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

WRIT PETITION NO.2771 OF 2022
WITH
WRIT PETITION NO.2021 OF 2022

Dilip Gangaram Patil
At Vashi Village, Plot No.136,
Chaitanya Villa, Vashi,
Navi Mumbai – 400 703
PAN : AKEPP0668H

...Petitioner

Versus

1. Additional/Joint/Deputy Assistant
Commissioner of Income/Income Tax
Officer, National Faceless Assessment
Centre, Delhi
2. Assistant Commissioner of Income Tax
Circle – 27(1), Mumbai Room No.415,
4th Floor, Tower No.6, Vashi Railway
Station, Commercial Complex,
Vashi, Navi Mumbai – 400 703
3. Principal Commissioner of Income Tax-27,
Mumbai Room No.401, 4th Floor,
Tower No.6, Vashi Railway Station,
Commercial Complex,
Vashi, Navi Mumbai – 400 703

...Respondents

Ms. Rutuja N. Pawar a/w Ms. Sneha More and Ms. Hetal Laghave for the
Petitioner.

Mr. Akhileshwar Sharma for the Respondents.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.

RESERVED ON : 18 February 2025

PRONOUNCED ON : 20 February 2025

JUDGMENT (Per Jitendra Jain J):-

1. Rule. By consent of the parties, since pleadings are completed, taken up for final disposal. By consent of the parties, both the writ petitions are disposed of by common order since the issue involved is identical. We propose to treat Writ Petition No.2771 of 2022 as a lead matter.

2. The petitioner challenges notice dated 25 March 2021 issued under Section 148 of the Income Tax Act, 1961 ('the Act') for the assessment year 2013-14.

Brief facts :

3. The petitioner is engaged in the business of real estate and has filed his return of income on 27 September 2013 declaring total income of Rs.54,91,960/-. On 31 December 2015, an assessment order under Section 143(3) of the Act came to be passed accepting the return income.

Proceedings u/s 263 :

4. On 29 November 2017, a notice under Section 263 of the Act came to be issued by the Commissioner of Income Tax on the ground that M/s. Orchid Builders and Developers has sold 6 flats on behalf of the petitioner for Rs.2,74,94,950/-. However, the same is not reflected in the profit and loss account for the year ending 31 March 2013. The notice further seeks to examine disallowance on account of interest payment and proposes to examine income from house property which was not offered for tax. The petitioner filed his reply to the said show cause notice vide letter dated 1 March 2018. On 16 March 2018, an order under Section 263 was passed by the Commissioner of Income-tax

setting aside the assessment order with a direction to conduct proper inquiries, investigation and examine all the issues raised in 263 notice and pass a fresh order. Pursuant to the said direction, Assessing Officer on, 14 December 2018, passed an assessment order under Section 143 (3) read with Section 263 assessing income of the petitioner at Rs.57,06,250/- by making additions on account of notional rent under the head 'income from house property.'

Proceedings u/s 148 :

5. On 25 March 2021, a notice under Section 148 of the Act was issued to the petitioner calling upon the petitioner to file his return of income for assessment year 2013-14 since the respondents proposed to reassess the income under Section 147 of the Act. The petitioner on 4 January 2022 filed his return of income in compliance with the said impugned notice. On a request being made by the petitioner, the reasons recorded for reopening the case were furnished on 22 March 2021. The petitioner vide letter dated 2 March 2022 objected to the reasons for reopening on the ground that the issue for which the reopening is sought was subject matter of 263 proceedings and, therefore, reopening is bad-in-law. The petitioner also raised objection with respect to there being no failure to disclose fully and truly all material facts and further challenged the sanction obtained from the Commissioner of Income Tax under Section 151 of the Act. On 11 March 2022, an order rejecting the objections came to be passed. In the said order, the reopening was justified on the grounds that, if in the original assessment, the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Assessing Officer, the assessment can be reopened on the basis of information obtained from the original

assessment. In the said order, reliance was placed on the decision of the Supreme Court in the case of *Kalyanji Mavji & Co. Vs. CIT*¹.

6. It is on the above backdrop that the petitioner is before us challenging the order rejecting the objections dated 11 March 2022 and notice under Section 148 of the Act dated 25 March 2021.

7. Ms. Pawar, learned counsel for the petitioner submits that in the absence of any failure to disclose fully and truly all material facts, the impugned proceedings cannot be initiated and for this submission, she placed reliance on the first proviso to Section 147 of the Act. She further relied upon the third proviso to Section 147 of the Act and submitted that since in the instant case an order under Section 263 of the Act was passed and there being no fresh material to reopen the case, the impugned proceedings were bad-in-law.

