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

WRIT PETITION NO.2545 OF 2010

Tata Sons Limited ...Petitioner
vs.
Dy. Commissioner of Income Tax
Range 2(3), Mumbai and Others ...Respondents

Mr. P.J. Pardiwalla, Senior Advocate a/w. Mr. Anil Wani i/b.ANS Law Associates, for the Petitioner.
Mr. Arvind Pinto, for the Respondents-Revenue.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATE : FEBRUARY 03, 2022

P.C.:

1. Petitioner had filed its return of income on 31st October, 2005 for A.Y.2005-06 declaring total income of Rs. 880.66 Crores (incorrectly recorded in the reasons as Rs. 808.66 Crores). The return was processed under section 143(1) of the Income Tax Act, 1961 (the said Act) on 27th March, 2006. Subsequently, the case was selected for scrutiny and an order dated 31st December, 2007 under section 143(3) of the Act was passed assessing the income at Rs 1160.67 Crores. A rectification order was passed under section 154 of the Act on 6th May, 2009 assessing the income at Rs. 2541.34 Crores under section 115JB of the Act, as tax liability was higher. Subsequently, the assessment was reopened and an order under section 143(3) read with 147 was passed on 18th December, 2009.

2. Thereafter, Petitioner received a notice dated 31st March, 2010 under section 148 of the said Act from Respondent No. 1 alleging that he had reason to believe that Petitioner's income chargeable to tax for A.Y. 2005-2006 has escaped assessment within the meaning of section 147 of the Act. Petitioner was later provided a copy of reasons recorded for reopening assessment on 18th May, 2010. Petitioner has attacked the notice for re-opening the assessment on various grounds including that it was dispatched by Respondent more than four years after the relevant assessment year and therefore even if the notice is dated within four years of relevant assessment order, the Court should consider it to have been reopened after four years.

3. Mr. Pardiwalla submitted that in any event Petitioner has a cast iron case and the Court will hold on merits in favour of the Petitioner, after considering the reasons recorded for re-opening.

4. We have heard Mr. Pardiwalla, for Petitioner and Mr. Arvind Pinto, for Respondents and having considered the reasons for re-opening with their assistance, we are inclined to hold in favour of Petitioner and set aside the notice dated 31st March, 2010 under sec.148 of the Act impugned in this Petition. Consequently the order

rejecting the objections of the Petitioner dated 29th October, 2010 which is also impugned in the Petition also will have to be set aside.

5. The entire basis of forming an opinion that there has been an escapement of assessment is that, the sale of shares of TCS Division by Petitioner was nothing but 'business income' and therefore the profits arising out of the sale of shares held by Petitioner in the group companies would be treated as Petitioner's income from business, and not profits arising out of sale of investment. Therefore, according to Respdt. No. 1 he had reason to believe that a sum of Rs.22,71,25,79,374/- has escaped assessment. Break up for this figure of Rs.22,71,25,79,374/- can be found in reasons itself and it is necessary for us to re-produce the same. The same is as under:

Head of Income	**Name of scrip**	**Cost**	**Sale consideration**	**Profit/Loss**
Short term capital gains (Annexure D)	Tata Mutual Fund	22081463148	22095246862	13783714
	Tata Mutual Fund	1600014357	1600000000	-14357
Long terms capital gains (Annexure E)	Tata Consultancy Services Ltd.	22419806	12288548600	12266128794
	Slump sale of TCS Division			3375612825
	Tata Telecom	1920000	1689600	-230400
Long term capital gains (Annexure D)	Tata Consultancy Services Ltd.	12899202	7070198000	7057298798
			Total	**22712579374**

6. If we consider the table reproduced above, the sale of shares of TCS Ltd. which according to Respondent No. 1 should be treated as 'business income' and not 'profits arising out of sale of sale of investment', is only Rs. 19,32,34,27,592/- (12,26,61,28,794 + 7,05,72,98,798) i.e."Long terms capital gains:- Tata Consultancy Services Limited". Mr. Pinto though he made valiant attempt to defend the notice issued for re-opening, in fairness, as an officer of the Court, considering the reasons as recorded agreed that the only item which could have been stated to have escaped assessment would be the Long Term Capital gains in the sale of TCS Ltd. shares amounting to Rs. 19,32,34,27,592/- and Respondent No. 1 was incorrect in stating that he had reason to believe that the sum of Rs. 22,71,25,79,374/- has escaped assessment.

