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

WRIT PETITION NO.71 OF 2016

M/s. Jai Trust)
Through its current trustee)
1. Mr. Navin C. Ashar)
2. Mr. Bipin N. Jani)
A trust incorporated under the Indian Trust Act,)
1882 having its office at 4th Floor, Ready Money)
Terrace, Dr. A.B. Road, Worli, Mumbai – 400 018) ….Petitioner

V/s.

1. The Union of India)
Through the Secretary, Government of India,)
Ministry of Finance, New Delhi – 110 001)

2. The Income Tax Officer 21(1)(5))
Room No.120, 1st Floor, Piramal Chambers, Parel,)
Mumbai – 400 012) ….Respondents

Mr. P.J. Pardiwalla, Senior Advocate a/w. Ms. Vasanti B. Patel for petitioner.
Mr. Akhileshwar Sharma for respondents – Revenue.

CORAM : K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 8th MARCH 2024

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

1 Petitioner is challenging the legality and validity of notice dated 12th March 2015 issued under Section 148 of the Income Tax Act, 1961 (the Act) by respondent no.2 seeking to reopen petitioner's assessment for Assessment Year 2010-2011 and the order dated 18th August 2015 passed by respondent no.2 rejecting the objections of petitioner challenging reopening.

2 Petitioner, during the previous year relevant to Assessment Year 2010-2011, transferred 30,65,600 shares of United Phosphorus Limited (UPL) and 3,06,560 shares of Uniphos Enterprises Limited (UEL) both public listed companies to one Nerka Chemicals Private Limited (NCPL) by way of a gift in terms of Transfer Deed dated 26th February 2010. Since the shares were transferred by way of a gift, admittedly no consideration was received by petitioner. We say admittedly because it is also respondents' case that petitioner had transferred those shares without consideration. The cost of the shares to petitioner was Rs.1,02,27,547/-.

3 On 22nd July 2010 petitioner filed its return of income for Assessment Year 2010-2011 declaring total income as Nil. This was because the income of petitioner was distributed in the hands of the beneficiaries. Petitioner also claimed refund of tax deducted at source of Rs.547/- in the return of income. In the return of income, petitioner had disclosed the investment of Rs.8,92,335/- standing as of 31st March 2010 in the balance sheet and also the sum of Rs.1,02,27,547/- as gift which was debited to the profit and loss account.

4 Petitioner did not receive any communication after the return of income was filed and since no communication or order was received within the prescribed time, petitioner has proceeded on the basis that the said return of income is deemed to have been processed under Section

143(1) of the Act.

5 On or about 19th March 2015 petitioner received a notice dated 12th March 2015 from respondent no.2 under Section 148 of the Act alleging that there was reason to believe that the income has escaped assessment for Assessment Year 2010-2011. Petitioner was provided with the reasons for initiating the proposed reassessment by a letter dated 7th July 2015 after two reminders.

6 Petitioner, by its letter dated 15th July 2015, filed its objections. The stand of petitioner was as under :

(a) On identical issue, this Court had quashed the reopening proceedings initiated under Section 148 of the Act in the case of one of the group companies, i.e., Nivi Trading Limited, wherein the Assessing Officer initiated reopening proceedings to verify an identical transaction of gift of shares made by petitioner without any consideration;

(b) No income accrues or arises to petitioner from the aforesaid transfer of shares by way of gift since the same has been made voluntarily and without any consideration;

(c) The transfer of shares by way of gift is an exempt transfer under Section 47(iii) and accordingly, not liable to capital gains as defined under Section 45 of the Act;

(d) This Court while disposing of Writ Petition in the case of the transferee company, i.e., Nerka Chemicals Private Limited (Writ Petition No.11911 of 2013) to whom the aforesaid shares have been gifted, was pleased to observe that the shares received by Nerka Chemicals Private Limited were in the nature of gift and accordingly, ought to be treated as capital receipts not liable to tax; and

(e) There is no provision in the Act enabling the Assessing Officer to adopt the market value as the consideration in case of transfer of shares for the purpose of computing capital gains.