8. Ms. Pawar further submitted that the issue for which reopening is sought was subject matter of not only proceedings under Section 263 of the Act but also an order passed pursuant to the directions under Section 263 of the Act and, therefore, the impugned proceedings are based on change of opinion. She further submitted that the reliance placed by the respondent on the Supreme Court's decision in the case of *Kalyanji Mavji & Co. (supra)* is no more a good law as per the decision of the Supreme Court in the case of *Indian & Eastern Newspaper Society Vs. Commissioner of Income-tax*². Therefore, she submitted that the impugned notice should be quashed.

9. In support of her submissions, she relied upon the following case

1 (1976) 102 ITR 287 (SC)

2 (1979) 2 Taxman 197 (SC)

laws :-

- i. *ACIT, Circle 12(3)(2) Vs Marico Ltd.* ³
- ii. *CIT, Delhi Vs Kelvinator of India Ltd.* ⁴
- iii. *PCIT Vs State Bank of India* ⁵
- iv. *State Bank of India Vs ACIT, Circle 2(2)(1), Mumbai* ⁶
- v. *ITO Vs Lakhmani Mewal Das* ⁷
- vi. *Hindustan Lever Ltd. Vs R.B.Wadkar* ⁸
- vii. *Chandra Global Finance Ltd. Vs ITO* ⁹
- viii. *Saravana Stocks Investments (P) Ltd Vs DCIT* ¹⁰
- ix. *Samet Estates (P) Ltd. Vs CIT* ¹¹
- x. *Tumkur Minerals (P) Ltd. Vs JCIT* ¹²
- xi. *HDFC Bank Ltd. Vs ACIT* ¹³

10. Mr. Sharma, learned counsel for the respondent defended the impugned proceedings by relying upon the reasons recorded and the order rejecting the objections. He submitted and prayed that the petition be dismissed.

11. We have heard learned counsel for the petitioner and respondent and with their assistance have perused the documents on record.

12. Admittedly, the reopening is sought to be done beyond the period of 4 years from the end of the relevant assessment year. The reasons for reopening as furnished to the petitioner reads as under:-

3 (2021) 133 taxmann.com 122 (SC)

4 (2010) 187 Taxman 312 (SC)

5 (2022) 145 taxmann.com 33 (SC)

6 (2019) 103 taxmann.com 164 (Bombay)

7 (1976) 103 ITR 437 (SC)

8 (2004) 137 Taxman 479 (Bombay)

9 (2024) 168 taxmann.com 182 (Delhi)

10 (2021) 133 taxmann.com 315 (Madras)

11 (2022) 140 taxmann.com 342 (Bombay)

12 (2022) 145 taxmann.com 397 (Bombay)

13 (2022) 136 taxmann.com 69(Bombay)

ANNEXURE

Reasons to issue notice u/s 148 of the IT Act, 1961 in the case of

Dilip G. Patil

A.Y. 2013-14

1. Brief details of the Assessee :-

Assessee filed return of income for A.Y.2013-14 on 27/09/2013 declaring total income at Rs.54,91,960/-. Assessment u/s.143(3) was completed on 31/12/2015 accepting the returned income.

1. Brief details of information collected/received by the AO :-

On perusal of records, it is observed that there is underassessment of total income to the tune of Rs. 3,39,61,096/-.

1. Analysis of information collected/ received :-

On verification of records, the following issues have been identified:

1. Sale consideration of flats not fully offered for taxation

On perusal of case record, it is observed that in the P&L account, the assessee has shown total receipts of Rs.3,69,80,163/-, the details of which are not explained. From the letter dtd. 18.03.2013 of Orchid Builders and Developers (copy enclosed) addressed to the assessee, it is seen that Orchid Builders and Developers sold six flats for a total cost of Rs.2,74,94,950/- on behalf of assessee and remitted the amount to assessee. A copy of Deed of Settlement of Dispute dtd.29.03.2010 placed on record in the file of Orchid Builders and Developers clearly states the terms and conditions between the assessee and Orchid Builders and Developers that assessee an investor will own 38 flats (50%) from the said building without any expenses in addition to Rs. 2,30,00,000/- as settlement compensation from Orchid Builders and Developers to assessee .