7. In our view, if the reasons for re-opening the assessment is based on incorrect facts or conclusions, certainly the notice issued for re-opening cannot be sustained. Moreover, if according to Respondent No. 1 only the sale of shares of TCS was 'business income' and not 'profits arising of sale of investment' to say that the amount of Rs.22,71,25,79,374/- has escaped assessment, also indicates non- application of mind. We would also go a step ahead and observe that if only the approving authority under section 151

of the Act had considered the reasons properly, either he would have directed Respondent No. 1 to re-work on the reasons or would not have granted the approval. Moreover, we may keep in mind this is a case where the scrutiny assessment was completed and order under section 143(3) of the Act has been passed followed by a rectification order under section 154 of the Act. Therefore Petitioner's case has been considered at two stages, (i) When the assessment order was passed after scrutiny under section 143(3) of the Act and (ii) When an order under section 154 of the Act was passed.

8. The reasons for proposed re-opening clearly indicates that Respondent No. 1 wants to re-open only on the basis of change of opinion which, as held time and again by various Courts, can not be a ground for reopening. This is because in the assessment order dated 31st December, 2007 passed under section 143(3), the same point raised in the reasons for re-opening has been discussed and considered. The relevant portion reads as under:

> "As per the submissions, the activity of the assessee company for making investment in shares group company was to acquire and retain control of the companies promoted by it. The question that requires to be considered is whether this activity itself constitute a business when the real intention of the company is not to earn profit but to acquire and exercise control of the group companies. In order to constitute activity of the assessee for carrying on

> the business, it is essential that such activity for carrying on the business, it is essential that such activity must be with a motive of earning profit. Such earning of profit should be by the company itself and not by the other group company. This issue came to be considered by the Hon'ble Madras High Court in the case CIT vs. K.S. Venkatasubbiah Reddiar (1996) 221 ITR 181 where it was held that the income tax Act defines the term "business" only inclusively. The two essential requirements for an activity to be considered as **"business" are (i) it must be continuous course of activity and (ii) it must be carried on with a profit motive.** The issue also came to be considered by the Delhi High Court in the case in Bharat Development Pvt. Ltd. vs. CIT (1982) 133 ITR 4702 where it was observed that **the expression "business" is a word of a occupation. In taxing statute, it is used in the sense of a occupation or profession which occupies the time, of making profit. To regard an activity as business there must be a course dealings either actually continued or contemplating to be continued with the profit motive, and not for support or pleasure.** Whether a person carried on business in a particular commodity must depend upon the volume, frequency, continuity and transaction of purchase and sale in class of goods and the transaction must ordinarily be entered into with a profit motive. **Now when the ratio of the aforesaid decisions is to be applied to the facts of the present case, the actions of the assessee are not actuated by the profit motive. Transactions of purchasing shares to garner controlling interest could not be regarded as carrying on business for the purpose of section 28 of the Income Tax Act ."**

9. It is settled law that review in the garb of reassessment is absolutely prohibited and the Courts have consistently held that reassessment cannot be allowed in such situation of change of opinion and presence of fresh tangible material is a *sine qu*a non for a valid re-assessment. Where the assessment is sought to be reopened within a period of 4 years, of end of relevant assessment year, this Court in **Jainam Investments vs. Assistant Commissioner**

of Income Tax & Ors.[1] has laid down the settled principles which read as under:

> 12. ....Where the assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the Apex Court in **Commissioner of Income Tax V/s. Kelvinator of India Limited**[2] has laid down the test of the principle which reads as under :
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> "Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" falling which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment 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 reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO 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 s. 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 s.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 AO".

10. In the circumstances, we allow the Petition in terms of prayer clause (a), which reads as under:

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1 [2021] 323 CTR (Bom) 25.
2 (2010) 320 ITR 561.

(a) For a writ of certiorari or a writ, direction or order in the nature of certiorari or any other appropriate writ, direction or order under Article 226 of the Constitution of India calling for the records of the case pertaining to the impugned notice dated 31.03.2010 issued by the Respondent No. 1 under section 148 of the Act to reopen the assessment for the assessment year 2005-06 and the order dated 29.10.2010 rejecting the objections of the Petitioner to the issuance of the notice under section 148 of the Act and after considering the legality thereof quashing and setting aside the same.

11. Petition disposed accordingly with no order as to costs.

(N. J. JAMADAR, J.) (K. R. SHRIRAM, J.)