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

WRIT PETITION NO. 1902 OF 2019

Supra Estates India Pvt.Ltd.
Having its office at 601/602,
Sony House- 34, Gulmohar Road,
JVPD Scheme, Vile Parle (West),
Mumbai- 400 056. … Petitioner.

V/s.

1. Income Tax Officer, Ward-11(2)(4),
having her office at Room No.349,
3rd Floor, Aayakar Bhavan,
Maharshi Karve Road, Churchgate,
Mumbai- 400 020.

2. Pr. Commissioner of Income-tax – 11,
having his office at Room No.437,
Aayakar Bhavan, M.K. Road,
Churchgate, Mumbai- 400 020. … Respondents.

Mr.J.D.Mistry, Senior Advocate with Mr.B.V.Jhaveri and
Mr.S.Sriram for the Petitioner.

Mr.Akhilesh Sharma for Respondent Nos.1 and 2.

CORAM: M.S. SANKLECHA AND
NITIN JAMDAR, JJ.

DATE : 21 August 2019.

JUDGMENT : (Per Nitin Jamdar, J.)

Rule. Rule made returnable forthwith. Respondents waive service. The petition is taken up for final disposal.

2. The Petitioner- Supra Estates India Pvt.Ltd. has challenged the notice dated 24 March 2019 issued by the respondent- Assessing Officer proposing to reopen the assessment and the order dated 25 June 2019 passed by the Assessing Officer rejecting objections raised by the Petitioner to the notice seeking to reopen the assessment.

3. The Petitioner, a private limited company, is in the business of redevelopment of residential premises in the cities of Mumbai and Thane. The Petitioner filed its Return of income on 30 September 2012 for the assessment year 2012-13 declaring the total income of Rs.22,23,404/-. The case of the Petitioner was selected for scrutiny by the respondent- authorities. A notice under section 143(2) of the Act was issued on 13 August 2013. The Petitioner participated in the assessment proceedings. The Assessing Officer vide a notice under section 142(1) issued on 21 August 2014

called upon the Petitioner to explain shareholding pattern, details of shareholders, details of share application money/premium, allotment of shares, details of expenditure above Rs.5 lakh debited to profit and loss account and the comparative figures of gross profit and net profit. The Petitioner submitted details of the information called for on 9 September 2014 and 9 February 2015. The Assessing Officer issued another notice under section 142(1) on 13 February 2015 seeking further details regarding share premium, details of earning per share and profit earned by the Petitioner; the comparative rate of premium charged by other companies; computation of share premium, the net worth of the Petitioner, subscription agreements etc. The details were submitted by the Petitioner on 20 February 2015. One more notice under section 142(1) of the Act was issued on 20 February 2015 to which the Petitioner submitted an explanation on 27 February 2015. An order was passed by the Assessing Officer on 13 March 2015 accepting the return filed by the Petitioner.

4. After a period of four years, on 28 March 2019, a notice was issued by the Assessing Officer under section 148 of the Act, seeking to reopen the assessment. The Petitioner by letter dated 5 April 2019 filed its return of income and requested for reasons for reopening the assessment. The Respondent No.1- Assessing Officer on 10 May 2019, furnished reasons recorded for exercising jurisdiction under section 148 of the Act. The Petitioner filed its

objections to the reopening on 20 May 2019. The Assessing Officer rejected the objections by order dated 25 June 2019. By this petition, the Petitioner has challenged the notice dated 28 March 2019 and the order dated 25 June 2019.

5. The assessment year in question is 2012-13. The impugned notice under section 148 was issued on 28 March 2019, i.e. after the expiry of four years from the end of the assessment year.

6. The period of four years is vital because of the language of section 147 of the Act. Under Section 147, the Assessing Officer has jurisdiction to reopen the assessment, if he has reason to believe that income chargeable to tax has escaped assessment. However, if the assessment sought to be reopened after four years, then there is an additional requirement, that is, there must be a failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment. The existence of these parameters is a jurisdictional requirement. If the jurisdictional requirement is not met, the Assessing Officer would not have jurisdiction to reopen the assessment after four years.

7. As regards the satisfaction of the condition of failure by the assessee to fully and disclose all material facts for assessment, there are two facets. First, the Assessing Officer must be satisfied; there is a failure to disclose all material facts. Second, even if the Assessing

Officer is satisfied there is a failure by the assessee, factually it must be demonstrated so.

8. The satisfaction of the Assessing Officer regarding the failure of the assessee must be reflected in the reasons given for reopening the assessment[1] The notice proposing to reopen the assessment must reflect an application of mind of the Assessing Officer to this critical facet of section 147 of the Act, i.e. after four years the assessment can be reopened only if there is a failure by the assessee.

