IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.315 OF 2012

Indivest Pte Ltd., Singapore ..Petitioner.
versus
Additional Director of Income Tax
-3(1), Mumbai and others ..Respondents.

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Mr. Porus F. Kaka, Senior Advocate with Mr. Manish Kanth and Mr. Atul K. Jasani for the Petitioner.
Mr. Tejveer Singh for the Respondents.

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CORAM : DR.D.Y.CHANDRACHUD &
M.S. SANKLECHA, JJ.

13 March 2012.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

1. Rule, by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. By a notice dated 16 March 2011, the Assessing Officer has sought to reopen an assessment under Section 148 of the Income Tax Act, 1961 for Assessment Year 2006-07. The objections which were submitted by the assessee to the reopening of the assessment have been rejected by an order dated 20 December 2011. Both the notice reopening the assessment and the order disposing of the objections of the assessee have been challenged in these proceedings under Article 226 of the Constitution.

3. The Petitioner is a company incorporated under the laws of Singapore and is wholly owned by the Government of Singapore. The Petitioner claims to be a tax resident of Singapore and a non-resident for the purposes of the Income Tax Act, 1961. The Petitioner was incorporated on 20 October 1995 and carries on the business of investment in different jurisdictions across the world, including in

India. For the financial year 2005-06 the Petitioner had a profit of Rs.131.70 Crores from the business of investment in Indian securities. The Petitioner filed a return of income on 31 October 2006 for Assessment Year 2006-07 returning a nil income taxable in India on the basis of the provisions of the Double Taxation Avoidance Agreement, between India and Singapore. The returns initially filed by the Petitioner on 20 October 2006 before the Assessing Officer were in the electronic form. The Petitioner filed a conventional copy of the return on 31 October 2006. On 28 March 2008 the Petitioner received an intimation under Section 143(1). On 16 March 2011 a notice was issued to the Petitioner under Section 148 proposing to reopen the assessment. This was followed by a communication of the reasons on the basis of which the assessment was sought to be reopened. The reasons on the basis of which the assessment for Assessment Year 2006-07 is sought to be reopened are as follows :

> "Return of income for A.Y. 2006-07 was filed by the assessee on 31.10.2006 declaring total income of Rs. Nil/-. Assessment u/s. 143(1) of the I.T. Act was completed on 28.03.2008 determining the total income at Rs. Nil/-.
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> As per Section 90(2) of the Income Tax Act, that where the Central Government has entered into an agreement with the Government of any country outside India granting relief of tax or for avoidance of double taxation, then in relation to assessees to whom such agreement applies, the provisions of the Act shall apply only to the extent they are beneficial to such assessees.
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> The assessee company filed its return of income for AY 2006-07 on 31.10.2005 declaring Nil income. The assessee is a private limited company incorporated in the Republic of Singapore on 20.10.1995. The principal business of the company is to, inter alia, invest in Indian securities. The assessee company earned income of Rs.1317020173/- during the previous year relevant to assessment year 2006-07. The assessee claimed that the profits earned from the transactions in Indian securities are not liable to tax in India in view of article 7 of India – Singapore tax treaty.
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> As per article 7 of the India – Singapore treaty business income is taxable only in Singapore, unless resident carries on business in India through a permanent establishment situated in India.
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> In simple terms that the assessee company treated the income earned on investment activities as business income and accordingly not taxable in India as the assessee company did not have any permanent

establishment in India.

In this connection following remarks are offered:

(1) No foreign companies are allowed to invest through stock exchange in India unless it is approved as FII by the regulatory authorities viz. RBI, SEBI etc.

(2) In case, the assessee company is a registered FII or sub account of any registered FII, which is not permitted to buy and sell securities without taking delivery. Accordingly any gain earned on investment as FII is liable to be taxed u/s. 115AD of the Income Tax Act. Therefore the possibility of escapement of income taxable as STCG under the Act may not be ruled out.

In view of these, I have reason to believe that income chargeable to tax of Rs.147769663/- (i.e. 11.22% of Rs.1317020173/-) has escaped assessment within the meaning of provision of section 147. Issue notice u/s. 148 of the I.T. Act."

