

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

WRIT PETITION NO. 3344 OF 2018

Ankita A. Choksey .. Petitioner.
v/s.
Income Tax Officer-19 (1)(1)
& Others .. Respondents.

Mr. Jitendra Jain with Mr. Sameer Dalal, for the Petitioner.
Mr. Sham Walve, for the Respondents.

**CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.
DATE : 10th JANUARY, 2019.**

P.C:-

With the consent of the parties, this Petition which challenges a re-opening notice under the Income Tax Act, 1961 (the Act), is being taken up for final disposal at the stage of admission.

2 This Petition under Article 226 of the Constitution of India, challenges a notice dated 27th March, 2018 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice seeks to re-open the Assessment for Assessment Year 2011-12.

3 Briefly, the facts leading to this Petition are as under:-

(i) The Petitioner held 10% shares in one M/s. Samuel Dracup and Sons India Private Limited (the Limited Company) .

- (ii) On 18th October, 2010, the Limited Company decided to voluntarily wind up and liquidate its business. This by the Limited Company passing resolution at the General Body Meeting of its share holders. It was resolved that the assets (including immovable property) remaining after paying of the liabilities, would be distributed between its share holders in proportion to their share holding.
- (iii) Pursuant to the above, on 27th December, 2010, the Limited Company executed a sale deed, transferring the immovable property i.e. a flat in "Geetanjali" situated in Mumbai (said flat) in favour of the Petitioner and her mother – Mrs. Priti Choksey to the extent their shares holding i.e. 10% and 90% in the Limited Company respectively.
- (iv) On 30th June, 2011, this Court ordered the dissolution of the Limited Company. This, while indicating the share holding of the Limited Company at 90% in the hands of Ms. Priti Choksey and 10% in the hands of the Petitioner. The above order of dissolution was passed after the Respondent-Revenue gave its no objection to it.
- (v) On 30th June, 2011, the Petitioner filed its return of income for the Assessment Year 2011-12, returning an income of Rs.6.34 lakhs. In its return of income the Petitioner had disclosed under Section 46 of the Act, the receipt of 10% interest in the said flat received from the company on account of its liquidation i.e. 10% of Rs.3.79 Crores (being value of flat). This to arrive at her capital gains. The return of income was processed under Section 143(1) of the Act by way of intimation.

(vi) Thereafter on 27th March, 2018, the impugned notice under Section 148 of the Act was issued, seeking to re-open the Assessment for Assessment Year 2011-12. The reasons recorded in support of the impugned notice dated 27th March, 2018 is as under:-

“1. In the above case, the assessee has filed the return of income for A.Y. 2011-12 on 30.07.2011 declaring total income of Rs.6,34,580/-. The return was processed u/s. 143(1) of the Act on 17.12.2012. The assessee is having income from Salary and income from other Sources.

2. Information has been received from the ITO 1(3)(2), Mumbai vide letter dated 27.12.2013 that during the course of assessment proceedings of the company M/s. Samuel Dracup & Sons (I) Pvt. Ltd., (PAN: AAHCS6649D) for A.Y. 2011-12, it was noticed that the assessee company was liquidated by the order of Hon'ble Bombay High Court. Consequently, the assets in the hands on company were transferred to the shareholders in the ratio of their holdings. One of the shareholders in the ratio of their holdings. One of the shareholders Ms. Ankita Amit Choksey, PAN: AFXPC9692J is assessed to tax with this charge and the consideration arising out of liquidation of the assets is charged in the hands of the assessee Ms. Ankita Amit Choksey.

3. On analysis of the information received and on the verification of the ITS details from ITD system, it is revealed that the assessee Ms. Ankita Amit Choksey has received consideration to the tune of Rs.3,79,63,000/- from the sale of immovable property of the company M/s. Samuel Dracup and Sons Pvt Ltd. The same was not offered for tax and not reflected in the books of account. The nature/ source of the same transactions remained unverified.

4. In view of the above facts and circumstances of the case and after application of my mind, I have reason to believe that the income of the assessee Ms. Ankita Amit Choksey, chargeable

to tax for the A.Y. 2011-12 amounting to Rs.3,79,63,000/- has escaped assessment due to failure of the assessee to disclose fully and truly all material facts necessary for the assessment in this case in terms of provisions of Section 147 of the I.T. Act.