7 Respondent no.2 rejected the objections by an order dated 18th August 2015. Thereafter, petitioner filed this petition which came to be admitted by an order dated 11th February 2016 and the same reads as under :

> *Heard.*
>
> *2. Rule.*
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> *3. This Petition challenges the notice dated 12th March, 2015 issued under Section 148 of the Income Tax Act, 1961(the "Act") seeking to reopen the assessment for the Assessment Year 2010-2011.*
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> *4. The reasons recorded in support of the impugned notice as communicated to the Petitioner indicate that the Respondent-assessee had transferred shares without consideration to M/s. Nerka Chemicals Pvt Ltd by transfer deed dated 26th February, 2010. It is the case of the Assessing Officer that these transfer of shares without consideration i.e. gift are chargeable to tax as capital gains. The Petitioner in its objection besides relying upon the decision of this Court in respect of similarly based transferrers (belonging to the same group) i.e. M/s. Nivi Trading Limited v/s Union of India(Writ Petition No.2314 of 2015 rendered on 7th April, 2015) also*

placed reliance upon Section 47(iii) of the Act which provides that no capital gain would be payable on transfer of capital asset as a gift. However, the order disposing of the objections does not even refer to the objection based on Section 47(iii) of the Act much less deal with it. Besides nothing has been shown to us which would permit the Assessing Officer to substitute the nil consideration received on gifts by the market value of the shares i.e. movable.

5. Be that as it may, the reasons recorded for issuing the impugned notice, prima facie, do not indicate in the face of Section 47(iii) of the Act that the Assessing Officer could have reason to believe that income chargeable to tax as capital gains has escaped assessment.

6. In the above view, there shall be interim relief in terms of prayer clause(b).

8 Mr. Pardiwalla submitted as under :

(a) Before proceedings under Section 148 of the Act could be validly initiated, there are certain jurisdictional preconditions to be complied with one of which is that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment prior to the initiation of the proceedings. This condition is not complied with in the present case because there cannot be any reason to believe that income has escaped assessment because there is no income that could be assessed to tax;

(b) Respondent no.2 has accepted that petitioner has transferred 33,72,160 shares to NCPL without any consideration. Once respondent no.2 has accepted that the shares are transferred without any consideration, there can be no material on the basis of which any person could have validly formed a reason to believe that any income is chargeable

to tax;

(c) Only if petitioner had received any consideration as a result of the transfer of such shares, then the same could be charged to tax under the head “capital gains” in terms of Section 45 read with Section 48 of the Act. Since the shares were transferred without any consideration, there cannot be any gain which has accrued to or been received by petitioner which can be held liable to be taxed under the head “capital gains”;

(d) Before any income can be brought to charge under the head “capital gain” in terms of Section 45 of the Act, the computation provision of Section 48 must be capable of being applied as the charging and the computation provision are integrated code. In the present case, as the computation provision fail in as much as there is no consideration, there can be no reason to believe that any income has escaped assessment;

(e) Respondent no.2 could not have held that the market value of shares gifted by petitioner was found out to be Rs.48,49,77,920/- and petitioner did not offer the resultant income for tax and in view of this, petitioner has understated the income and the same has been under assessed. Explanation 2(c)(i) of Section 147 of the Act, which has been relied upon in the reason to believe, is applicable to cases where assessment has been made but income chargeable to tax has been under assessed. In the present case, the regular assessment has not been done by the Assessing

Officer and the return of income is deemed to have been processed under Section 143(1) of the Act. Hence, the reliance by respondent no.2 on Explanation 2(c)(i) of Section 147 of the Act to the facts of the present case is not correct.

(f) In the affidavit in reply filed through one Ranjeet Kumar Sinha and affirmed on 13th October 2015, there is no stand taken to speak of. The Officer has only explained that according to him Explanation 2(c)(i) of Section 147 of the Act was correctly invoked and there was *prima facie* facts which gave reason to believe income has escaped assessment.

9 Mr. Sharma submitted that that the Court has to only consider whether the Assessing Officer in the reason to believe has relied on some tangible material and if that is the case, assessee should be directed to go through the process of reopening. What is tangible is something which is not illusory, hypothetical or a matter of conjecture.

10 We are conscious that in this case return was accepted under Section 143(1) of the Act. Even in that case, the principle requirement that the Assessing Officer has reason to believe that income chargeable to tax had escaped assessment would still survive. Though this formation of belief by the Assessing Officer must be *prima facie* and at the stage when the Court is testing validity of such a notice, it would not be necessary for the Assessing Officer to conclusively establish that the income chargeable to tax

had escaped assessment, for various reasons we are convinced that the reasons for reopening lack validity.

11 In this case, Section 45 read with Section 47 read with Section 48 of the Act makes it clear that the Assessing Officer could not have any tangible material to form a belief that income has escaped assessment. On scrutiny of the statutory provisions as the transaction in question does not invite any tax liability, we cannot accept Mr. Sharma's submission that there is some tangible material to form a belief that there is an escapement of income.