Upon receipt of the reasons, the Petitioner submitted its objections to the reopening of the assessment by a letter dated 14 June 2011. The Petitioner stated in the objections that while filing its return on 31 October 2006 it had provided a full disclosure by way of notes to the return about its Indian sourced income and as to why it was not chargeable to tax. The Petitioner in the course of the objections dealt with the two reasons on the basis of which the assessment was sought to be reopened. As regards the first reason, the Petitioner submitted that it has been wrongly treated in the notice as a Foreign Institutional Investor (FII) or a sub account of an FII registered with the Securities and Exchange Board of India and sought to be taxed under Section 115AD which is a special provision applicable to FIIs. The Petitioner clarified that it is neither an FII nor a sub account registered with SEBI and hence, the provisions of Section 115AD were not applicable to it. As regards the second ground, it was submitted that the reasons wrongly postulate that the Petitioner has realised short term capital gains whereas factually all the investments were held for a period in excess of twelve months prior to sale. Finally, the Petitioner submitted that the reasons which were recorded disclosed that the exercise of the jurisdiction was founded merely on the possibility of escapement and hence, there was no reason to believe that income had actually escaped assessment.

4. The objections have been rejected by the Assessing Officer on 20 December 2011. According to the Assessing Officer the Petitioner filed electronically, only certain sketchy details. The Assessing Officer has further noted that the Petitioner had not chosen to disclose how it had conducted its business affairs, which scrips were bought and sold, who was the custodian, broker or agent for such sale and purchase of shares and how payments were made or collected. The concern of the Assessing Officer, it has been stated, was that income arising out of the transactions of the Petitioner may be liable to be taxed as short term capital gains and the possibility of escapement cannot be ruled out. According to the Assessing Officer, the transactions in securities were subject to stringent regulation covering investments by foreign companies in India and what was permitted was only investment and not a business venture. According to the Assessing Officer what had arisen to the Petitioner was capital gains and not business income.

5. Counsel appearing on behalf of the Petitioner submitted that -

(i) There was no tangible material on the basis of which the Assessing Officer could have formed a reason to believe that income had escaped assessment. A reason to believe, it was urged, cannot be based on a mere suspicion. In the present case the Assessing Officer has based his opinion merely on the possibility of escapement without the formation of a reason to believe;

(ii) Once the reasons have been formulated in pursuance of a notice under Section 148, no improvement on those reasons is permissible at the behest of a succeeding Assessing Officer who disposed of the objections raised by the assessee to the reopening of the assessment;

(iii) In the present case, the provisions of Section 147 have been impermissibly been used to get over the statutory time limit for issuing a notice under Section 143(2). Consequently it was urged that the reopening of the assessment is based on a mere change of opinion without the existence of any tangible material before the Assessing Officer.

6. On the other hand counsel appearing on behalf of the Revenue submits that -

(i) The assessee failed to make a full and proper disclosure in the return of income which was filed electronically in the first instance and thereafter in a conventional mode. According to the submission the assessee had to first determine the taxable income and thereupon claim the relief which was available under Section 90(2) having regard to the provisions of the Double Taxation Avoidance Agreement between India and Singapore. Instead of doing this, the assessee left the relevant columns in the return of income blank. Consequently since there was no proper disclosure by the assessee, the Assessing Officer has acted within his jurisdiction in coming to the conclusion that there was a possibility of escapement;

(ii) In the present case, there was no scrutiny assessment and merely an intimation was furnished to the assessee under Section 143(1). The fact that the Assessing Officer had not exercised his jurisdiction under Section 143(2) would not preclude him from seeking to reopen the assessment under Section 147;

(iii) The Assessing Officer was within his jurisdiction in reopening the assessment under Section 147 and has correctly rejected the objections preferred by the assessee.

