IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2770 OF 2022

Emkay Global Financial Services Limited
7th Floor, The Ruby, Senapati Bapat Marg,
Dadar West, Mumbai 400028
PAN No.: AAACE0994L **...Petitioner**

Versus

1 Assistant Commissioner of Income Tax
Circle 4(1)(1), Mumbai **...Respondents**
R.No.640, 6th floor,
Aayakar Bhavan,
M.K.Road, Mumbai-400 020.

2 The National Faceless Assessment Centre
E Ramp, Jawaharlal Nehru Stadium,
Delhi 110 003.

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

Dr. K. Shivaram, Senior Advocate, with Mr. Rahul Hakani, for Petitioners.
Mr. Suresh Kumar, for Respondents.

CORAM: **K. R. SHRIRAM &**
KAMAL KHATA, JJ.
DATED: **6th February 2024**

ORAL JUDGMENT:- (*Per K.R. Shriram, J.)*

1. By consent, Petition taken up for hearing at the stage of admission itself. Therefore, **Rule**. Rule made returnable forthwith.

2. Petitioner is in the business of shares and stock broking. Petitioner is challenging the action of Respondent No.1 of issuing notice dated 31st March 2021 under Section 148 of the Income Tax

Act, 1961 ("**the Act**") seeking to reassess Petitioner's income for Assessment Year ("**AY**") 2015-16. Petitioner is also challenging an order dated 26th February 2022 passed by Respondent No.2 rejecting Petitioner's objections to the issuance of notice under Section 148 of the Act.

3. Petitioner had filed on 29th September 2015, its return of income for AY 2015-16. Petitioner declared income of 'Nil'. An assessment under Section 143(3) of the Act was made and an assessment order dated 14th December 2017 came to be passed determining Petitioner's total income at Rs.58,96,900/-.

4. Petitioner thereafter received the impugned notice dated 31st March 2021. Petitioner filed its objections vide letter dated 6th January 2021. Petitioner's objections came to be rejected by the impugned order dated 25th March 2022.

5. Since in this case, the impugned notice under Section 148 of the Act has been issued after expiry of more than four years from the end of the relevant assessment year and an assessment under Section 143(3) of the Act having been made, the proviso to Section 147 of the Act shall apply. As per the proviso, reassessment is impermissible after expiry of four years from the end of the relevant assessment year and where assessment under Section 143(3) of the Act has been made unless there has been failure on the part of assessee to truly

and fully disclose material facts during the assessment. A bare perusal of the reasons recorded would show that there has been no failure on the part of Petitioner to truly and fully disclose material facts. Though the words '*failure on the part of assessee to disclose fully and truly all material facts necessary for assessment'* have been used in the reasons recorded, those have been used only to get over the fetters placed by the proviso to Section 147 of the Act. The reasons for reopening read as under:

> *"The assesse has filed return of income for A.Y. 2015-16 on 29/09/2015 declaring income of Rs. NIL. The assessment u/s. 143(3) of the Act was completed on 14/12/2017 determining total income at Rs. 58,96,900/-.*
>
> *2.1 It was noticed from P & L A/c that assessee has debited Rs.35,87,05,815/- exceptional item stating the reasons in note-5 that loss occurred due to a manifest material mistake on October 5, 2012 while executing the sale order on NSE as per SAT orders of August, 2014. The same was added back in the computation of income stating that the same was already claimed in AY 2013-14 and finally the business income of Rs. 17,66,31,378 has been arrived which was set off fully from business loss of previous year (AY 2013-14). It was further noticed in the ITR that major carried forward business loss of Rs.34,39,23,169 was pertaining to AY 2013-14. The loss arrived in AY 2013-14 was due to the reasons as assessee has debited Rs. 35,87,05,815 in the computation as Loss due to erroneous trades.*
>
> *2.2 Loss occurred as assessee has requested to NSE regarding the trades executed on October 5, 2012 which constitute material mistake in the trade and under Bye law 5(a) framed by NSE, those trades are liable to be annulled. NSE however, has rejected the claim on the ground that if the appellant had complied with regulatory requirements by installing prudent risk management and order management system at the dealers terminal, no mistake could go unnoticed and even if any order was erroneously punched remedial measures could be taken before erroneous order went out of dealers system and reached NSEs trading system and therefore in the facts of present case, appellant beinggrossly negligent, trades in question cannot be considered as material mistake in the trade and consequently the said trades cannot be annulled. Assessee has made appeal to SAT for relief but after hearing the*

SAT has ordered that the appeal does not succeed.