12 The provisions which matter in this petition are Section 45(1), Section 47(iii) and Section 48 of the Act which read as under :

> *Capital gains.*
>
> ***45. (1)*** *Any profits or gains arising from the transfer of a capital asset effected in the previous year shall, save as otherwise provided in sections 54, 54B, 54D, 54E, 54EA, 54EB, 54F, 54G and 54H ,be chargeable to income tax under the head "capital gains", and shall be deemed to be the income of the previous year in which the transfer took place.*
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> *xxxxxxxxxxxx*
>
> *Transactions not regarded as transfer.*
>
> ***47.*** *Nothing contained in section 45 shall apply to the following transfers :*
>
> *xxxxxxxxxxxx*
>
> ***(iii)*** *any transfer of a capital asset under a gift or will or an irrevocable trust:*
>
> *Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares,*

debentures or warrants allotted by a company directly or indirectly to its employees under any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf;

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Mode of computation.

48. *The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely :*

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

(iii) in case of value of any money or capital asset received by a specified person from a specified entity referred to in sub-section (4) of section 45, the amount chargeable to income-tax as income of such specified entity under that sub-section which is attributable to the capital asset being transferred by the specified entity, calculated in the prescribed manner:

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13 Therefore, under Section 45 of the Act any profits or gains arising from the transfer of a capital asset shall be chargeable to income tax under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. Therefore, (a) there has to be a capital asset, (b) there has to be a transfer of such a capital asset and (c) there has to be a profit or gain arising from the transfer. Only when these three conditions are fulfilled, can the profit or gain be charged to income tax under the head "capital gains".

14 Section 47 (1)(iii) of the Act, which deals with transactions not regarded as transfer, expressly provides nothing contained in Section 45 shall apply to any transfer of a capital asset under a gift or will or an irrevocable trust. The proviso in clause (iii) of Section 47 of the Act for apparent reasons is not applicable to the case at hand. This proviso is in the nature of exclusion to main provisions of sub-clause (iii) of Section 47 of the Act. The case in hand, therefore, would be governed by the main body of sub-clause (iii) of Section 47 of the Act. Therefore, even if there is a transfer of a capital asset under a gift, which admittedly in the case herein, it shall not amount to a transfer under Section 45 of the Act. If it does not amount to a transfer under Section 45 of the Act, no capital gains will be payable because Section 45 is the only taxing provision for capital gains.

15 Moreover, Section 45 of the Act provides, any profits or gains arising from the transfer of a capital asset - it means there has to be a consideration received by assessee. Only when there is a consideration received, can the profit or gain be measured. This is evident from Section 48 of the Act which says "*the income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset .....*".

16 Consequently, the provision of Section 45 of the Act pertaining to capital gain would not apply.

17 We also gain support for this view from a judgment of the Gujarat High Court in ***Prakriya Pharmacem V/s. Income Tax Officer, Ward-7***[1] where paragraphs 7, 10 to 13 read as under :

> *7. We are conscious that in the present case return of the income filed by the petitioner was not taken in scrutiny. No scrutiny assessment was therefore, framed. Return was only accepted under section 143(1) of the Act. In that view of the matter the scope for the Assessing Officer to reopen such assessment on a valid reason to believe that the income chargeable to tax had escaped assessment would be much wider compared to the case where scrutiny assessment has been framed. This would be so since there would be no opinion formed by the Assessing Officer while accepting return under section 143(1) of the Act without scrutiny. Consequently, therefore, the question of change of opinion would not arise. This is in sum and substance held by the Supreme Court in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd. (supra). It is on this ground that the Supreme Court had in the case of Commissioner of Income Tax and another Vs. Zuari Estate Development and Investment Company Ltd. (supra) reversed the judgment of the High Court. However, even in the case of assessment previously framed without scrutiny which is sought to be reopened by issuance of notice under section 148 of the Act, the principle requirement that the Assessing Officer has reason to believe that the income chargeable to tax had escaped assessment would still survive. Of course, this formation of belief by the Assessing Officer must be prima facie and at the stage when the Court is testing validity of such a notice; it would not be necessary for the Assessing Officer to conclusively establish that the income chargeable to tax had escaped assessment.*
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> *xxxxxxxxxxxx*
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> *10. For multiple reasons we are convinced that these reasons lack validity. The first and foremost, reasons themselves record merely the transaction and nothing more. Quite apart from there not being live link between the first portion of the*

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reasons recorded, namely, by merely duplicating the recording of transaction of transfer of sizable number of shares having considerable market value without consideration and second portion of the reasons where he concluded that the income chargeable to tax had escaped assessment.