In view of the above, it is clear that assessee did not incur any expenses against the receipt of Rs. 2,74,94,950/- from sale of six flats. The entire income should have been taxed in the hands of the assessee, as out of 38 flats, 6 flats have been sold during the year and the closing stock has been

shown at Rs. 1,66,88,066/- from which it can be presumed that out of total 38 flats only a few flats are remaining to be sold which has been shown as closing stock. From the above, it is clear that assessee has already sold out major portion of the flats out of 38 flats owned by him and receipt from remaining flats is not offered by the assessee.

Therefore, the receipts of Rs. 2,74,94,950/- should have been fully offered for taxation, since the assessee has not incurred any expenses on the same.

It is further observed that CIDCO had allotted plot of land No.63, Sector-14, Koparkhairne, Navi Mumbai admeasuring 2299 square meters to Shivshankar CHS Ltd. comprising 30 project affected persons of Village Koperkhairane, Navi Mumbai under 12.5% scheme. Assessee vide copy of unregistered Development Agreement cum sale dtd.27.02.2008 with Shivshankar CHS Ltd. for development of the said plot, the number of members in the society is mentioned as 31 instead of 30 as per original allotment by CIDCO to 30 PAPs. As per the said agreement the assessee agreed to pay Rs. 2,45,30,000/- to the members for the development rights but has paid only Rs. 1,22,00,000/-. No proof for the said payments is placed on record.

Shivshankar CHS Ltd. vide letter dtd. 30.10.2009 sought permission of Jt. Registrar of Co-op. Society for holding Special General Body Meeting for calling tender for sale/transfer of the Plot No. 63, Sector-14, Koparkhairne. Finally, the tender was given to M/s. Orchid Builders & Developers being the highest bidder for a consideration of Rs.2,50,00,000/-. Vide final transfer order dtd.23.02.2010, CIDCO transferred the plot in favour of Orchid Builders & Developers. The assessee raised an objection against the said transfer vide letter dtd.27.02.2010 and claimed his rights upon the said plot of land and included one more name in the list of members and shown as 31 nos instead of 30. Thereafter, vide Deed of Settlement of Dispute between M/s. Rahul Builders & Developers (the assessee-Investor) and M/s. Orchid Builders & Developers(Builder) and ShivShankar CHS dtd.29.03.2010, M/s. Orchid Builders & Developers(Builder) agreed to pay a sum of Rs.2,30,00,000/- in terms of monetary consideration as well as 50% share in the newly constructed building. As per the said agreement, the builder M/s. Orchid Builders & Developers has to incur all expenses related to development viz. Municipal charges payment to architect, materials, sub-contractor and after related construction expenses. It is pertinent to note that inspite of the fact that all expenses are being incurred by M/s. Orchid Builders & Developers(Builder), the assessee has claimed various expenses against the receipts in the P&L account. Moreover, the assessee has also claimed plot

expenses amounting to Rs 3,33,62,460/-, the veracity of which is not known. It may also be noted that the assessee Shri Dilip G. Patil, Mrs. Rajani D. Patil, wife and his son Shri Rahul D. Patil are all partners of M/s. Orchid Builders & Developers.

1. Interest expenses not allowable

On perusal of the Balance Sheet, it is seen that the assessee has debited interest paid of Rs.15,69,923/- against unsecured loan. On perusal of the balance sheet it is seen that an amount of Rs.5,23,44,852/- has been received by the assessee from customers and the same is lying with the assessee at his disposal whereas assessee has shown unsecured loan of Rs.2,18,68,679/- against which interest of Rs.15,69,923/- has been paid. From the above, it is clear that assessee does not require any unsecured loan for the purpose of current ongoing project. The balance sheet also shows an amount of Rs.2,30,94,340/- as Loans and Advances and no interest from this loan and advances has been earned during the year. The case has been selected for scrutiny under CASS for the reason "large increase of unsecured loan". Assessee's current assets including loans and advances is shown at Rs.9,30,42,313/-. Accordingly, the interest paid of Rs.15,69,923/- is not related to the expenses of the project under consideration and no nexus of interest expenses is proved by the assessee.

1. Income from House property income not offered

On perusal of the balance sheet, it is seen that the assessee owns five house properties. In spite of owning five house properties, the assessee has not shown any income from house property during the year. From the Returns of Income for A.Y. 2011-12 and A.Y. 2012-13, it is noticed that assessee has offered income from house property at Rs.1,15,235/- and Rs.1,15,290/-. The details of properties (as per Schedule of fixed assets) owned by the assessee are as under :-

1	Flat at Vashi Gaon	Rs.11,50,000
2	Flat at Vashi	Rs.31,50,000
3	Flat at Koparkhairane	Rs. 7,75,000
4	Flat in Aniket Apartment	Rs.21,71,545

5	Flat in Shraddha Apartment	Rs.8,80,000
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In view of the above, the ALV of the property held by the assessee has to be worked out for computing income from house property. The flat at Vashi appearing at Sr. No. 2 of the table, is considered as SOP, as the same is higher in value. The other four properties, therefore, have to be considered as deemed to be let out properties.

