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IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO.58 OF 2022

1. Shivam Ispat Private Limited Through its Director, Shri. Vijendra Kumar Singla, S/o Late Sham Lal Singla Aged 64 years, Resident of H. No. 235/H, Pulvado Karle Ville River, Benaulim, South-Goa, Salcete Goa, 403716. .... Petitioner.

v/s

1. Union of India, Ministry of Finance, Income Tax Department, Government of India, National Faceless Assessment Centre-Delhi
2. Assistant Commissioner of Income Tax, National Faceless Assessment Centre, Delhi .... Respondents.

Mr Parag Rao and Mr Akhil Parrikar, Advocate for the petitioner.
Ms Susan Linhares, Advocate for the respondent no.2.

CORAM: M. S. SONAK &
AVINASH G. GHAROTE , JJ.

DATE: 20th MARCH, 2024.

ORAL JUDGMENT (Per Avinash G. Gharote, J)

1. Heard Mr P. Rao, learned counsel for the petitioners and Ms S. Linhares, learned counsel for the respondent no.2.

2. Rule. Rule made returnable forthwith.

3. Heard parties by consent for final disposal.

4. The petition questions the order dated 2.2.2022 passed by the respondent no.2 rejecting of the objections raised by the petitioner to the issuance of the notice under Section 148 of the Income Tax Act and the subsequent notice dated 27.3.2021 (page 28), on the ground that the order of re-assessment of income tax for the Assessment Year 2016-2017, is not on account of any mistake, but is on account of change of opinion, which is impermissible in law.

5. Shorn of unnecessary details. The facts relevant for the present petition are as under:

1. The petitioner had on 4.10.2016 filed an E-return for the Assessment Year 2016-2017 declaring a total income of Rs.32,58,510/-. The case of the petitioner was selected for limited scrutiny through CAAS and a notice under Section 143(2) of the Income Tax Act was issued to the petitioner on 31.8.2017. Subsequently notice under Sections 129 and 142(1) of the Income Tax Act along with the questionnaire has been issued to the petitioner calling for details in connection with the return of income filed, were also issued.

6. On 26.11.2018 a show cause notice was issued to the petitioner

calling upon him to explain as to why the amount of Rs.3,07,96,304/-, which was claimed to be on account of clandestine and unaccounted sales, should not be added to the total sales of the petitioner. In the reply dated 26.12.2018, the petitioner denied the allegations and claimed that all the sales of the finished products to M/s Sahanu Sponge and Power Ltd and other entities had been duly accounted for in the books of accounts.

7. The Assessment Officer came to a conclusion that there was clandestine sale by the petitioner to M/s Sahanu Sponge and Power Ltd and M/s Ambey Metallic Limited on account of which by the order dated 28.12.2018(page 23), the respondent no. 2 held that the assessee had not offered sale amounting to Rs.3,70,96,304/- to tax in his return of income and considering that the gross profit of the assessee as per the audit report was shown to be 0.78%, calculated gross profit at the rate of 1% i.e. Rs.3,07,963/- which was added to the income from the business and profession of the Assessee. The total income of the assessee and the tax payable accordingly was computed and demand notice with penalty notice under Section 274 read with section 271(1)(c) of the Income Tax Act was directed to be issued to the petitioner.

8. Though the petitioner had filed an appeal against this assessment

order dated 28.12.2018 before the Commissioner of Income Tax (Appeals), the same came to be withdrawn in the light of the acceptance of the application of the petitioner under the vivad se viswas scheme 2020.

9. On 27.3.2021 (page 28) notice under section 148 of the Income Tax Act came to be issued by respondent no. 2 to the petitioner, informing it that the department proposes to assess/reassess the income for the Assessment Year 2016-2017. The reasons thereof, for reopening the assessment, were furnished to the petitioner on 27.1.2022(page 29), to which objections were filed by the petitioner on 28.1.2022 (page 32) contending, that there was no new fact/information available with the Assessment Officer and therefore the assessment could not be reopened merely on the change of opinion.