11. Quite apart from this, even on greater scrutiny of the statutory provisions, we find that the transaction in question did not invite any tax liability on the petitioner. Section 45 of the Act, as is well known, pertains to capital gains. Subsection (1) thereof in particular provides for charging of tax on any profit or gain from transfer of capital assets as deemed income of the assessee for the previous year in which transfer took place. Section 47 of the Act pertains to transaction not regarded as transfer. Sub-clause (iii), which is relevant for our purpose reads as under :

> *47. Nothing contained in section 45 shall apply to the following transfers :-*
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> *(i) and (ii) xxx xxx*
>
> *(iii) any transfer of a capital asset under a gift or will or an irrevocable trust:*
>
> *Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly to its employees under any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf.*

Under sub-clause (iii) of section 47 of the Act, therefore, nothing would apply to any transfer of capital assets under a gift or will or irrevocable trust. It is not the case of the Assessing Officer that the present case is not one of transfer of asset under a gift. In terms of sub-clause (iii) of section 47 of the Act, thus such transfer would not be governed by section 45 of the Act. For apparent reasons, the proviso to subsection (iii) of section 47 of the Act would not apply to the present case, since it applies to any transfer under gift or irrevocable trust under capital asset in the nature of shares, debentures or warrants allotted by a company to its employees under Employees' Stock Option Plan or Scheme. Admittedly, this is not such a case. This proviso is in the nature of exclusion to main provisions of sub-clause (iii) of section 47 of the Act. Under the circumstances, the case on

hand would be governed by the main body of sub-clause (iii) of section 47 of the Act and consequently, the provision of section 45 of the Act pertaining to capital gain would not apply.

12. An attempt was made by the Assessing Officer to apply further to proviso to section 48 of the Act. Section 48 of the Act pertains to mode of computation. It essentially provides that the income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely, expenditure incurred wholly and exclusively in connection with such transfer, and the cost of acquisition of the asset and the cost of any improvement.

Further proviso to section 48 of the Act which the respondents want to press into service reads as under:

> *Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section.*

13. For the simple reason this proviso would not apply in the case on hand. Firstly section 48 of the Act itself provides for mode of computation of income chargeable as capital gain. Sub-clause (iii) of section 47 of the Act excludes application of section 45 of the Act in case of certain transfers. By no application of section 48 of the Act, such exclusion can be ignored. Section 48 of the Act only aims to provide for formula for computation of income chargeable as capital gain. Further, this proviso provides for computation of income which is referred to in proviso to sub-clause (iii) of section 47 of the Act, and thus, would cover cases which are to be excluded from the purview of sub-clause (iii) of section 47 of the Act. As noted, the case on hand does not fall within the proviso to sub- clause (iii) of section 47 of the Act, and therefore, mode of computation provided under section 48 of the Act would simply not apply.

18 Mr. Sharma's reliance on Section 50CA of the Act in this regard has to be rejected because (a) Section 50CA of the Act was inserted with

effect from 1st April 2018 by the Finance Act, 2017 and (b) it applies to a capital asset being share of a company other than a quoted share (in this case shares transferred were quoted shares) and also applies only where the consideration received or accruing as a result of such transfer. Mr. Sharma's reliance on Section 50D of the Act also has to be rejected because (a) it was inserted by Finance Act, 2012 with effect from 1st April 2013 and (b) there also the Section postulates receiving consideration and not a situation where admittedly no consideration has been received.

19 A gift is commonly known as voluntary transfer of property by one to another without any consideration. A gift does not require a consideration and if there is a consideration for the transaction, it is not a gift. Since in the reason to believe it is admitted that shares were transferred by assessee to NCPL without consideration, certainly it is a gift. Infact it is not even respondents' case that is it not a gift. Mr. Sharma submitted, as an after thought, that assessee being a Trust it can be reasonably presumed that the transfer was for a consideration because anything a Trust does is for the benefit of its beneficiaries. It is not the case of the Revenue in the reasons to believe or in the order disposing objections or even in the affidavit in reply. Therefore, this submission of Mr. Sharma cannot be even considered. We cannot proceed on hypothesis and deal with such presumptuous argument. Moreover, if the transfer is not valid, the

property still remains with the Trust and in such a situation, there can be no capital gain.

20 In the circumstances, the Rule issued on 11th February 2016 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 a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner's case and after examining the legality and validity thereof quash and set aside the Impugned Notice dated 12 March 2015 issued by Respondent No.2 under section 148 of the Act (Exhibit A) and the Impugned Order dated 18 August 2015 (Exhibit B).*

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