Since the fair market rent of the property is not available, as per the decision of Gujarat High Court in the case of Shri Bipinbhai Vadilal Family Trust Vs. CIT (208 ITR 1005)(Guj), 8% of the property value is reasonable estimate for determining the annual value of the property. Relying on the Gujarat High Court's decision, in this case also 8% of the value of the property should have been estimated by the A.O. for determining the value of property, the working of the same is as under :-

1	Flat at Vashi Gaon	11,50,000
2	Flat at Koparkhairane	7,75,000
3	Flat in Aniket Apartment	21,71,545
4	Flat in Shraddha Apartment	8,80,000
		49,76,545
	ALV : 8% of Rs.49,76,545	Rs.3,98,124
	Less: Deduction u/s.24(a) @30% of ALV	Rs.1,19,437
	Income from House property	Rs.2,78,687

1. Contract receipt fully not offered for taxation

On perusal of Form 3CD at Col.No.18, it is seen that the Auditor has specified

the payment made to persons specified u/s.40A(2)(b) viz. Smt. Rajani D. Patil, wife at Rs.9,61,450/- and Rs.88,05,450/- to Shri Rahul D. Patil, Son, towards contract expenses totaling to Rs.97,66,900/-, whereas in the P&L account the assessee has debited Rs.57,73,464/- as contract charges. Thus, there is a difference of Rs.39,93,436/- which has not been explained by the assessee. No details in this regard are placed on record (copy of Form 3CD and P&L account are enclosed). Further, no TDS has been deducted on this payment, being the first year of audit. The P&L account of Smt. Rajani D. Patil and Shri Rahul D. Patil does not show any such receipts from the assessee in the form of contract, as claimed by the assessee .

1. Office rent claimed in spite of having own premises

As per Schedule A of fixed assets, the assessee owns office valued at Rs.17,42,000/-. In the P&L account the assessee has debited office rent at Rs.6,24,100/-. In spite of owning an office, the assessee has debited office rent of Rs.6,24,100/-, no explanation or proof in respect of the same is on record.

1. Undisclosed income on sale of flat

It is observed that the assessee has sold 6 flats during the A.Y. 2013-14. On perusal of the record for A.Y. 2014-15, it is seen that the assessee has sold 5 flats and the closing stock stands at nil which shows that the assessee has sold all the 38 flats which is under his possession, as per the above stated agreement. On perusal of Returns of Income for the A.Y.2011-12 and 2012-13, it is seen that the assessee has shown total income of Rs.14,17,740/- and Rs.20,37,169/- respectively. From the above, it can be concluded that the assessee has not offered any income against the consideration from the balance 27 flats. The date of commencement of the project is shown as 09.05.2010 and the date of receipt of occupation certificate is 19.07.2013.

1. Proportionate disallowance on account of personal use of vehicle

The assessee is a proprietor having three cars costing Rs.1,12,94,027/- against which depreciation is claimed at Rs. 9,12,305/-. The assessee has claimed vehicle expenses at Rs.13,41,560/- and insurance at Rs.2,43,870/- in the P&L account. In the assessment order, no proportionate disallowance on account of personal use of vehicles has been made.

During the assessment proceedings an amount of Rs. 3,39,61,096/- has escaped assessment for A.Y. 2013-14, due to failure on the part of the assessee to disclose true and correct income.

1. Enquires made by the AO as sequel to information collected/ received :-

On verification of the records, it is verified that the assessee has wrongly claimed expenses and not offered income.

1. Findings of the AO :-

During the course of assessment proceedings the assessee wrongly claimed expenses and not offered income. Thus income chargeable to tax amounting to Rs. 3,39,61,096/- has escaped assessment for F.Y. 2012-13 relevant to A.Y. 2013-14 by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for A.Y. 2013-14.

1. Basis of forming reason to believe and details of escapement of income :-

As the assessee has during the course of assessment proceedings failed to disclose fully and truly all material facts necessary for his assessment, for A.Y. 2013-14. I have reason to believe that an amount of Rs. 3,39,61,096/- has escaped assessment for A.Y. 2013-14, within the meaning of provisions of section 147 of the Income Tax Act, 1961, due to failure on the part of the assessee to disclose true and correct income.