7. The rival submissions now fall for determination. The assessee in the present case is a company owned and controlled by the Government of Singapore. The assessee filed a return of income in the electronic form on 20 October 2006. Under Section 139 of the Income Tax Act, 1961 every person being a company or a firm or being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under the Act during the previous year exceeds the maximum amount which is not chargeable to income tax, he shall on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form, verified in a prescribed matter and setting forth such other particulars as may be prescribed. The Central Board of Direct Taxes initially

issued a circular on 10 October 2006 notifying forms for the filing of returns for Assessment Year 2006-07. Form No.1 was prescribed as the form for filing a return of income and of fringe benefits for companies other than those claiming exemption under Section 11. The circular stated that these return forms were designed to make them amenable for electronic filing. Where a tax payer did not use a digital signature, a two step procedure was envisaged. In the first step the assessee would transmit details of the return and the schedules thereto electronically, without digital signature to the designated website and would thereafter file a 'paper' return. The date of electronic transmission and acknowledgment would be filled in as part of the paper return. All corporate tax payers were necessarily required to furnish the return for Assessment Year 2006-07 electronically after 24 July 2006. For other classes of tax payers it was made optional to furnish a return. The circular clarified that the forms should not be accompanied by any attachment or annexure. Consequently tax payers were directed not to enclose with their return forms any statement showing the computation of income or tax or notes thereto, copies of the balance-sheet, profit and loss account, proof of payment of advance tax, audit report or any other document. All the relevant documents were required to be retained by tax payers and to be furnished in original during the course of scrutiny proceedings. The new forms which were devised for electronic filing were made "annexure-less". Assessees were, however, informed that in pursuance of a notice under Section 143(2), they could avail of the opportunity to file documents, furnish reasons and make disclosures in support of various claims made by them.

8. Parliament amended the provisions for filing returns by the insertion of Section 139C and 139D by the Finance Act of 2007 with retrospective effect from 1 June 2006. Under Section 139C the Board is empowered to make rules providing for a class or classes of persons who may not be required to furnish documents, statements, receipts, certificates, reports of audit or any other documents, which are required otherwise to be furnished along with the return. Under Section 139D the Board is empowered to make rules providing for the class or classes of persons who shall be required to furnish the return in an

electronic form. Rule 12(1)(a) of the Income Tax Rules 1962 provides for the filing of a return in the case of a company in Form No.1. Rule 12(3) which was inserted with effect from 24 July 2006 inter alia provides that the return of income to be furnished in Form 1 shall not be accompanied by a statement showing the computation of tax payable or of proof of tax deducted at source or of advance tax paid. Similarly, no document or audit report is required to be attached with the return of income. It has become necessary to advert to these provisions in view of the fact that the Petitioner for Assessment Year 2006-07 filed a return of income in the electronic form in pursuance of the Board's circular dated 10 October 2006. Under the circular all corporate tax payers were mandatorily required to furnish the return electronically.

9. In the return of income that was filed by the Petitioner, the main activity was disclosed to be of investment in securities. The Petitioner disclosed its residential status as a non-resident and that it had claimed double taxation relief under the agreement with another country. The Petitioner disclosed that it had income in the amount of Rs.7.78 Crores which was not to be included in the total income being exempt income. The return contained a statement that the beneficial owner of the shareholding of the Petitioner was a corporation of the Government of Singapore which held the entire beneficial ownership. The Petitioner further stated in the course of the return that it was claiming relief under Sections 90/91 in the amount of Rs.131.70 Crores. The Petitioner annexed to the return of income several notes to the following effect :

> "1. Indivest Pte Ltd ('Indivest' or 'the Company') is a private limited company incorporated on the Republic of Singapore on October 20, 1995. The principal business of the Company is to, inter alia, invest in Indian securities.
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> 2. Section 90(2) of the Income Tax Act, 1961 ('Act') provides that where the Central Government has entered into an agreement with the Government of any country outside India for granting relief of tax or for avoidance of double taxation, then, in relation to assessees to whom such agreement applies, the provisions of the Act shall apply only to the extent they are more beneficial to such assessees.
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> 3. Indivest is a tax resident of Singapore. The Government of the Republic of India and the Government of the Republic of Singapore have

> entered into an agreement for avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income ('the India – Singapore tax treaty'). As a Singapore tax resident, Indivest's taxability in India will be governed by the provisions of the Act and the India-Singapore tax treaty
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> 4. Article 7 of the India-Singapore tax treaty, provides that a resident of Singapore will be taxable on its 'Business Profits' only in Singapore, unless the Singapore resident carries on business in India through a permanent establishment ('PE') situated in India. In such a case, the business profits will be taxable in India to the extent to which the profits are attributable to the PE of the Singapore resident in India.
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> 5. Indivest is engaged in the business of investing in securities. Accordingly, any profits that it may realize from its transactions in securities constitute Indivest's profits from its business. Indivest does not have an office or any other place of business in India. On this basis, Indivest does not have a PE in India, as defined in Article 5 of the India-Singapore tax treaty. Hence, based on the provisions of Article 7 of the India-Singapore tax treaty, the profits earned by Indivest from its transactions in Indian securities amounting to Rs.1,317,020,173 are not liable to tax in India."

