

Versus

Dy. Commissioner of Income Tax Circle 4(3)(1),
Mumbai and others ... Respondents

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Dr. K. Shivaram, Senior Advocate instructed by Mr. Shashi Bekal for the
Petitioner.

Mr. Suresh Kumar for the Respondent-Revenue.

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CORAM : K.R. SHRIRAM AND

N.R. BORKAR, J.J.

DATED : APRIL 25, 2022

P.C. :-

1. Petitioner is impugning a notice dated 30th March, 2021 issued under Section 148 of the Income Tax Act, 1961 (the said Act), an Order dated 24th February, 2022 rejecting Petitioner's objections and also a subsequent notice dated 25th February, 2022 issued under Section 143(3).
2. Petitioner filed its return of income for A.Y. 2017-2018 on 27th October, 2017 declaring income at Rs.19,08,72,160/-. The assessment proceedings under Section 143(3) was completed on 16th December, 2019 assessing the income at Rs.19,08,72,160/-.

3. On 30th March, 2021, Petitioner received the impugned notice under Section 148 of the Act. The reason for re-opening was provided to Petitioner by a communication dated 1st June, 2021. Two issues have been raised in the reasons for re-opening, firstly, Petitioner has given to its senior employees incentives of Rs.17,86,30,560/-, and those employees together are holding about 31.34% shares in the Company. No dividend has been declared for F.Y. 2016-2017. According to the Assessing Officer, these payments are nothing but a share of profit or dividend given in the form of incentives.

Secondly, as per the VAT returns originally filed and profit and loss account, there is a difference of Rs.20,01,84,990/-.

So, these two amounts have escaped assessment. Petitioner filed its objections to the re-opening which came to be rejected by an Order dated 24th February, 2022, which is also impugned.

4. Dr. Shivaram submitted that though the re-opening of assessment is proposed within the expiry of four years from the end of relevant assessment year, and the proviso to Section 147 of the Act may not strictly apply, nevertheless since an assessment has been completed and an assessment order under Section 143(3) of the Act has been passed, proposing to re-open on change of opinion is not permissible.

5. Mr. Suresh Kumar without filing any reply submitted that as regards the incentives to the senior employees of the Company, it was a clear case the amounts that have been paid as incentives were actually a share of dividend. By doing this, Mr. Suresh Kumar submitted that Petitioner has claimed expenses and also has not paid dividend distribution tax. Mr. Suresh Kumar also submitted that these issues do not find mention in the assessment order and therefore, it cannot be stated that these two points were even considered by the Assessing Officer during the original assessment proceedings.

6. Dr. Shivaram submitted that both these issues raised in the reasons for re-opening were subject matter of consideration during the original assessment proceedings as much as specific queries have been raised and replies have been given which have been considered and as held by this Court in various matters including *Aroni Commercial Ltd. v. Deputy Commissioner of Income Tax 2(1)*¹, even if there is no specific discussion in the assessment order, query having been raised and answers given by the assessee, these issues were certainly subject matters of consideration in the assessment proceedings.

7. We have considered the Petition and documents annexed thereto with the assistance of Dr. Shivaram and Mr. Suresh Kumar. It is settled law as

¹ [2014] 44 taxmann.com 304 (Bombay)

held by this Court in *Aroni Commercials Ltd. (supra)*, that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

8. In this case by a notice dated 7th August, 2019 issued under Section 142(1) of the Act, the Assessing Officer had called upon Petitioner to give details of payments made to the persons covered by section 40A(2)(b). Petitioner submitted replies dated 19th August, 2019, 19th October, 2019 and 14th November, 2019 giving details of the payments made. By a notice dated 21st September, 2019 issued under Section 142(1) of the Act, the Assessing Officer had called upon Petitioner to furnish copies of quarterly VAT returns for all the quarters of F.Y. 2016-2017 and also the revised VAT returns, if any. A second notice dated 18th October, 2019 under Section 142(1) of the Act was again issued, where the Assessing Officer raised a specific query *“further, as per the Profit and Loss Account total turn over is Rs.9,74,78,99,276/- and as per revised VAT returns total turn over is Rs.9,94,80,84,266/-. There is huge difference of Rs.20,01,84,990/-. Please explain the same in detail.”* . Petitioner replied by its letters dated 16th October, 2019 and 5th November,

2019 explaining the difference and also forwarding various documents including Form 704, i.e., Audit Report under the Maharashtra Value Added Tax Act, 2002.

9. Therefore, these two issues have been subject of consideration before the Assessing Officer during the original assessment proceedings. There can be no doubt in the present facts, the very issue of incentives to the senior executives and the difference in the VAT turnover was a subject matter of consideration by the Assessing Officer during the original assessment proceedings. It would therefore, follow that the re-opening of the assessment by the impugned notice is merely on the basis of change of opinion from that held earlier during the course of assessment proceedings. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

10. In the circumstances, we allow petition 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) The reopening Notice dated March 30, 2021 under section 148 of the Act for AY 2017-18 (**Exhibit-A**), (ii) The impugned order dated February 24, 2022 being (**Exhibit-B**) and (iii) Notice under Section 143(2) of the Act dated February 25, 2022 being (**Exhibit-C**).”

11. Petition disposed with no order as to costs.

(N.R. BORKAR, J.)

(K.R. SHRIRAM, J.)