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

INCOME TAX APPEAL (IT) NO. 965 OF 2016

The Commissioner of Income Tax]
(Exemptions) Second Floor, B.O.Bhavan]
Sector No.47, Plot No.1, Pune Satara Road]
Parvati, Pune – 411 009] ...Appellant.

Vs.

Marhatta Chamber of Commerce]
Industries and Agriculture]
403 A, Senapati Bapat Road,]
Pune 411 016] ...Respondent.

.....

Mr Suresh Kumar for the appellant.
None for the Respondent.

CORAM : AKIL KURESHI &
B.P.COLABAWALLA, JJ.

Reserved On : 8th January, 2019
Pronounced On : 11th January, 2019

JUDGMENT [PER B. P. COLABAWALLA J.]:

1. This Income Tax Appeal filed under section 260A of the Income Tax Act, 1961 (for short the **"I.T. Act, 1961"**), takes exception to the order passed by the Income Tax Appellate Tribunal, Pune Bench "B", Pune (for short the **"ITAT"**) under which the appeal

filed by the revenue was dismissed. The appeal filed before the ITAT was against the order passed the Commissioner of Income Tax (Appeals) [for short **"CIT(A)"**] dated 6th December, 2012 which allowed the appeal of the assessee. The assessment year (for short **"A.Y."**) in question was A.Y. 2003-04.

2. Mr Suresh Kumar, learned advocate appearing on behalf of the appellant – revenue would contend that the following questions, and as projected by him as substantial questions of law, require our consideration and read thus:-

> "**(I) Whether on the facts and circumstances in law, the Hon'ble Tribunal erred in setting aside the reassessment notice overlooking the crucial fact that the assessee's case is squarely covered by Explanation 1 to section 147 of the I.T. Act, 1961.**
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> **(II) Whether on the facts and circumstances the case and in law, the Hon'ble Tribunal erred in setting aside the reassessment notice overlooking the fact that the facts material to the computation of income were not disclosed fully and correctly by the assessee and the property purchased and sold by the assessee within one year of its acquisition was correctly brought to tax by the Assessing Officer as Short Term Capital Gain."**

3. The brief facts of this case would show that the respondent – assessee had filed its return of income as "**NIL**" after claiming exemption under Section 11 of the I.T. Act, 1961. The original assessment of the respondent – assessee was completed on 13th February, 2006 under Section 143(3) of the I.T. Act, 1961.

Thereafter, the Assessing Officer (for short **"A.O."**) recorded reasons for reopening the assessment under Section 147 of the I.T. Act, 1961 and notice under Section 148 was issued on 25th February, 2010. In the reasons recorded, the A.O. was of the view that the assessee had claimed excessive deduction / relief under the provisions of the I.T. Act, 1961 in respect of the Short Term Capital Gains of Rs.872 lacs which was neither exempted under Section 11(1A) nor eligible for accumulation or setting apart as per the provisions of Section 11(1)(a) or Section 11(2) of the I.T. Act, 1961. According to the A.O., since the income in excess of Rs.1 Lakh had escaped assessment, notice under Section 148 of the I.T. Act, 1961 could be issued for A.Y. 2003-04 up to six years i.e. on or before 31st March, 2010. The second point noted by the A.O. was that no assessment order for A.Y. 2003-04 was passed under Section 143(3) of the I.T. Act, 1961 till four years had elapsed.

4. The assessee replied to the aforesaid notice and *inter alia* pointed out that there was no failure on the part of the assessee to make full and true disclosure, as in the note attached with the return of income, the assessee had declared that it has sold the land and the manner in which the sale consideration of Rs.3034.50 Lakhs was proposed to be received and utilized. The objections of the assessee

were overruled by the A.O. who thereafter proceeded to pass the re-assessment order under Section 143(3) read with Section 147 of the I.T. Act, 1961 in relation to A.Y. 2003-04.

5. Being aggrieved by this re-assessment order, the assessee preferred an appeal before the CIT(A). The CIT(A), after considering the submissions of the assessee and the return of income filed by the assessee [which can be found at page 11 of the CIT(A) order] and the note explaining the background and computation of capital gains arrived at [which is reproduced on pages 10 and 13 of the CIT(A) order] gave a finding that all facts were mentioned in the note appended to the return of income for A.Y. 2003-04. The CIT(A) therefore held that the assessee had disclosed the fact of acquisition of the asset and the transfer of development rights in the note attached to the return of income and also in the audited balance-sheet along with the notes of the auditor. It was, accordingly, held that the disclosure was a full and true disclosure by the assessee and hence there was no failure on the part of the assessee to give a full and true disclosure of all particulars of income. He therefore concluded that there was no justification for reopening the assessment.

6. Being aggrieved by this order of the CIT(A), the revenue approached the ITAT. The ITAT after hearing the revenue as well as the assessee, confirmed the order passed by the CIT(A) and dismissed the revenue's appeal. This is how the present appeal has come up before us under Section 260A of the I.T. Act, 1961.

7. In this factual backdrop, Mr Suresh Kumar, learned advocate appearing on behalf of the appellant – revenue submitted that the ITAT erred in setting aside the re-assessment notice overlooking the crucial fact that the assessee's case was squarely covered by Explanation (1) to Section 147 of the I.T. Act, 1961. He submitted that the assessee had not disclosed fully and correctly computation of income and hence the property purchased and sold by the assessee within one year of its acquisition was correctly brought to tax by the A.O. as a Short Term Capital Gain. For all the aforesaid reasons, he submitted that the questions of law as reproduced earlier are substantial questions of law that need consideration by us and hence the appeal be admitted.

