



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

WRIT PETITION NO. 2234 OF 2022

Upesi Ventures Ltd.,
9, Agios Andreas Vasileos,
Konstantinou Street, Nicosia, Cyprus. **...Petitioner**

Versus

- 1. The Assistant Commissioner of Income Tax,
(International Taxation), Circle-4(3)(1),
Air India Building, Nariman Point,
Mumbai – 400 021.**
- 2. The Commissioner of Income Tax
(International Taxation)-4,
Air India Building, Nariman Point,
Mumbai – 400 021.**
- 3. The Union of India,
Through the Joint Secretary & Legal
Adviser, Branch Secretariat,
Department of Legal Affairs,
Ministry of Law and Justice, 2nd Floor,
Aayakar Bhavan, M. K. Marg, **...Respondents**
New Marine Lines, Mumbai – 400 020.**

Mr. Madhur Agrawal i/b Mr. Atul K. Jasani for Petitioner.
Mr. Ahileshwar Sharma for Respondents-Revenue.

**CORAM: K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.**
DATED: 7th May 2024

ORAL JUDGMENT : (Per K. R. Shriram, J.)

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

2. By this Petition, Petitioner challenges (i) the impugned notice dated 30th March 2021 issued by Respondent No. 1 under Section

148 of the Income Tax Act, 1961 (“**the Act**”), proposing to reopen the assessment for the Assessment Year (“**AY**”) 2015-2016, (ii) the impugned order dated 27th March 2022, rejecting the objections of Petitioner against reopening of assessment and (iii) the impugned draft order dated 30th March 2022 passed by Respondent No. 1 proposing to make an adjustment of Rs. 16,71,24,000/-, as being *ex facie* illegal, untenable, unsustainable, unreasonable and contrary to the provisions of the Act.

3. Petitioner is a company incorporated under the laws of Cyprus. Petitioner is a tax resident of Cyprus and is an investment holding company. Petitioner company was also registered as Foreign Portfolio Investor (“**FPI**”) with the Securities and Exchange Board of India (“**SEBI**”). Respondent No. 1 is the Jurisdictional Assessing Officer (“**JAO**”) and Respondent No. 2 is the Commissioner of Income Tax (International Taxation) [“**CIT(IT)**”], who is required to grant approval under Section 151 of the Act.

4. Assessment of Petitioner for AY 2015-2016 was completed on 30th October 2017 under Section 143(3) of the Act accepting the return of income as ‘Nil’.

5. Petitioner, thereafter, received a notice dated 30th March 2021 under Section 148 of the Act alleging that there were reasons to believe that Petitioner’s income chargeable to tax for AY 2015-2016

has escaped assessment within the meaning of Section 147 of the Act.

Petitioner was provided the reasons to believe why the tax had escaped assessment. In the reasons to believe, it was alleged that :

- “i. It is observed from the case records of assessment year 2014-15 that Petitioner offered to tax interest income of Rs. 16,71,24,000/- from investment in NCDs from 2 companies namely NDL and LPMIPL.*
- ii. It is seen that Petitioner is still invested into debentures of the said two companies during assessment year 2015-16 but no interest income has been offered to tax. It is also noted that closing stock of NCDs for assessment year 2015-16 is the same as that for assessment year 2014-15. It is also noted from the return of income for assessment year 2015-16 and 2014-15 that Petitioner follows Mercantile system of accounting.*
- iii. It is observed that Petitioner has not offered any interest income from NCDs during the year under consideration even though Petitioner is following Mercantile system of accounting. Therefore, accrued interest of Rs. 16,71,24,000/- from the above two companies should have been offered to tax. Therefore, it is apparent that Petitioner has not disclosed fully and truly all material facts necessary for the assessment.”*

6. Petitioner filed its objections vide its Chartered Accountant's letter dated 21st March 2022. Petitioner also dwelled on the merits of the case and raised the grounds viz. (a) reasons recorded show change of opinion, which is not permissible; (b) full and true disclosure had been made and (c) even though Petitioner was following Mercantile system of accounting, in view of the India-Cyprus Double Taxation Avoidance Agreement (“DTAA”), Petitioner was entitled to claim benefits of the DTAA during the year under consideration because Petitioner held a valid Tax Residency Certificate issued by the Cyprus Tax Authorities. Petitioner submitted

that under Article 11 of the DTAA, interest income can be taxed only when the same was received by the payee and since Petitioner had not received any interest income on the Non-convertible Debenture (“NCD”) during the AY 2015-2016, no tax was payable. It was also submitted that the entire interest income was received during AY 2017-2018 for the period for AYs 2015-2016 and 2016-2017 as also for AY 2017-2018 and tax has been paid on the entire interest income in AY 2017-2018. The objections filed by Petitioner was rejected by an order dated 27th March 2022 in which the Assessing Officer (“AO”), Respondent No. 1 has not bothered to deal with any of the objection raised by Petitioner. The AO has simply proceeded on the basis that considering facts of the case, it is found that there is tangible material on the basis of which it is held that the income has escaped assessment and also there was also no change of opinion in the case. By following this, the AO passed the draft assessment order on 31st March 2022 under Section 144C of the Act. It is at that stage Petitioner approached this Court and this Court, by an order dated 4th July 2022 granted ad-interim relief. That order has been continued since then.