10. The objections filed by the petitioner, have been rejected by respondent no.2 by its order dated 2.2.2022 (page 42A), which is subject matter of challenge as indicated above.

11. Mr Rao learned counsel for the petitioner contends, that once the assessment has been finalised by the Assessment Officer, which is reflected in the Assessment order dated 28.12.2018(page 23), unless and until, it was a case of a pure mistake, the same could not have been

reopened merely on the basis of change of opinion as the material on record remained the same. He therefore submits that the impugned order which is not based upon any mistake but is based upon the change of opinion is clearly not sustainable in law. Learned counsel in support of his submissions places reliance upon ***M/s. Indian & Eastern Newspaper Society, New Delhi, Vs Commissioner of Income Tax***,[1] para 14; ***Commissioner of Income Tax Vs Kelvinator of India Ltd***, [2] and ***Aroni Commercials Limited Vs Dy. Commissioner of Income Tax***[3].

12. Ms S. Linhares, learned counsel for respondent no.2 while supporting the impugned judgment and notice, contends, that this is a case in which there is no change of opinion, but a mistake committed, While making earlier assessment for which reason, the re-opening of the assessment and the consequent order impugned is clearly justified. She relies upon ***Gruh Finances Ltd VS. Joint Commissioner of Income-Tax(Assessment)***[4] in support of her contention.

13. In ***M/s Indian and Eastern Newspaper Society*** (supra) it has been held that in the case of reappraising the material considered by

1 (1979)4 SCC 248
2 2010(2) SCC 723
3 2014 SCC online Bombay 221.
4 (2000) SCC online Gujarat 451

him during the original assessment the Income Tax Officer if he discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment, however, an error discovered on reconsideration of the same material, and no more, does not give him that power.

14. In ***Kelvinator of India Ltd*** (supra) while considering the provisions of Section 147 of the IT Act, which is a repository of the power of the assessing officer to reopen the assessment, the Hon'ble Apex Court noticing the change in the language of Section 147 after the amending Act of 1989 whereby the expression "for reasons to be recorded by him in writing" and "is of the opinion" stood deleted and its place, the expression "has reason to believe", was inserted, held that post 1.4.1989 the power to reopen, assessment was much wider. However it was also held that the expression "reason to believe" needed to be given a schematic interpretation failing which, section 147 would give arbitrary powers to the Assessment Officer to reopen assessment on the basis "mere change of opinion", which cannot be *per se* reason to reopen. This was more so, in light of the conceptual difference between the power to review and the power to reassess and whereas the Assessment Officer had no power to review, he had the power to assess, but reassessment has to be based on

the fulfillment of certain preconditions and if the concept of "change of opinion" is removed then in the garb of reopening the assessment the review would take place. It was also held that even while considering the expression "reason to believe" as inserted in Section 147 of the Income Tax Act w.e.f. 1.4.1989, one must treat the concept of change of opinion as an inbuilt test to check abuse of power by the Assessment Officer, hence after 1.4.1989 the Assessment Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment and reasons must have a live link with the formation of the belief.

15. In ***Aroni Commercial Ltd***(supra) after noticing ***Kelvinator of India Ltd*** (supra), learned Division Bench of this Court has held that a change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

16. The change in the language of section 147 of the Income Tax Act, can be discerned from the following table:-

Before Amendment Act of 1989	*After Amendment Act of 1989*	*After Finance Act 2021*
"147. Income escaping assessment.—If the assessing officer, for reasons to be recorded by him in writing, is of	*Section 147 reads as under:* *"147. Income escaping assessment.—If the assessing officer has*	*147. If any income chargeable to tax, in the case of an assessee, has escaped assessment for any*

the opinion that any income chargeable to tax as escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):" (emphasis supplied)	*reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year):" (emphasis supplied)*	*assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."*

17. It would be material to note that, the deletion of the expression "has reason to believe" as inserted by the amending Act 1989 in section 147 has taken place, by the Finance Act, 2021, w.e.f. 1.4.2021. Since the present petition, deals with the reopening of the assessment for the financial year

2016-2017, the position as prevailing then, would have to be taken into consideration for the purpose of testing the impugned order dated 2.2.2022.