2.3 As the above trade and transaction was not validated and not considered as regular business transaction either by NSE or by SAT and hence for income tax purpose also the loss arises out of it is required to be treated as not generated from regular business transaction. Hence, the loss was required to be treated as speculation loss in the AY 2013-14 and not to be allowed to be set off against business income of the current year. Incorrect allowance of set off of losses resulted in under assessment of income of Rs. 35,87,05,815/-.

3.1 Further, it was noticed that the business income of Rs. 17,66,31,378 has been arrived which was set off fully from business loss of previous year (AY 2013-14). The loss arrived in AY 2013-14 was due to the reasons as assessee has debited Rs. 35,87,05,815/- in the computation as Loss due to erroneous trades.

3.2 Each assessment year is distinct and separate and hence in every year normal income or loss as well as MAT income is mandatorily required to be simultaneously computed and whichever is higher to be offered for tax. It was however noticed in this case that in the AY 2013-14 as the assesse has debited Rs. 35,87,05,815 in the computation for normal income as 'Loss due to erroneous trades', the same was also required to be considered for computation for MAT, which was not done. However just to cover up that mistake, the adjustment of the same was done and that loss was debited in books for MAT as exceptional item in the AY 2015-16 which may not be allowable. That debit should have been done in AY 2013-14 and not in AY 2015-16, therefore income under MAT of Rs. 19,79,92,443 before exceptional item is required to be taken in AY 2015-16 and offered to tax. Omission to tax the same has resulted in under assessment of the same....."

6. In paragraph 2.1 of the reasons, it says "*It was noticed from P&L A/c that assessee has debited…….stating the reasons in note 5 that loss occurred due to a…….. The same was added back in the computation of income stating that the same was…… It was further noticed in the ITR that major carried forward business loss……*".

Paragraph 3.1 of the reasons, it says "*Further it was noticed*

that the business income.....has been arrived which was set off fully from business loss.....".

Paragraph 3.2 of the reasons, it says "*.....It was however noticed.....in the computation for normal income....., the same was also required to be considered for computation for MAT, which was not done.....and that loss was debited in books for MAT as exceptional item.....,which may not be allowable.....*".

7 Therefore, it is absolutely clear that the entire basis for forming a reason to believe there was escapement of income is from the records filed by Petitioner with return of income.

8 Moreover, admittedly, as stated in the affidavit in reply filed by one Keshav M. Dixit, Deputy Commissioner of Income Tax-4(1)(1), affirmed on 8th September 2022, the issue involved as noted in the reasons for reopening were examined at the time of original assessment. Therefore, it is a clear case of change of opinion which does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. After admitting that the issues involved as noted in the reasons for reopening were examined at the time of original assessment proceedings, it is stated that the factual error came to the notice of the Assessing Officer ("**AO**") subsequently, on the basis of which belief was formed that

income chargeable to tax has escaped assessment. The Apex Court in ***Gemini Leather Stores v. ITO***[1] held that the assessment cannot be reopened by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts as the Income Tax Officer had material facts before him when he made the original assessment. The Court held that the Assessing Officer cannot take recourse to open to remedy the error resulting from his oversight in the assessment proceeding.

9. Moreover, as held by the Apex Court in ***Calcutta Discount Co. Ltd. v. ITO***[2], the duty of assessee does not extend beyond the full and truthful disclosure of all primary facts. Once all the primary facts are before him, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. If from primary facts, more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. The Court held, *Explanation* to the sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed.

1 [1975] 100 ITR 1 (SC)
2 [1961] 41 ITR 191 (SC)

The *Explanation* has not the effect of enlarging the section, by casting a duty on the assessee to disclose "inferences" to draw the proper inferences being the duty imposed on the Income-tax Officer. The Court held that the duty of the assessee is to disclose fully and truly all primary relevant facts and it does extend beyond that.

10. In the circumstances, in the case at hand, we are satisfied that there has been no failure on the part of assessee to truly and fully disclose primary facts. Therefore, Rule made absolute. Petition is allowed in terms of prayer clause (a), which reads as under:

> *"(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said (i) Notice dated 31/3/2021 u/s 148 for A.Y. 2015-16, (ii) the impugned order dated 26/3/2022 (iii) Notice for proposed variation dated 27/3/2022 and (iv) consequential Assessment Order u/s 147 along with Demand Notice u/s 156 and Penalty Notice u/s 271(1)(c) [if passed] and after examining the legality and validity thereof to quash and set aside the same."*

11. No order as to costs.

(KAMAL KHATA, J.) (K. R. SHRIRAM, J.)

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