5 *In this case, a return of income was filed for the year under consideration but no scrutiny assessment u/s. 143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceedings u/s. 147 is reason to believe which has been recorded above.*

6. *It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment as stipulated u/s. 2(40) of the Act was made and the return of income was only processed u/s. 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 of Section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.”*

- (vii) On 5th October, 2018, the Petitioner filed its objection to the impugned re-opening notice and the reasons in support thereof. In particular, the Petitioner pointed out that the reasons in support of the impugned notice erroneously proceed on the basis that the Petitioner received a consideration of Rs.3.79 Crores for the sale of the said flat and that this fact was not disclosed. In fact, it was pointed out in the objection that the said flat had not been sold by the Petitioner as she continues to be in possession of the same. Besides, it was pointed out that Petitioner had disclosed the amount of 10% of Rs.3.79 Crores i.e. Rs.38.07 lakhs as being the full value of consideration received on extinguishment of its share holding in the Limited Company in its return of income. Thus, it was the Petitioner's contention that if correct and relevant facts

were to be considered, there can be no reason to believe that income chargeable to tax has escaped assessment. Therefore, the Petitioner prayed that the impugned notice dated 27th March, 2018 be withdrawn.

(viii) By an order dated 18th October, 2018, the Assessing Officer rejected the Petitioner's objection. However, the assertions on facts made by the Petitioner were not disputed in the order dated 18th October, 2018. This even when it is contrary to the facts recorded in the reasons in support of the impugned notice. The only basis for sustaining the impugned notice dated 27th March, 2018 in the order was that the Return of Income for the subject Assessment Year had not been subjected to any scrutiny assessment, as it was only processed by an intimation under Section 143(1) of the Act.

4 Mr. Jain, the learned Counsel for the Petitioner on the above facts points out absence of any reason to believe that income chargeable to tax has escaped Assessment. Thus, he submits that the impugned notice is completely without jurisdiction and should be quashed.

5 Mr. Walve, learned Counsel appearing for the Revenue and supporting the impugned notice dated 27th March, 2018, adopts the reasoning of the order dated 18th October, 2018 i.e. there was no scrutiny assessment. Thus, no occasion to examine the claim made by the Petitioner. Therefore, it is submitted that at this stage, the Court should not interdict the reassessment proceedings. This, if the claim of the Petitioner is correct, the same would be accepted in the re-assessment order and there would be no cause for grievance.

6 It is a settled position in law that the Assessing Officer acquires jurisdiction to issue a re-opening notice only when he has reason to believe that income chargeable to tax has escaped Assessment. This basic condition precedent is applicable whether the return of income was processed under Section 143(1) of the Act by intimation or assessed by scrutiny under Section 143(3) of the Act. [See Asst. Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers (P) Ltd., (SC) 291 ITR 500 and PCIT v/s. M/s. Shodimen Investments (Bombay) 2018 (93) Taxman.Com 153]. Further, the reasons to believe that income chargeable to tax has escaped Assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and *prima facie*, establish that the facts stated by it in its reasons as recorded are correct. In the absence of the order of objections dealing with the assertion of the Assessee that the correct facts are not as recorded in the reason, it would be safe to draw an adverse inference against the Revenue.

7 Thus, we are of the view that even in cases where the return of income has been accepted by processing under Section 143(1) of the Act, re-opening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under Section 143(1) of the Act, does not give the Assessing Officer a carte blanc to issue a re-opening notice. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the re-opening notice. In the present case, the Assessing Officer has

proceeded on fundamentally wrong facts to come to the reasonable belief conclusion that income chargeable to tax has escaped assessment. Further, even when the same is pointed out by the Petitioner, the Assessing Officer in its order disposing off the objection does not deal with factual position asserted by the Petitioner. Thus, it would safe to conclude that the Revenue does not dispute the facts stated by the Petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment.

8 Therefore, in the above view, as the impugned notice is without jurisdiction, it is quashed and set aside.

9 **Petition allowed** in the above terms.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)