the said sale of property is short terms capital Gain, however on perusal of computation of income it is seen that you have considered date of acquisition of property at 28.05.2010 and computed net long term capital loss of Rs.33,793/-. In view of the same, you are requested to explain as to why the capital gain on said sale of property should not be computed as under"*
>
> *Sale consideration of flat (50% ownership) – Rs.1,05,00,000/-*
>
> *Less :- Purchase consideration of flat (50% ownership) Rs.71,95,625/-*
>
> *Short terms Capital Gain = 33,04,375/- taxable @ 30%."*

5 Petitioner replied to the said notice dated 22nd March 2022 objecting to the reopening vide petitioner's Chartered Accountant's letter dated 28th March 2022. Notwithstanding, petitioner's objections, the order dated 31st March 2022 under Section 148A(d) of the Act has been passed and notice also dated 31st March 2022 issued under Section 148 of the Act, holding that the asset sold was short term capital asset and gain arising on the transfer of such asset is short term capital gain. It is this order and the

notice both dated 31st March 2022 which are impugned in this petition.

6 Various grounds have been raised but one ground is that there has been change of opinion. Mr. Gopal submitted that this court has taken a view in ***Siemens Financial Services Private Limited Vs. Deputy Commissioner of Income Tax & Ors.***[1] that assessment cannot be reopened on the basis of change of opinion. Paragraphs 36 to 39 of *Siemens Financial Services Private Limited* (supra) read as under:

> *36 We would agree with the submissions of Mr. Pardiwalla that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of re-opening the assessment, review would take place. The concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. As held in Dr. Mathew Cherian (Supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercials (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised.*
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> *The Division Bench of this court in Aroni Commercials Ltd. (supra) held it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Paragraph 14 of Aroni Commercials Ltd. (supra) read as under:*
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> > *"14. 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*

1. (2023) 457 ITR 647 (BOM)

*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."*

*37 The Assessing Officer does not have any power to review his own assessment when during the original assessment petitioner provided all the relevant information which was considered by him before passing the assessment order under section 143(3) of the Act dated 23rd December 2018. Petitioner had debited an amount of Rs.6,41,87,931/- on account of software consumables in the profit and loss account and a detailed break-up of the said expenses were submitted before the Assessing Officer during the course of assessment proceedings vide a letter dated 6th December 2018. It is settled law that proceedings under section 148 cannot be initiated to review the earlier stand adopted by the Assessing Officer. The Assessing Officer cannot initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment. In petitioner's case the Assessing Officer having allowed the amount of software consumables as a revenue expenditure now seeks to treat the same as capital expenditure which is a clear change of opinion. Various judicial precedents have held that reassessment proceedings initiated on the basis of a mere change of opinion are invalid and without jurisdiction.*

*38 The Apex Court in Kelvinator of India Ltd.(Supra) emphasised on the difference between a power to review and the power to reassess.*

*The Apex Court held that the Assessing Officer has no power to review but has only the power to reassess. The concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer. The relevant extract of the judgement is reproduced as under:-*

> *".....However, 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 re-open assessments on the basis of "mere change of opinion", which cannot beper sereason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 , 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. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987 , Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer....."*

*39 The Delhi High Court in Seema Gupta v. ITO [(2022) 288 Taxman 519 (Del)] held that the order under section 148A(d) and notice under section 148 of the Act should be set aside when the reassessment was initiated on a change of opinion where the same was discussed and verified by the Assessing Officer at the time of original assessment proceedings.*

7 In the affidavit in reply filed through one Ratnesh Kumar Mishra affirmed on 20th June 2022, the stand has taken is that the entire scheme of reassessment is changed by insertion of new provisions through Finance Act 2021 and, therefore, the concept of change of opinion does not survive. Mr.

Suresh Kumar in fairness agreed that since the court has specifically, in its judgment in *Siemens Financial Services Private Limited* (supra), held that the concept of change of opinion would still apply, if the court comes to conclusion that there was change of opinion, then certainly the impugned order passed under Section 148A(d) of the Act and the impugned notice issued under Section 148 of the Act, both dated 31st March 2022 have to be quashed.

8 In our view, it is clear case of change of opinion. We say this because the issue as to whether there was a short term capital gain with respect to the said flat, was the subject matter of consideration during the assessment proceedings. It is settled law 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. In fact, the AO in the assessment order dated 28th April 2021 has noted that the issue of investment in immovable property and capital gain / income on sale of property was considered under limited scrutiny assessment and in view of the material on record no addition on the issue is made. The information relied upon while issuing notice under Section 148A(b) of the Act also relates to the said flat and entirely contradictory view is taken in the impugned order that the asset sold was short term capital asset and gain arising on transfer of the said flat is short term capital gain. In our view, the reopening of the assessment is

purely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings. This change of opinion does not constitute justification for assuming that income chargeable to tax has escaped assessment.

9 Rule, therefore, made absolute. Petition allowed in terms of prayer clause (a) which reads as under:

> *"(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India, appropriate writ or order or direction including a writ in the nature of 'Certioraris' calling for the records for the case and after satisfying itself as to the legality thereof quash and set aside the order dated 31.03.2022 under section 148A(d) of the Act being Exhibit -'M' and notice issued by Respondent No.1, dated 31.03.2022 under section 148 of the Act being Exhibit- 'N' being illegal and bad in law."*

10 Petition disposed.

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

Meera Jadhav