Bombay High Court M/S.Dalal & Broacha Stock Broking ... vs Asstt. Commissioner Of Income Tax ... on 7 May, 2013 Bench: Dr. D.Y. Chandrachud krs 1/13 wpL419.13.sxw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.419 OF 2013

M/s.Dalal & Broacha Stock Broking Pvt. Ltd. : Petitioner

V/s.

Asstt. Commissioner of Income tax 4(1), Mumbai & Anr. : Respondents

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Dr.K. Shivram with Mr.R.K. Hakani for the Petitioner.

Mr.Suresh Kumar for the Respondents.

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ig CORAM : DR.D.Y.CHANDRACHUD &
A.A. SAYED, JJ.

Date of Reserving the)
Judgment.) : 08.04.2013.

Date of Pronouncing)

the Judgment.) : 07.05.2013.

JUDGMENT (per A.A.Sayed,J.)

Rule. Counsel for the Respondents waives service. By consent, Rule is made returnable forthwith and the petition is taken up for hearing and final disposal. 2. The challenge in these proceedings is to: (i) Notice dated 1 June 2012 under Section 148 of the Income-tax Act, 1961 (ii) Notice dated 1 October 2012, and (iii) Order dated 21 January 2013 rejecting the objections of the Petitioner. The notice under Section 148 relates to AY 2008-09. Re-opening of the assessment has thus taken place within a period of four years of the end of the relevant Assessment Year. krs 2/13 wpL419.13.sxw 3. The Petitioner is a member of the B.S.E. and N.S.E. and is engaged in the business of share and stock broking. In the A. Y. 2008-09 the Petitioner filed a return of income and declared a total income of Rs.16.13 crores. The return of income was processed under Section 143(1) and an assessment order dated 1 December 2010 came to be passed under Section 143(3). During the relevant Assessment Year, the Petitioner paid an amount aggregating to Rs.1.50 crores to its three Directors i.e. Rs.50 lakhs to each Director as commission. The expenditure was allowed by the Assessing Officer. The assessment is however sought to be reopened vide notice dated 1 June, 2012. 4. The reasons for re-opening the assessment read as follows:- "In respect of the captioned matter, the return of income was filed by the assessee on 27.09.2008 declaring a total income of Rs.16,13,12,344/-. Subsequently, the Return of Income was processed u/s. 143(1) and the case was selected for scrutiny. The assessment in the said case was completed vide order u/s. 143(3) dated 01.12.2010. During the said year, the amount of Rs.1,50,00,000/- on account of commission was paid to the three directors of the company. After scrutinizing the said expenditure, the same was allowed u/s. 37(1) by the A.O. by respectfully following the judgment of the Hon'ble Mumbai Tribunal in assessee's own case for A.Y. 2005-06. krs 3/13 wpL419.13.sxw However, subsequent to the above, the Special Bench of The Hon'ble Mumbai Tribunal in the assessee's own case for A.Y. 2006-07 comprising of similar facts rendered the decision upholding the treatment of the revenue authorities. Relying on the judgment of Hon'ble Jurisdictional High Court in case of Subodh Chandra Poppatlal vs. CIT (24 ITR 586), the Hon'ble Special Bench reversed the decision in A.Y. 2005-06 and held that the commission of Rs.1.20 crores to the three working directors was in lieu of dividend and the same is not allowable as deduction under section 36(1)(ii). The Special Bench confirmed the treatment of the said commission u/s. 36(1)(ii) and stated that the provision of section 37(1) are not applicable in the said case. Since, the order u/s. 143(3) for the year under consideration was passed relying on the ITAT order which has now been reversed, the said assessment order needs to be reviewed in order to assess the amount of Rs.1,50,00,000/- paid as commission which had initially escaped assessment. Herein, the judgment of the Hon'ble Cochin Tribunal in the case of CIT vs

