IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2840 OF 2022

Konark Life Spaces, }
A registered Partnership Firm, }
1st Floor, Konark Plaza, Sapna }
Talkies, Nr. Sapna Garden }
Ulhasnagar, Maharashtra-421003} ... Petitioner

Versus

1. Assistant Commissioner of }
Income -Tax, Central Circle – 4, }
Thane, Ashar IT Park, 6th Floor, }
Road No. 16Z, Wagle Industrial }
Estate, Thane (W), Maharashtra }
– 400 604 }

2. Union of India, through the }
Secretary Department of Revenue}
Ministry of Finance, North Block, }
New Delhi – 1100 01 } … Respondents

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Dr. K. Shivram, Senior Advocate a/w Mr. Rahul Hakani, Advocates for the Petitioner.

Mr. Suresh Kumar, Advocate for the Respondents.

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CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.

RESERVED ON : 12th JANUARY, 2023.

PRONOUNCED ON : 10th FEBRUARY, 2023.

JUDGMENT

PER DHIRAJ SINGH THAKUR, J.:

. The Petitioner assessee challenges the notice under Section 148 of the Income Tax Act, 1961 ("the Act") dated 30th March, 2021, whereby seeking to reopen the assessment year 2015-16. The reasons for reopening as communicated to the Petitioner was an advance payment of Rs.17,76,08,505/- made to M/s Nancy Builders and Developers Pvt. Ltd., which according to the Assessing Offcer (A.O.), remain unexplained and, therefore, it was alleged that the Petitioner had failed to disclose fully and truly all material facts necessary for the reassessment.

2. Reasons as communicated to the Petitioner, briefy stated are as under:

> "**(2) Brief details of the information collected/received by the AO:**
>
> On the basis of material available on record it is seen that the assessee has disclosed payment of advance of Rs. 17,76,08,505/- to M/s Nancy Builders and Developers Pvt Ltd. The assessee had paid the said amount for acquiring development rights in a property which has been acquired by them from one M/s Goel Ganga Developers India Pvt Ltd. A MOU (Memorandum of Understanding) between Goel Ganga Developers Private Limited and Nancy Builders and Developers Private Limited was entered into on 09/09/2011. Further it is noticed that the assessee entered into a MOU on 05/04/2012 with M/s Nancy Builders and Developers to acquire the development rights acquired by them from M/s Goel Ganga Developers Private Limited.
>
> Considering the above facts of the case, it is established that MOU is only a colourable device to transfer the money to M/s Nancy Builders as there is no agreement between the assessee and the original owner for transfer of the said development rights.

Therefore, such transaction is to be treated as unexplained investment u/s 69 and brought to taxation.

(3) Analysis of information collected/received:

On perusal of the records it is seen that the assessee has not entered into MOU to acquire the development rights directly with the original party i.e. M/s Goel Ganga Developers Private Limited, but with M/s Nancy Builders and Developers. There is not agreement between the assessee and the original owner for transfer of the development rights.

(4) Inquiries made by AO as a sequel to information collected/received:

On perusal of the records it is seen that the assessee has not entered into MOU to acquire the development rights directly with the original party i.e. M/s Goel Ganga Developers Private Limited, but with M/s Nancy Builders and Developers.

(5) Findings of the AO:

On perusal of the records it is noticed that M/s Goel Ganga Developers Private Limited, the original party was not a party of the MOU between M/s Nancy Builders and Developers Private Limited and M/s Konark Lifespaces. The original owner M/s Goel Ganga Developers Private Limited has not consented to the said transfer. Considering the above facts, it is established that the MOU is only a colourable device to transfer the money to M/s Nancy Builders. Further there is no agreement between the assessee and the original owner for transfer of the said development rights. Hence the transaction of Rs.17,76,08,505/- remains unexplained.

(6) Basis for forming reason to believe and details of escapement of income:

In view of the above facts and discussion made in above paras, I have reason to believe that the income chargeable to tax to the extent of Rs.17,76,08,505/- has escaped assessment for A.Y 2015-16 within the meaning and scope of section 147 of Income tax Act, 1961.