7. An affidavit-in-reply through one Namita Patel affirmed on 24th November 2022 has been filed by Respondents opposing the petition. In the affidavit-in-reply the stand as taken in the order on objections, has been taken.

8. Mr. Sharma appearing for Respondents also submitted that the queries raised during the assessment proceedings were not exactly on the issue of non-disclosure of interest on the NCDs and therefore, is no change of opinion.

9. In our view, the notice dated 30th March 2021 issued under Section 148 of the Act, the order dated 27th March 2022 rejecting Petitioner's objections and the draft assessment order dated 31st March 2022, all have to be quashed and set aside.

10. Section 147 of the Act as was in force at the relevant time, provided that *“if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153 of the Act, assess or re-assess such income.”*. The proviso to Section 147 of the Act states that *“such re-assessment is not permissible where it is proposed to re-assess after the expiry of four years from the end of the relevant assessment year and an assessment under Section 143(3) of the Act has been completed unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of Assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.”*.

11. In this case, since the assessment is proposed to be reopened after the expiry of four years and the assessment under Section

143(3) of the Act has been completed, the proviso will apply.

12. During the course of original assessment proceedings, Petitioner was issued a notice dated 15th May 2017 under Section 142(1) of the Act to which a questionnaire was enclosed calling upon Petitioner to furnish details/evidence/explanation to 37 items. Petitioner was called upon to give details of income from sources other than that of capital gain and also details of interest income accrued on security held during the last four financial years.

13. By its Chartered Accountant's letter dated 29th May 2017, Petitioner replied to the notice and stated that it had not received any income during AY 2015-2016. During the course of discussion that Petitioner's Chartered Accountant had with the AO, Petitioner was called upon to furnish details of the statement showing closing stock of NCDs. By its Chartered Accountant's letter dated 3rd August 2017, which was received by the AO on same day, Petitioner furnished a statement showing closing stock of NCDs as also a statement giving details of investment in NCDs during the year. The opening stock and the closing stock were unchanged. Thereafter, the assessment order dated 30th August 2017 came to be passed. In the assessment order, it is accepted that Petitioner is the resident of Cyprus and its nature of business is to act as investment holding company.

14. In our view, since Petitioner was called upon and Petitioner

supplied the details of investment in NCDs during the year, the issue of holdings in the NCDs and the interest on the NCDs was certainly a subject of consideration of the AO.

15. Mr. Sharma submitted that there is no discussion in the assessment order. As held by this Court in *Aroni Commercial Limited v. Deputy Commissioner of Income Tax-2(1)*¹, 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 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 Commercial 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

¹ (2014) 44 taxmann.com 304 (Bombay).
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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 AY 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 AY 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. Therefore, it is clear that the reopening of assessment by the impugned notice dated 30th March 2021 is merely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceeding leading to the order dated 30th October

2017. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

17. Moreover, Petitioner's objection to reopening that under the DTAA, interest income can be taxed only when the same was received by the payee under the provisions of Article 11, has not been controverted in the order rejecting the objections. This has also been raised by Petitioner in petition in Grounds L & M. In the affidavit-in-reply, this has not even been denied. Respondents only state that Petitioner failed to disclose the interest part in the return of income, but when such an income can be taxed only if it is paid by the payer, the question of disclosing the same in the return of income or in its account does not arise. This has been accepted by the AO because specific query has been raised on the status of NCDs during the assessment proceedings.

18. In the affidavit-in-reply, it is stated that Assessee has failed to state the difference between accrual of income and receipt of income. The case of Assessee is non-receipt of interest income accrued in its book, which is not relevant in the Mercantile system of accounting and Assessee did not disclose its accrued interest in its account even as bad-debt to be received.

19. In our view, the AO must have certainly considered these

aspects during the assessment proceedings because specific queries were raised regarding the NCDs and the details were made available which disclosed that there was no change in the opening and closing stock of the NCDs.

20. It is also to be noted that in Ground N, Petitioner has stated that Petitioner received the interest in AY 2017-2018 and it has been offered to tax during the said assessment year. In the affidavit-in-reply it is not denied. In fact, it is stated that the income offered by Assessee during AY 2017-2018 in respect of interest income received for AY 2015-2016 will be duly recognized and Assessee will be entitled to claim the credits of the same after payment of taxation.

21. In the circumstances, the Rule is made absolute 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 any other writ order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned notice and passing of the impugned order and after going through the same and examining the question of legality thereof quash, cancel and set aside (i) the impugned notice (Exhibit F) dated March 30, 2021, (ii) the impugned order (Exhibit N) dated March 27, 2022 and (iii) impugned draft order (Exhibit O) dated March 31, 2022.”

22. Petition disposed. No order as to costs.

(DR. NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)

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by GITALAXMI
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KOTAWADEKAR
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