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

WRIT PETITION NO.2179 OF 2022

The Suminter Organic and Fair Trade Cottton Ginning Mill Pvt. Ltd., having its address as G-1. Black Diamond CHS Ltd, Dand Para Road, Khar West, Mumbai. ... Petitioner

Versus

1. Deputy Commissioner of Income -tax Officer 4(3)(1), Room No.543, 5th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai-400 020

2. Principal Commissioner of Income tax-4, Room No. 629, 6th Floor, Aayakar Bhavan, Maharshi Karve Road, Mumbai-400 020.

3. Union of India Through the Secretary, Ministry of Finance, Government of India, North Block, New Delhi-110 001 ... Respondents

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Mr. S. Sriram a/w Ms. Ushashi Datta i/b Mr. Sriram Sridharan, Advocate for the Petitioner.

Mr. Suresh Kumar for the Respondents.

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CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.

RESERVED ON : 23rd JANUARY 2023
PRONOUNCED ON : 10th FEBRUARY 2023

: J U D G M E N T :

PER DHIRAJ SINGH THAKUR, J.:

. The Petitioner challenges the notice under Section 148 of the Income Tax Act, 1961 ("the Act") dated 30th March, 2021 for the assessment year 2015-16 as also the order dated 08th March, 2022 rejecting the objections raised by the Petitioner regarding the reopening of the assessment proceedings.

2. The reasons for reopening are as under:

The reasons for reopening is that the Petitioner had issued premium of Rs.17 per share, which was not valued correctly in terms of Rule 11UA r/w Section 56(2)(viib) of the Act and that the correct valuation of equity shares as per the aforesaid rule worked out at Rs.6.48 per share. It was thus stated that an amount of Rs.1,68,30,000/- received as premium was required to be added as income from other sources. The reasons also reflect that the assessee had failed to disclose truly and fully the material facts and, therefore, the

case is required to be reopened under Section 147 of the Act.

Objections were filed to the reopening by the Petitioner in which a stand was taken that the assesse had issued 9,90,000 shares of the face value of Rs.10 at premium of Rs.17 per share to its parent company, for a total consideration of Rs.2,67,30,000/-, which was disclosed by the assessee in its annual income tax return filed for the assessment year 2015-16. It was also stated that the return filed to the relevant assessment year was selected under the Computer Assisted Scrutiny Selection ("CASS") System. One of the reasons for selecting the case under scrutiny, as mentioned in the notice dated 23rd March, 2017 was point No. 7(a) therein, pertaining to large share premium received during the year. It was further stated in the objections that the queries raised during the scrutiny assessment were replied by the Petitioner.

A valuation report obtained by the Petitioner from its Chartered Accountant (C.A.) is also stated to have been furnished during the scrutiny assessment, which valuation report determined the fair value of the shares at Rs.28.41 as

against issue price of the shares by the Petitioner at Rs.27 per share. The valuation was arrived at by following the Discounted Cash Flow Method. It was therefore urged that the issue of premium collected by the Petitioner had been gone into during the scrutiny assessment and based upon the specific queries raised and the material supplied, the order of assessment dated 08th November, 2017 came to be passed.

3. Learned Counsel for the Petitioner therefore urged that there was no failure on the part of the Petitioner to disclose fully and truly the material facts during the assessment proceeding and that the reopening of assessment proceeding was nothing but a change of opinion.

4. Section 56(1) of the Income Tax Act envisages that the income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income tax under the head “Income from other sources” if it is not chargeable to income tax under any of the heads specified in Section 14, items A to E.

5. In terms of Section 56(2)(viib), this Section also brings

inter alia within its ambit, a case where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares.

6. Learned Counsel for the Petitioner urged that in accordance with Rule 11UA2(b) of the Income Tax Rules, 1962, ("the Rules") as it stood during the relevant year, before its amendment in 2018, the fair market value of the unquoted equity shares could also be determined by a merchant banker or an accountant as per the Discounted Free Cash Flow Method. Post the amendment with effect from 24th May, 2018 the words "or an accountant" were omitted. It was thus urged that Discounted Free Cash Flow Method adopted by the Petitioner certified by the C.A. was a permissible mode for determining the fair market value of the shares as it had been rightly accepted by the A.O. during the scrutiny assessment proceedings.

7. Learned Counsel for the Respondents on the other hand reiterated that the correct valuation of the equity shares determinable in terms of Rule 11UA of Rules of 1962 was Rs.6.48 by applying the following formula as prescribed under Rule 11UA(2)(a) of Rules, 1962.

8. While it may be true that Rule 11UA(2)(a) of Rules, 1962 prescribes a particular formula as is reflected therein, yet Rule 11UA(2)(a) did give an option to the assessee to follow Rule 11UA(2)(b) i.e. the Discounted Free Cash Flow Method as certified by the C.A. and, therefore, the Petitioner cannot be said to have not disclosed facts fully and truly only because, it had adopted a particular method of determining the fair market value of the shares which was otherwise permissible. The issue with regarding to the valuation of the shares was indeed a subject matter of scrutiny by the A.O. during the assessment proceeding, which was responded to by the Petitioner leading to the passing of the order of assessment dated 08th November, 2017.

For purpose of facility of reference, Rule 11UA(2) is

reproduced as under to show that it did provide such an option to the assessee.

> "Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of *Explanation* to clause (*viib*) of sub-section (2) of Section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at the option of the assessee, namely :- ....."

9. This issue was raised by the A.O. during the assessment proceedings can be seen from the notice dated 23rd March, 2017, which was specifically responded to by the Petitioner vide communication dated 16th May, 2017 and 29th August, 2017.

10. The Supreme Court in ***Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.*** [1]**,** held that there was a difference between 'power to review' and 'power to reassess' under section 147 and that the AO had no power to review and that, if the concept of 'change of opinion' was removed, then, in the

1 [2010] 320 ITR 561

garb of reopening of the assessment, a review would take place.

It was held :

> 4.....Therefore, post-1-4-1989, power to re-open is much wider. 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 be *per se* reason to re-open. 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 re-assess. 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 re-open, 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....."

11. In fact, the Supreme Court in **Kelvinator of India Ltd**. (Supra) had upheld the Full Bench decision of Delhi High Court in ***Commissioner of Income-tax Vs. Kelvinator of India Ltd.***[2]. In the said judgment, a Full Bench of Delhi High Court has held :

> " We also cannot accept submission of Mr. Jolly

2 [2002] 256 ITR-1

> to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi- judicial function to take benefit of its own wrong."

12. We have no hesitation that there was no failure on the part of the assessee to disclose fully and truly the material facts, nor there was any tangible material with the A.O. which would have otherwise justified the reopening of the assessment by issuing the notice impugned.

Be that as it may, the petition is allowed. The order impugned dated 08th March, 2022 and the notice dated 30th

March, 2021 are hereby set aside. The petition is, accordingly, disposed of.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR, J.)**

RUSHIKESH V PATIL

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