

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

WRIT PETITION NO. 102 OF 2022

Lokhandwala Construction Industries
Private Limited

....Petitioner

V/s.

Deputy Commissioner of Income Tax
Circle 4(3)(1), Mumbai and Anr.

...Respondents

Dr. K. Shivaram, Senior Advocate a/w Mr. Rahul Hakani for Petitioner.
Mr. Suresh Kumar for Respondents.

**CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATED : 27th JANUARY, 2022**

P.C. :

1. At the outset, in the order dated 10th January, 2022, in Paragraph No.1 the date "**08/11/2021**" be corrected and replaced with "**12/11/2018**". The original order to be corrected. Rest of the order remains unaltered.

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)**¹ 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.*

3. Mr. Suresh Kumar is not disputing the same and naturally he cannot but submits that the Assessing Officer while recording the reasons for re-opening the assessment has relied upon two judgments one of Delhi High Court and other of Ahmedabad ITAT and therefore, the Assessing Officer's satisfaction that there has been escapement from assessment cannot be faulted.

4. 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 15th December, 2018 and the query on this issue has been raised on 8th October, 2018 and replied by petitioner vide its letter dated 12th November, 2018. Therefore, the Assessing Officer had benefit of the judgment of the Delhi High Court relied

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

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.

5. In the circumstances, it is quite clear that it is nothing but change of opinion on the part of the Assessing Officer wanting to re-open the assessment. The re-opening of assessment based on change of opinion goes to the root of the matter and as held repeatedly by various courts, is not permissible.

6. In the circumstances, 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) reopening Notice dated 31st March, 2021 (issued and signed on 8th April, 2021), u/s 148 for A.Y. 2016-17 (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").

7. Petition disposed.

(N. J. JAMADAR, J.)

(K.R. SHRIRAM, J.)