9. Turning to the facts, the reasons supplied to the petitioner are as under:

> *"1. The return of income for the AY 2012-13 was e-filed on 30.09.12 declaring total income of Rs.22,23,404/-. The same was processed u/s 143(1). Subsequently, the assessment was completed u/s 143(3) on 13.03.2015 assessing the total income at Rs.22,23,404/-. The assessee company is engaged in the business of construction.*
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> *2. During the year under consideration, i.e. F.Y. 2011-12 relevant to A.Y. 2012-13, the assessee company has issued 103845 shares of the face value of Rs.100 at a premium of Rs.1200 per share. On perusal of the financials of the company from A.Y. 2008-09 onwards it is observed that the assessee company has been continuously showing business losses till A.Y. 2018-19. Because no profits from the business have been offered for tax during the period*

1 (2012) 343 ITR 183 (Bom) (Titanor Components Ltd. v. Asst.CIT)

before the year of issuance of shares, there is no justification for issuing shares at such a high premium of Rs.1200 per share. The assessment for A.Y. 2016-17 was selected under CASS, one of the reasons being "to verify large share premium". Accordingly, the details of share premium received were called for. It was submitted that the shares were issued in F.Y. 2011-12 and subsequently no shares were issued by the assessee company.

3. During assessment proceedings for A.Y. 2016-17, it is seen that the project has not been completed but has been delayed as the Dy. Collection (Encroachment & Removal) is re-verifying the eligibility of Slum Dweller. This means that the Slum Rehabilitation Project as on 31.03.2016 is itself in the initial stages wherein the slum developers are yet to be shifted to transit accommodation. Further, the earning per share of the company during the year under consideration, i.e. 2012-13 is 9.54 and negative in the preceding year. Hence, in view of the above, there is no justification for receiving such a huge premium of Rs.12,46,14,000/- considering the net worth of the assessee company and the projected project plans.

4. It is further observed that the assessee company has incurred expenses on account of legal and professional fees to the tune of Rs.85,95,000/- for providing consultancy services by Queens Developer. The said amount has been paid for availing the consultancy services in the slum redevelopment project. Because the expenses incurred in relation to the Slum Rehabilitation Project have been debited to work in progress and above amount which has been claimed by the assessee company in the profit and loss account is not in order. Further, during the assessment proceedings for A.Y. 2016-17, it is seen that only transit accommodation is being constructed for rehabilitating the slum dweller and no income has been offered from the said project. Hence, this expenditure

should have been considered under work in progress instead of claiming it as a P & L Expenditure.

5. Therefore, the high share premium of Rs.12,46,14,000/- @ 1200/- per share received by the company vis-a-vis the financials of the company remains unexplained. Also, the expenditure to the tune of Rs.89,50,000/- claimed as an expenditure in the Profit & Loss account is also unexplained.

6. Hence, in view of the above, I have reason to believe that the income to the extent of Rs.13,32,09,000/- (12,46,14,000 + 85,95,000) has escaped assessment for A.Y. 2012-13.

7. Therefore, a notice u/s 148 r.w.s. 147 of the Act is being issued to assess such income chargeable to tax, which has escaped assessment, after obtaining necessary approval from the competent authority."

The petitioner in his objections had pointed out there is no averment in the reasons that the assessee has failed to disclose fully and truly all material facts necessary for the assessment, and factually there has been no such failure. While rejecting the objections, the Assessing Officer has not even noticed this requirement and has referred to the decision of the courts which do not deal with the situation at hand. Thus, the first jurisdictional requirement that the notice must disclose an application of mind by the authority seeking to reopen the assessment to the additional requirement under section 147 in case of reopening after four years is missing.

10. Secondly, there is no such failure by the Petitioner- assessee to fully and truly disclose all the material facts necessary for the assessment. In the reasons given for reopening the assessment, the Assessing Officer had stated that considering that the Petitioner was showing no profits from the business for tax during the period before the year of issuance of shares and there was no justification for issuing shares at such a high premium. It was also stated that during assessment proceedings, the project was not completed but was delayed and the slum rehabilitation project was in the initial stages and the earning per share of the Petitioner was negative in the preceding year and, hence, there was no justification for receiving such a huge premium. It is further observed that expenditure incurred on account of legal and professional fees should have been considered as work in progress in spite of claiming it as an expenditure in Profit & Loss Account. It is stated that this remained unexplained. The question was whether this is because of the result of the failure of the Petitioner to submit necessary details.

11. Earlier, by notice dated 21 August 2014, various details were called for, particularly regarding shareholding pattern, details of shareholders and various other details in 29 requirements. The record shows that the Petitioner had supplied these details on 9 September 2014 and 9 February 2015. Again 10 point details were sought on 13 February 2015. Those were also handed over on 20 February 2015. The Petitioner had given a note on the valuation of

the share at a premium along with details, and all details were placed on record. The order passed by the Slum Rehabilitation Authority and the agreement entered into between the Petitioner, and the Developer was also placed on record.