1. Escapement of Income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India :-

2. Applicability of the provisions of section 147/151 to the facts of the case :-

Assessee filed return of income for A.Y.2013-14 on 27/09/2013 declaring total income at Rs.54,91,960/-. Assessment u/s.143(3) was completed on 31/12/2015 accepting the returned income. Since four years from end of relevant assessment year has expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the F.Y. 2012-13 relevant to A.Y. 2013-14 has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for A.Y. 2013-14.

It is pertinent to mention here that reasons to believe that income of Rs. 3,39,61,096/- has escaped assessment for A.Y. 2013-14 have been recorded above(para 6 above). I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during assessment proceedings and have noted that the assessee has not fully and truly disclosed the material facts necessary for his assessment for A.Y. 2013-14.

13. At the outset, the reasons recorded seek to reopen the assessment which was made under Section 143(3) of the Act on 31 December 2015. It is important to note at this stage that, this order of 31 December 2015

was set aside by the PCIT in revisional proceedings under Section 263 of the Act vide order dated 16 March 2018. The assessing officer passed a fresh assessment order pursuant to the direction issued under Section 263 of the Act on 14 December 2018. Therefore, the original assessment dated 31 December 2015 which is sought to be reopened did not exist on the date of recording the reasons and, therefore, on this ground itself the proceedings are bad in law. The assessing officer glossed over the assessment order passed under Section 143(3) read with Section 263 of the Act on 14 December 2018 which was the order in existence on the date of recording reasons and sought to reopen the assessment order which was not in existence.

14. In any event, the issues raised in the reasons recorded for reopening are identical to the reasons for which revisional proceedings under Section 263 of the Act were initiated by the PCIT on 29 November 2017. The said revisional order under Section 263 of the Act was passed on 16 March 2018 directing the assessing officer to examine the issues raised in the revisional proceedings and pass a fresh order. Therefore, on the same ground the assessing officer is not justified to reopen the case, moreso, after a period of 4 years. In our view, even the approving authority should not have given his approval after he himself having passed the order under Section 263 of the Act. Therefore, even on this ground since the issues were subject matter of 263 proceedings, the impugned proceedings are barred by 3rd proviso of Section 147 of the Act.

15. The reasons recorded initially states that there has been no disclosure of material facts necessary in the assessment but, what were the material facts which were not disclosed has not been stated. On perusal of the reasons recorded it is observed that the officer himself has

recorded that it is based on the perusal of records and verification of records that reopening proceedings are initiated. In our view, on this ground also the pre-condition required of failure to disclose truly and material facts necessary for the assessment is not satisfied and therefore, the proceedings are bad in law as per the proviso of Section 147 of the Act.

16. It is important to note that in the order rejecting the objections, the officer states that the reopening is permissible if in the original assessment the Assessing Officer has through inadvertence oversight given relief. In our view, if that be the case, then, certainly no proceedings could have been initiated by the respondent by virtue of first proviso to Section 147 of the Act because according to the respondent, it is the mistake of the predecessor Officer and, therefore, the issue of any failure to disclose fully and truly all necessary facts for the assessment by the petitioner would not arise. In any case, pursuant to the direction under Section 263 of the Act, the Assessing Officer examined all the issues which are also subject matter of the present proceedings and passed the assessment order on 14 December 2018. Therefore, any attempt now to re-agitate the issues which were already examined while passing the assessment order pursuant to directions in 263 proceedings would be based on change of opinion and review of the earlier order which is not permissible.

17. The learned counsel for the petitioner is justified on relying upon the decision in the case of *Samet Estates (P) Ltd. (Supra)* where on very similar ground where 263 proceedings were initiated, reopening was quashed by Co-ordinate bench of this Court. The learned counsel for the petitioner is justified in stating that the decision in the case of *Kalyanji Mavji & Co. (Supra)* relied upon by the respondent is no more a good

law post the decision of the Supreme Court in the case of *Indian Express Newspaper (Supra)*.

18. In view of the above, the impugned notice under Section 148 of the Act for the assessment year 2013-14 dated 25 March 2021 is quashed and set aside. The Rule is made absolute in the above terms.

Writ Petition No.2021 of 2022 :-

19. For the reasons recorded in Writ Petition No.2771 of 2022 the notice under Section 148 of the Act dated 25 March 2021 for the assessment year 2014-15 is also quashed and set aside.

20. Both the petitions are disposed of.

(Jitendra Jain, J.)

(M. S. Sonak, J.)