

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1164 OF 2022

LOKHANDWALA CONSTRUCTION	)	
INDUSTRIES PRIVATE LIMITED	)	
Plot No.48, Indranarayan Road, Santacruz	)	
West, Mumbai – 400054 PAN No.AAACP2037	)	...PETITIONER
V/s.		
1 DY.COMMISSIONER OF INCOME TAX	)	
CIRCLE 4(3)(1), Mumbai, R.No.649, 6 th Floor	)	
Aayakar Bhavan, M.K.Road, Mumbai-400020	)	
	)	
2 UNION OF INDIA through the Secretary	)	
Department of Revenue, Ministry of Finance,	)	
North Block, New Delhi – 110001	)	...RESPONDENTS

Mr.Rahul Hakani, Advocate for the Petitioner.

Mr.Suresh Kumar, Advocate for the Respondent.

CORAM : K. R. SHRIRAM &
N. R. BORKAR, JJ.

DATE : 29th MARCH 2022

ORAL JUDGMENT : (PER : K. R. SHRIRAM, J.)

1 Petitioner is impugning the notice dated 30th March 2021 issued under Section 148 of the Income Tax Act, 1961 (the said Act) for A.Y. 2017-18 and the order dated 10th December 2021 rejecting petitioner's objections. The subsequent notices issued have also been included in the petition.

2 Admittedly, the re-opening has been proposed before the expiry of four years from the end of relevant assessment year, and therefore, even proviso to Section 147 will not apply. At the same time, it is settled that if an assessment has been completed under Section 143(3), re-opening cannot be proposed on the basis of change of opinion. In this case assessment under Section 143(3) has been completed. Let us now examine whether the notice is sustainable.

3 We have considered the reasons recorded and we are satisfied that the re-opening proposed is on the basis of change of opinion. Two issues are raised in the reasons for reopening. The first issue is, petitioner has, in the profit and loss account and balance sheet, shown closing finished goods of Rs.54,68,37,517/- and out of this the value of unsold flats was shown at Rs.54,64,17,000/- for two projects which has not been offered to tax under the head 'Income from house property' as held by the Delhi High Court and ITAT Ahmedabad.

The second issue is, that out of 12 flats sold by petitioner,

for 9 flats market value is more than the agreement value and therefore, provisions of Section 43CA(1) of the Act applies.

4 As regards the first issue, identical reasons were recorded for A.Y.2016-17 and this Court was pleased to pass the order dated 27th January 2022 in Writ Petition No.102 of 2022.

Paragraph 2 of the said order reads as under :

“2. Paragraph No.1 of the order dated 10th January, 2022 reads as under :

1. Dr. Shivram for petitioner states that the notice under Section 148 of the Income Tax Act, 1961 ("the Act") for Assessment Year 2016-2017 has been issued purely on change of opinion, which is not permissible in law. Dr. Shivram states that, for the reasons, reliance has been placed in assessment records and the Return filed by the petitioner along with the profit and loss account and balance sheet and secondly, an issue raised is regarding the finished stocks of Rs.65,53,57,872/-, which was for unsold flats of two projects at Kandivali and Bandra and according to respondents, petitioner's has not offered tax under the head income from house property. Dr. Shivram states that the same issue was raised during the assessment proceedings as could be seen from Item No.16 in the annexure to notice dated 8th October, 2018, issued under Section 142(1) of the Act and petitioner has replied to, the same vide petitioner's letter dated 8th November, 2021. Dr. Shivram states that this issue has not been discussed in the assessment

order but still relying on Aaroni Commercial Ltd. vs. Deputy Commissioner of Income-tax-2(1) (2014) 44 taxmann.com 304 (Bombay) submitted that once a query has been raised and it has been replied to, the Assessing Officer is deemed to have applied his mind and considered the same even if that issue has not been discussed in the assessment order.”

5 This Court, in paragraph 4 of the said order dated 27th January 2022 in Writ Petition No.102 of 2022 has held as under :

“ We have to note at the outset that the ITAT order is not binding on this court. Secondly, the judgment/order of the Delhi High Court relied upon for the reasons for re-opening has been reported in (2013) 213 Taxman 0143. Therefore, it is a judgment of 2013 or earlier. The assessment order in this case has been passed on 20th December, 2019 and the query on this issue has been raised on 19th October, 2019 and replied by petitioner vide its letter dated 14th November, 2019 and 12th December 2019. Therefore, the Assessing Officer had benefit of the judgment of the Delhi High Court relied upon by the Assessing Officer wanting to re-open the assessment but still did not find anything wrong in the case made out by petitioner and proceeded to pass the assessment order.”

6 On the second issue of market value being more than the agreement value and applicability of Section 43CA(1) of the Act,

that has been a subject matter of consideration during the assessment proceedings. Mr.Suresh Kumar submitted that in the assessment order dated 20th December 2019 the Assessing Officer has not discussed this aspect. He does not have to because as held by this Court in **Aaroni Commercials Ltd. vs. Deputy Commissioner of Income-tax -2(1)**¹ once a query is raised during assessment proceedings and assessee has replied to it, it follows that the query raised was a subject matter 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. In this case, during the original assessment proceedings, a notice dated 19th October 2019 was issued under Section 142(1) of the Act by which petitioner was called upon to furnish copies of Index II(s) of three flats sold during the year. Petitioner responded by its letter dated 14th November 2019 and provided copies of Index II of flats sold during the year. Therefore, it is abundantly clear that the second issue relating to

1 (2014) 44 taxmann.com 304 (Bombay)

nine flats out of the twelve flats mentioned in the reasons for reopening was a subject of consideration of the Assessing Officer while completing the assessment. There can be no doubt in the present facts that the subject matter of the market value of nine flats as against the agreement value was a subject matter of consideration by the Assessing Officer. It would, therefore, follow that the reopening of the assessment for this reason is merely on the basis of change of opinion of the Assessing Officer. As held in **Aaroni Commercials Ltd. (supra)** this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

7 In the circumstances, we allow the 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) reopening Notice dated 30th March, 2021 u/s 148

for A.Y. 2017-18 (Exh. A), (ii) the impugned order dated 10/12/2021 being (Exh “B”) and (iii) Notice u/s 143(2) dated 29/12/2021 being (Exh “C”).”

8 Petition is disposed.

(N. R. BORKAR, J.)

(K. R. SHRIRAM, J.)