18. A perusal of the assessment order dated 28.12.2018 would indicate that it takes into consideration the report of the Directorate General of Goods and Service Tax Intelligence to come to a conclusion that there was a large scale suppression of sale by the petitioner and therefore it was concluded that the assessee had not offered sales amounting to Rs.3,07,96,304/- to tax in its return of income and after considering the gross profit of the assessee as per the audit report to be 0.78% had added gross profit at the rate of 1% i.e Rs.3,07,963/- to the income of the business and profession of the assessee.

19. As against this the notice dated 27.1.2022 (page 29) giving the reasons for reopening the assessment in the case of the petitioner does not indicate, that any new material has been found, but relies upon the same material and same set of facts as were prevailing, when the earlier order of assessment dated 28.12.2018 was made. Even the impugned order dated 2.2.2022(page 42A), does not indicate that there is any other material available with respondent no.2 of any nature whatsoever. The reasons for reassessment as spelt out in the impugned order dated

2.2.2022 are the report of the Directorate General of Goods and Services Tax Intelligence on the basis of which it is opined that there is large-scale suppression of sale by the assessee by not offering the sales amounting to Rs.3,07,96,304/- to tax in its return of income, which are contained in paragraph 5.2, which are the same reasons as found in the assessment order dated 28.12.2018. This would clearly indicate, that considering the law which was prevailing on the date on which notice under section 148 of the Income Tax Act dated 27.3.2021 was issued, a mere change of opinion, could not be the reason for reopening of the assessment.

20. Though Ms. S. Linhares, learned counsel for respondent no. 2 places reliance upon ***Gruh Finances Ltd*** (supra) that in our considered opinion, is a case based upon the absence of conscious consideration of the material on record at the time of the first assessment on account of which it has been held that a mistake has been committed, which according to us, is not the position, extant in the present case as indicated by the discussion made above. Even ***Gruh Finances Ltd*** (supra) holds that if the conscious application of mind to the relevant facts and material available or existing at the relevant point of time while making an assessment was made, and again a different or divergent view is sought, it would tantamount to "change of opinion", whereas, in the case of existing

material, if no conscious application of mind has been made, it would tantamount to mistake in not considering the relevant point or proposition and it would not be a change of opinion. We have already pointed out above, that the entire assessment order dated 28.12.2018 (page 23) was based upon the report of the Directorate General of Goods and Services Tax Intelligence, based upon which respondent no. 2, had assessed the income of the petitioner as indicated above. The same report has been considered as a reason for re-opening the assessment in the impugned order, which clearly would indicate that it was not a case of mistake, but was a change of opinion, as the same material, which cannot be sustainable in law.

21. Though reliance is also placed by Ms. S. Linhares, learned counsel for respondent no. 2 on the amended section 147 of the Income Tax Act, it does not assist her case for two reasons, (i) the amendment having been brought into effect from 1.4.2021, cannot be applied to the case of the petitioner and (ii) even otherwise, though the expression "reason to believe has been deleted therefrom, what has been held in ***Kelvinator of India***(supra) regarding the concept of "change of opinion" being treated as an in-built test to check abuse of power by the Assessment Officer, in absence of power to review, would continue to hold the field.

22. We therefore are of the considered opinion that the impugned order dated 2.2.2022 and the consequent notice dated 27.3.2021 cannot be sustained and are hereby quashed and set aside. Rule is made absolute in the above terms. No costs.

AVINASH G. GHAROTE, J **M. S. SONAK, J.**