(7) Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to section 147:

The advance payment of Rs.17,76,08,505/- to M/s Nancy Builders and Developers Pvt. Ltd. remains unexplained. Thus, the assessee had not disclosed fully and truly all material facts necessary for its assessments.

(8) Applicability of provisions of section 147/151 to the facts of the

case:

In this case return of income was fled for the year under consideration and regular assessment u/s 143(3) was made on 29/12/2017. Since 4 years from the end of relevant A.Y has expired in this case, the requirement to initiate proceedings u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above. I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that full and true disclosures of material facts have not been made and thereby necessitating re-opening of assessment u/s 147 of the Act.

It is evident from the above facts that the assessee has not truly and fully disclosed material facts necessary for its assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

It is true that assessee has fled a copy of annual report and audited P/L account and balance sheet alongwith the return of income where various information/material were disclosed. However the requisite full and true disclosures for the assessment were not made as noted above. It was only after investigation carried out by the department it was established that the above mentioned entities does not have credit worthiness and unsecured loan from them is not genuine. It is pertinent to mention that even though assessee has produced books of account, annual report, audited P/L account, balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reason for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered by due diligence, attracting provisions of section 147 of the Act.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/reassessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) during the 143(3) proceedings. It is important to highlight here that material facts relevant for the assessment on the issue under consideration were not fled during the course of assessment proceeding and the same may be embedded in annual report, audited P&L a/c, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For aforesaid reasons, it is not a case of change of opinion by the AO.

> In this case, more than 4 years have elapsed from the end of AY under consideration. Hence, necessary sanction to issue notice u/s 148 has been obtained separately from the Principal Commissioner of Income Tax (Central), Pune as per the provisions of Section 151 of the Act."

3. The main ground of challenge to the initiation of the reassessment proceedings is that there was no omission on the part of the Petitioner assessee to disclose fully and truly any material fact and that all material facts had been disclosed before the A.O. in regard to the said amount, which was considered by the A.O. leading to the passing of the order of assessment dated 29th December, 2017. It was stated that during the course of the said scrutiny assessment, the A.O. had vide his notice dated 16th May, 2017 issued under Section 142(1) of the Act, sought details with regard to the loans/advances made to a sister concern(s)(Form 3CD). In this regard, it is stated that the said notice was replied vide communication dated 05th June, 2017. A further clarifcation was submitted vide communication dated 16th August, 2017, wherein the Petitioner assessee submitted as under:

> "3.1 The details of Loans/Advances given are stated in Schedule I to Audited Balance Sheet (Refer Page 38 of Compilation). A sum of Rs.17,76,08,505/- is receivable from our sister concern Nancy Builders & Developers Pvt. Ltd.
>
> 3.2 This amount is paid towards Purchase of Development Rights in land at Pune from Goel Ganga Developers Pvt. Ltd. The advance paid by us is purely of commercial nature

> since we intended to develop this land jointly with Nancy Builders & Developers Pvt. Ltd."

Not only this in continuation of the earlier submissions, the Petitioner further vide communication dated 22nd December, 2017 submitted *inter alia,* as under:

> "2.1 It can be seen from our Balance sheet that sum of Rs.17,76,08,505/- is appearing under the head 'Loans & Advances'. (Sch.-J in Audited Balance Sheet) This amount is paid as advance to 'Nancy Builders & Developers Pvt. Ltd. The said 'Nancy Builders & Developers Pvt. Ltd. (hereinafter referred as the said company) had acquired rights in property being Plot B out of S.No. 22, Hissa No. 2 Kharadi, Pune area adm. 18427.87 sq.mtrs from Goel Ganga Developers (India) Pvt. Ltd. (hereinafter referred as the said property).
>
> 2.10 In our books, all these charges are transferred to the account of Nancy Builders & Developers Pvt. Ltd. since these payments will have to be adjusted against total purchase price at the time of fnal transactions. Copy of their Ledger Extract in our books for the period 01-04-2012 to 31-03-2015 is enclosed. It will be seen there from that after 29-12-2012, we have not paid any amount on account of this transactions."