Nedungadi Bank Ltd. (85 ITD 1) is relied upon to validate the reopening of assessment for krs 4/13 wpL419.13.sxw the year under consideration. In the said case the Hon'ble Tribunal had held that the revenue authorities are empowered to reopen a completed assessment on the basis of subsequent decision of higher court." 5. The Petitioner communicated to the first Respondent that the original return be treated as return filed pursuant to notice under Section 148 and also objected to the reopening. The first Respondent, however, rejected the objections by his order dated 21 January, 2013. 6. On behalf of the Petitioner, the learned Counsel made the following submissions: (i) The notice under Section 148 for re-opening the assessment is bad in law since it was a mere change of opinion; (ii) The re-opening was sought to be made on the ground that the facts for AY 2006-07 were similar to the relevant AY 2008-09, which is not correct as in AY 2006-07 no dividend was declared. For the relevant AY, dividend was declared and therefore Section 36(1)(ii) cannot be invoked. The decision of the Special Bench of ITAT in the Petitioner's own case for AY 2006-07 is therefore not applicable to the facts of the relevant AY. The Special Bench of the Tribunal does not deal with a situation of disallowance of commission under Section 36(1)(ii) where dividend is declared. The reasons recorded are therefore without application of mind; (iii) The Assessing Officer issuing the notice under Section 148(1) has to be the same Officer who has recorded the reasons under Section 148(2). In the present case, the predecessor of the Assessing Officer had recorded krs 5/13 wpL419.13.sxw the reasons for re-opening, whereas the succeeding Assessing Officer had issued notice dated 1 October 2012 under Section 148 and no reasons have been recorded by the succeeding Assessing Officer. The notice dated 1 October 2012 is therefore bad in law. The learned Counsel, in support of his submissions, has relied upon the decision of a Division Bench of this Court in M/s.OHM Stock Brokers Pvt. Ltd. v. Commissioner of Income Tax-4, Mumbai & Anr.1 and the decision of a Division Bench of the Gujarat High Court in Hynoup Food and Oil Industries Ltd. v. Assistant Commissioner of Income-tax2 7. The learned Counsel for the Respondents, on the other hand, has reiterated the assertions made in the affidavit-in-reply and submitted as follows:- (I) The re-opening was justified inasmuch as the order under Section 143(3) of the relevant assessment year 2008-09 was passed by following the judgment of the Tribunal in the assessee's own case for Assessment Year 2005-06. The expenditure was allowed under Section 37(1) by the Assessing Officer. Subsequent thereto, the Special Bench of the Tribunal in assessee's own case for AY 2006-07 reversed the earlier order of the Tribunal and held that the commission of Rs.1.20 crores to the three working Directors was in lieu of dividend and the same was not allowable as deduction under Section 36(1)(ii) and further held that the provisions of Section 37(1) are not applicable in the facts of the said case. The Assessing Officer has applied his mind and has stated in the reasons 1 W.P.No.79 of 2013 with other connected petitions decided on 20.2.2013. 2 [2008] 307 ITR 115 (Guj). krs 6/13 wpL419.13.sxw recorded for re-opening the assessment that an amount of Rs.1.50 crores paid as commission has escaped assessment; (II) The notice dated 1 October 2012 issued by the succeeding Assessing Officer was not a notice under Section 148 and it merely fixed

the date of hearing. The predecessor of the Assessing Officer was transferred in normal course of routine annual transfer policy and the succeeding Assessing Officer took over the charge on 4 June, 2012. Section 129 of the IT Act provides that in such cases the succeeding Officer may continue the proceeding from the stage at which the proceeding was left by his predecessor. The learned Counsel placed reliance upon the following judgments: (i) Maharaj Kumar Kamal Singh v. Commissioner of Income-tax3; (ii) A.L.A. Firm v. Commissioner of Income-tax4; (iii) Sesa Goa Ltd. v. Joint Commissioner of Income-tax 5;(iv) Siemens Information Systems Limited v. Assistant Commissioner of Income Tax, Range 7(2), Mumbai & Ors.6; and (v) Export Credit Guarantee Corporation of India Ltd. v. Additional Commissioner of Income-tax7. 8. The short point that arises for consideration is whether Respondent No.1 was justified in re-opening the assessment of the relevant AY 2008-09 on the basis of a subsequent judgment of the Special Bench of the Tribunal. The re- opening of the assessment in the present case has taken place within a period of 3 [1959] 35 ITR 1 (SC) 4 [1991] 189 ITR 0285. 5 [2008] 168 Taxman 281 (Bom.)

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four years of the end of the relevant Assessment Year. Where the assessment is sought to be re-opened after the expiry for a period of four years from the end of the relevant Assessment Year, the proviso to Section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. This stipulation does not apply to a notice for re-opening within a period of four years. Where the assessment is sought to be opened within four years of the end of the relevant assessment year, the governing principle has been laid down in the judgment of the Supreme Court in Commissioner of Income Tax v. Kelvinator of India Limited8. The Supreme Court held as follows: “Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words”reason to believe" falling which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the 8 (2010) 320 ITR 561 (SC) krs 8/13 wpL419.13.sxw concept of “change of opinion” as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there

is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in s.147 of the Act. However, on receipt of representations from the companies against omission of the words “reason to believe”, Parliament re-introduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the AO“. 9. Thus, within a period of four years, the Assessing Officer cannot re- open an assessment merely on the basis of a change of opinion. But when he has tangible material to come to the conclusion that there is an escapement of income from assessment, the power to re-open can be exercised. The expression”reason to believe" in Section 147 has been construed in the judgment of the Supreme Court in Assistant CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. wherein it was held as under: “Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason krs 9/13 wpL419.13.sxw to believe that income for any assessment year has escaped assessment. The word ‘reason’ in the phrase ‘reason to believe’ would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion ... At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is ‘reason to believe’, but not established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction.” Hence, when an assessment is re-opened, at that stage it is not necessary to conclusively prove or establish that income has escaped assessment. A reason to believe which the Supreme Court has construed to mean a cause or justification at the stage of re-opening, is all that is required. 10. In Maharaj Kumar Kamal Singh v. Commissioner of Income-tax krs 10/13 wpL419.13.sxw (supra), a Bench of three learned Judges of the Supreme Court held that the ITO was justified in his belief that the assessee’s income has escaped assessment on the basis of the decision of the Privy Council which was held to be ‘information’ within the meaning of Section 34(1)(b) of the 1922 Act. 11. In A.L.A. Firm v. Commissioner of Income-tax (supra), a Bench of three learned Judges of the Supreme Court held that a subsequent re-opening of assessment on consideration of a High Court decision which was not considered at the time of the original assessment would constitute ‘information’ on the basis of which assessment could be re-opened. The Supreme Court held as follows: “The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee’s contention that the surplus was