12. Vide notice dated 21 August 2014, various details were called for, which were submitted by the petitioner on 9 September 2014 and 9 February 2015. These were list of firms and companies in which shareholders had equities; details of Directors; details of sister concerns and group concerns; shareholding pattern; share application money and premium; monthly summary of purchases and sales; details of bank accounts; details of sundry creditors; details of sundry debtors; assessment history; inventories; elements of indirect taxes and custom duty; additions to fixed assets; rate of depreciation; date of installation; break-up of other income; details of exempted income; details of donations made; exemption certificates; demat accounts.

13. In respect of share premium, on 13 February 2015, the details were called for and they were submitted. These are :

i. The persons from whom share premium has been collected during F.Yrs. 2009-10 and 2011-12.
ii. The earning per share and profit in the past years as against the premium collected per share.
iii. The premium charged by the reputed companies in he field of business and the comparative data.

iv. The valuation of premium worked out. The financial consultants on whose advice such a premium was worked out.
v. The net worth of the company as per Balance Sheet and a presentation on future prospects of the company.
vi. The Subscription Agreements with the parties.
vii. The minutes of Meeting of the Board of Directors where the premium amount to be charged was fixed.
viii. The Resolution authorizing the issuing of shares passed. When was this Resolution intimated to the Registries of Companies:
ix. The source of income of all investing companies/ individual? Copy of their ROI for last five years.
x. The details of Directors of the investing company/ Companies and whether any Directors partners in these entities are in any way related to any of the Director's / shareholders of the investor.

14. The petitioner submitted a note on valuation of shares at a premium. The relevant part of which reads as under:

"It has been agreed between the parties that "ETA Start property Developers shall hold 35% of the Share Capital of the Company. The Company is in the business of redevelopment of Slums situated at Andheri West and accordingly has signed diverse agreement with Slum dwellers of the following societies:
1. Jagrut Hanuman Welfare SRA Co-op Housing Society Limited.
2 to 16….. ….. ….. ….. ….. …..

The Company has also made necessary application to the slum authorities for sanction of the above redevelopment. The LOI issued by the slum authorities is in respect of 46,490.26 sq.mt. Of FSI (5,00,235 Sq.ft) for free sale building. The Ready Reckoner rate of FSI on CTS 198 is Rs.39,600 per sq mt and 208 is

Rs.31300 per sq mt ie average of Rs.35450 per sq mt. Hence the total valuation of free sale of FSI in the hands of the company is approx. 165 crores less 65 crores for construction of rehabilitation and transit buildings for slum dwellers ie. 100 crores valuation. In order that ETGA holds 35% of the Share Capital, ET was required to bring in Rs.74.99 Crores as detailed under. Hence it is provided in the JV agreement dated 30.7.2009 that ETA shall bring the following amounts:

1. *Rs.2,69,23,000/- Face value of 35% shares*
2. *Rs.32,30,76,000/- Premium Amount*
3. *Rs.20,00,000/- Interest free Unsecured Loans*
4. *Rs.20,00,00,000/- Interest bearing unsecured Loans*

Rs.74,99,99,000/- Total

It may be noted that the shares has been allotted to ETA on the following dates against funds brought in by them.

1. *6.10.2009 Rs.21,50,00,500/- First Allotment*
2. *13.10.2011 Rs13,49,98,500/- Second Allotment*

Rs.34,99,99,000/- Total."

The Petitioner explained in the note how the valuation of share premium was arrived at. Having considered the material, it is clear there was no failure by the Petitioner to fully and disclose all the material facts for assessment as regards the reasons supplied under notice for reassessment. The power to reopen the assessment is not a power to review, and this power cannot be used to review because there is a change of opinion by the Assessing Officer.

15. Thus, to summarize, on both counts, there is no application of mind by the Assessing Officer to the jurisdictional requirements. First, to the existence of failure of the assessee to disclose all material

facts for assessment since the assessment was sought to be reopened after four years as it is not so mentioned in the reasons supporting the notice for reassessment. Second, factually, there has been no failure by the Petitioner to fully and truly disclose the material facts. The reasons in support of the notice of reassessment mention the areas in which reassessment needs to be carried out, and the record shows that material regarding these topics was called for over two occasions from the Petitioner and was supplied.

16. In these circumstances, although the Petitioner had a remedy of statutory appeal since the order is without jurisdiction and contrary to the settled position of law, it requires to be quashed and set aside. We hold and declare that the Respondents had no jurisdiction to issue the impugned notice, consequently, the impugned order rejecting the objections is also without jurisdiction.

17. The Rule is made absolute in terms of prayer clause (a). No costs.

NITIN JAMDAR, J. M.S. SANKLECHA, J.