4. Finally, the order of assessment dated 29th December, 2017 came to be passed. The main ground of challenge in the present petition is that the initiation of reassessment proceedings is nothing but a change of opinion and there was no omission on the part of the Petitioner to make disclosure of the material facts in the present case. In the response fled by the Respondents, this stand of the

revenue as was urged by Mr. Kumar, learned Counsel for the Respondents is that there was no proper disclosure of the material facts before the A.O. during scrutiny proceedings, on the ground that M/s Goel Ganga Developers(India) Pvt. Ltd. was not a party to the MOU between the Petitioner and M/s Nancy Builders & Developers Pvt. Ltd. and that M/s Goel Ganga Developers(India) Pvt. Ltd. had not consented to the said transfer and, therefore, an amount of Rs.17,76,08,505/- had remain unexplained and, therefore, the transaction had to be treated as unexplained investment under Section 69 of the Act and was required to be brought to tax.

5. Admittedly, in the present case the assessment is sought to be reopened beyond the period of four years from the end of the relevant assessment year 2015-16 and, therefore, the jurisdictional requirement that there was a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment had to be established by the assessing offcer.

6. The Supreme Court in ***Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd.*** [1] held that there was a difference between

1 [2010] 320 ITR 561

'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 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 Offcer 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 Offcer has no power to review; he has the power to re-assess. But reassessment has to be based on fulfllment 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 Offcer. Hence, after 1-4-1989, Assessing Offcer 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 "

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

> " We also cannot accept submission of Mr. Jolly 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

2 [2002] 256 ITR-1

> Offcer 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 offcial 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 beneft of its own wrong."

In ***Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*** [3]**,** the Court, in the light of the facts before it and in the background of section 147 of the Act, observed :

> "…….all that the Income-tax Offcer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Offcer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Offcer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Offcer. That order stands till today. What the Assessing Offce has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment.

3 [1998] 234 ITR 170 (Delhi)

> Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Offcer to initiate proceedings under Section 147 of the Act."

7. It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Offcer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the suffciency or adequacy of the material available. However, the present one is not a case of testing the suffciency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Offcer to initiate the proceedings under Section 147/148 of the Act."

8. Testing the facts of the present case on the on the touchstone of the judgment referred to hereinabove, it can be seen that the issue of 'Large Loans/Advances', was not only raised during the scrutiny assessment, but the same was responded to specifcally by the assessee, as seen from the clarifcations dated 5 June 2017 and 16 August 2017, which fnally led to passing of the Order under Section 143(3) of the Act.

9. In the present case from the record, and specifcally from the reasons recorded, it is not justifable as to what information was received by the assessing offcer and what was that issue or material that had not been considered by the assessing offcer during the scrutiny assessment proceedings. As between the date of Order of assessment, which is sought to be reopened and the date of forming of the opinion, in the present case, nothing new had happened. It is clear that there is neither a new information received nor has referrence been made to any new material on record. It is an absence of an agreement between the Petitioner, Goel Ganga Developers Pvt Ltd and M/s Nancy Builders and Developers Ltd that the assessing offcer formed a basis for reopening the assessment. It is nobody's case that there existed any such agreement, which ought to have been produced but was not produced. Rather the assessing offcer intends to imply that in the absence of any such agreement, the beneft ought not to have been granted to the Petitioner in the scrutiny assessment. There cannot be any failure to disclose fully and truly, if there was no such document as such. This, in our opinion, is nothing but a change of opinion, which does not satisfy the jurisdictional foundation under Section 147 of the Act.

10. Be that as it may, we hold that the impugned notice dated 30 March 2021 issued under Section 148 of the Ac and all connected proceedings are unsustainable and, accordingly, set aside. Accordingly the Petition is allowed. No costs.

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