8. We are unable to agree with the submissions of Mr. Suresh Kumar. It is not in dispute that initially, the respondent – assessee had furnished a return of income declaring "**Nil**" income

after claiming an exemption under Section 11 of the I.T. Act, 1961. It is also not in dispute that the original assessment of the case was completed under Section 143(3) of the Act on 13th February, 2006. The reasons recorded for reopening the assessment under Section 147 of the I.T.Act, 1961 and the notice under Section 148 of the I.T. Act, 1961 was issued on 25th February, 2010. Section 147 of the I.T. Act, 1961 deal with income that has escaped assessment. The said section *inter alia* provides that if the A.O. has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Section 148 to 153 of the I.T. Act, 1961, assess or re-assess the said income chargeable to tax. However, this is subject to certain limitations. One such limitation is set out in the first proviso to Section 147 of the I.T. Act, 1961 which *inter alia* reads thus-

> **"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."**

9. As mentioned earlier, admittedly, in the present case an assessment order has been passed under Section 143(3) of the I.T.

Act, 1961 as far back as on 13th February, 2006 for the A.Y. 2003-04. It is also admitted that the re-assessment proceedings initiated for A.Y. 2003-04 was after expiry of four years from the end of the A.Y. 2003-04. In such a scenario, no action for initiation of re-assessment proceedings for the said assessment year could be initiated unless the income chargeable to tax had escaped assessment by reason of a failure on the part of the assessee to disclose fully and truly all material facts. The reasons for re-opening the assessment have been set out by the A.O. in his re-assessment order dated 29th December, 2010. In the reasons recorded, there is not even an allegation that there was any failure on the part of the assessee to disclose any material facts which in turn lead to escapement of income, let alone the details thereof.

10. It is now well settled that the reasons which are recorded by the A.O. for reopening the assessment are the only reasons which can be considered. No substitution or deletion is permissible. No addition can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. This being the position in law, and admittedly there being no allegation in the reasons that there was any failure on the part of the assessee to disclose fully and truly any material fact, we find that the Tribunal was not incorrect in

upholding the order of the CIT(A) and dismissing the appeal filed by the revenue.

11. In the view that we take, we are supported by a decision of Division Bench of this Court (to which one of us was the party, B. P. Colabawalla J.) in the case of **City and Industrial Development Corporation of Maharashtra Ltd. Vs Assistant Commissioner of Income Tax-10(3) and Ors. [Writ Petition No. 1568 of 2013 decided on 24th March, 2014]**. Paragraphs 16 to 20 of this decision and which are relevant for our purpose read thus-

> ***"16.*** *Section 147 of the Act deals with income escaping assessment. The said section inter alia provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153 of the Act assess or reassess the said income chargeable to tax. However, this is subject to certain limitations. The first proviso to the section nter alia provides as follows :*
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> > "Provided that where an assessment under subsection (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the vrdate Page 16 of 43 WP1568/13 failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
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> ***17.*** *Admittedly, in the present case, an assessment had been made under section 143(3) for A.Y. 2005-06. It is also admitted that the reassessment proceedings initiated for A.Y. 2005-06 was after the expiry of four years from the end of the A.Y. 200506. In such a scenario, no action for initiation of reassessment proceedings for A.Y.*

2005-06 could be initiated unless the income chargeable to tax had escaped assessment by a reason of failure on the part of the petitioner to disclose fully and truly all material facts. As rightly submitted by Mr Dastur, the learned Senior Counsel appearing on behalf of the Petitioner, there is not even an allegation in the said reasons that there was a failure on the part of the Petitioner to disclose any material fact, let alone the details thereof.

18. *It is now well settled that the reasons which are recorded by the assessing officer for reopening an assessment are the only reasons which can be considered. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. Mr Dastur's reliance upon the judgement of a Division Bench of this Court in the case of* ***Hindustan Lever Ltd. Vs. R B Wadkar, Asst Commissioner of Income Tax and Others reported in [2004] 268 ITR 332 (Bom)*** *is well founded. At page 338 of the report, this Court held as under:*

> "It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing

> Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise the reasons which were lacking in the material particular would get supplemented, by the time the matter reaches the Court on the strength of the affidavit or oral submissions advanced."
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> **(emphasis supplied)**

19. *After relying upon the judgement of Hindustan Lever (supra) another Division Bench of this Court in the case of* ***Prashant S. Joshi v/s Income Tax officer and another, reported in (2010) 325 ITR 154 (Bom)****, held as follows :*

> "9. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of sections 148 to 163, assess or reassess such income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The first proviso to section 147 has no application in the facts of this case. The basic postulate which underlies section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under section 147. The reasons which are recorded by the Assessing officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under section 148."
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> **(emphasis supplied)**

20. *In view of these judgments and there admittedly being no allegation in the*

reasons that there was any failure on the part of the Petitioner to disclose any material fact, the impugned notice and the impugned order are liable to be set aside."

12. Even otherwise, on facts, we find that the CIT(A) as well as ITAT have examined the factual aspects of the matter and thereafter come to the conclusion that in fact there has been no failure on the part of the assessee to disclose fully and truly all material facts as contemplated under the first proviso to Section 147 of the I.T. Act, 1961. These findings, being purely factual in nature, and nothing being brought to our notice that these findings are in any way perverse, we do not think that the questions of law as proposed by Mr Suresh Kumar give rise to any substantial question of law requiring our consideration in an appeal under Section 260A of the I.T. Act, 1961.

13. In these circumstances, and in view of the foregoing discussion, we find that the appeal is without any merit. It is, accordingly, dismissed. However, there shall be no order as to costs.

(B. P. COLABAWALLA, J.) **(AKIL KURESHI, J.)**