not taxable. But, in doing so, he obviously missed to take note of the law laid down in G.R.Ramachari and Co. (1961) 41 ITR 142 (Mad) which, there is nothing to show, had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under section 147(b). The material which constituted information and on the basis of which the assessment was are opened was the decision in G.R. Ramachari and Co. (1961) 41 ITR 142 (Mad). This material was not considered at the time of the original assessment. Though it was a decision of 1961 and the Income-tax Officer could have known of it krs 11/13 wpL419.13.sxw had he been diligent, the obvious fact is that he was not aware of the existence of that decision then and, when he came to know about it, he rightly initiated proceedings for reassessment." 12. The assessment in the instant case was re-opened on the ground that the Special Bench of the Tribunal in the assessee's own case for AY 2006-07 had reversed the earlier decision of the Tribunal in the assessee's case for AY 2005-06 whereby the Special Bench held that the commission of Rs.1.20 crores to the three Directors was in lieu of dividend and the same was not allowable as deduction under Section 36(1)(ii). The Special Bench confirmed the treatment of the commission under Section 36(1)(ii) and held that the provisions of Section 37(1) are not applicable. In the circumstances, considering the principles enunciated in the judgments referred to above, in our opinion the re-opening of the assessment in the present case on the basis of the subsequent decision cannot be said to be a mere change of opinion. There was tangible material for the Assessing Officer to reopen the assessment. It is sought to be contended that the facts of the case before the Special Bench of the Tribunal were different than the facts of the relevant assessment year 2008-09 inasmuch as for the AY 2006-07 no dividend was declared, whereas for the relevant AY 2008-09, dividend was, in fact, declared and, therefore, the decision of the Special Bench of the Tribunal was distinguishable. Whether the judgment of the Special Bench is distinguishable or not, and the impact of the Petitioner having declaring dividend, if any, in the relevant assessment year, is not something which we are inclined to go into at this stage. It cannot be disputed that the issue in AYs 2005- 06, 2006-07 and the relevant AY 2008-09 is about disallowance of the commission to the three Directors of the Petitioner. What is relevant at this stage krs 12/13 wpL419.13.sxw is whether the Assessing Officer had reason to believe that income had escaped assessment. In our opinion, in the facts and circumstances of the case, it would not be appropriate for this Court to preempt an inquiry by the Assessing Officer once a tangible basis has been disclosed for re-opening the assessment and we refrain from expressing any opinion on the merits of the issue at this stage. 13. M/s. OHM Stock Brokers Pvt. Ltd. (supra) relied upon on behalf of the Petitioner was not a case where the Division Bench of this Court had dealt with the issue of an assessment being re-opened on the basis of a subsequent decision. The said decision would therefore have no application to the case in hand. 14. The contention of the Petitioner that the succeeding Assessing Officer could not have issued the notice dated 1 October 2012 under Section 148, as it was his predecessor who has recorded the reasons for reopening is completely misconceived. The reasons recorded for re-opening and the notice dated 1 June 2012

which has been issued under Section 148 for reopening are as a matter of fact by the same Assessing Officer. The notice dated 1 October 2012 issued by the succeeding Assessing Officer was merely a notice fixing the hearing. Section 129 of the Income-tax Act envisages such a situation and lays down that whenever in respect of any proceeding under the Act an income-tax authority ceases to exercise jurisdiction and is succeeded by another who has and exercises jurisdiction, the income-tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor. In Hynoup Food and Oil Industries Ltd. (supra) relied upon on behalf of the Petitioner, the Division Bench of the Gujarat High Court was dealing with a case krs 13/13 wpL419.13.sxw where the Assessing Officer who had recorded reasons for reassessment and the Assessing Officer who issued the notice under Section 148 were different. It is in these circumstances that the Division Bench held that the succeeding Assessing Officer cannot issue notice under Section 148 on the basis of reasons recorded by his predecessor. The facts of that case were, therefore, clearly different. 15. For the reasons mentioned above, we conclude that the assessment which is sought to be re-opened is valid and within the jurisdiction of the Assessing Officer. The notice for re-opening of the assessment is thus upheld. The Petition shall accordingly stand dismissed. Rule is discharged. We, however, clarify that though the submissions have been made on merits, we keep all rights and contentions of the parties open before the Assessing Officer upon the re-opening. (Dr. D.Y.Chandrachud, J.) (A.A. Sayed, J.)