Apart from this, the Petitioner relied upon certain precedents and submitted that the provisions of Sections 44AA and 44AB for maintenance and audit of accounts, were inapplicable since the company did not have any profits and gains which were chargeable to tax in India. The Petitioner received an intimation under Section 141(1). Evidently no recourse was taken by the Assessing Officer to the provisions of Section 143(2).

10. The assessment for Assessment Year 2006-07 was sought to be reopened principally on the basis of two grounds :- (i) No foreign company is allowed to invest through Stock Exchanges in India, unless it is approved as an FII; and (ii) In the event that the Petitioner is a registered FII or a sub account of a registered FII, it would not be permitted to buy and sell securities without taking delivery. Accordingly any gain or investment as an FII is liable to be taxed under Section 115AD of the Income Tax Act, 1961. On this ground it has been stated that the possibility of an escapement of income taxable as short term capital gain may not be ruled out. The Assessing Officer has stated that there was a reason to believe that income chargeable to tax computed at 11.22% of Rs.131.70 Crores has

escaped assessment within the meaning of Section 147. In the objections which were raised by the Petitioner to the reopening of the assessment, the Petitioner clarified that it is not either an FII or a sub account of an FII. Consequently the provisions of Section 115AD, it was clarified, are not applicable to the Petitioner. The Petitioner further clarified that there was no question of any short term capital gain since factually all the investments were held for a period in excess of twelve months prior to sale. The entire basis of the reopening in the present case is founded on the two grounds to which a reference has been made earlier. The Assessing Officer sought to reopen the assessment on the basis that the Petitioner is an FII to which the provisions of Section 115AD would be attracted and as a result of which short term capital gains would be chargeable to tax. The clarification which has been issued by the Petitioner in its letter dated 14 June 2011 has not been disputed by the Assessing Officer while disposing of the objections. The Assessing Officer does not dispute the correctness of the submission that the provisions of Section 115AD are not attracted. During the course of the hearing, this position is not in dispute.

11. Reading the reasons of the Assessing Officer, it is evident that there is absolutely no tangible material on the basis of which the assessment for Assessment Year 2006-07 could have been reopened. Upon the return of income being filed by the assessee both in the electronic form and subsequently in the conventional mode, the assessee received an intimation under Section 143(1). The Assessing Officer would have been legitimately entitled to issue a notice under Section 143(2) within the statutory period. That period has expired. We must clarify that the non-issuance of a notice under Section 143(2) does not preclude the Assessing Officer from reopening the assessment under Section 147. For that matter, as has been held by the Supreme Court in **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.**[1], the failure of the Assessing Officer to take steps under Section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when an intimation under Section 143(1) has been issued. But it is also a settled

1 (2007) 291 ITR 500(SC).

principle of law that when the Assessing Officer issues a notice under Section 148, at that stage the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief (**Rajesh Jhaveri** (supra)). At that stage, an established fact of the escapement of income does not have to be proved, since it is not necessary that the Assessing Officer should have finally ascertained that income has escaped assessment. The nature of the jurisdiction of the Assessing Officer which was dealt with by the judgment of the two learned Judges of the Supreme Court in **Rajesh Jhaveri**'s case was revisited in a decision of three learned Judges in **Commissioner of Income Tax v. Kelvinator of India Ltd.**[2]. The Supreme Court has held that though after 1 April 1989, a wider power has been conferred upon the Assessing Officer to reopen an assessment, the power cannot be exercised on the basis of a mere change of opinion nor is it in the nature of a review. The Supreme Court has laid down the test of whether there is tangible material on the basis of which the Assessing Officer has come to the conclusion that there is an escapement of income. The Supreme Court held thus :

> However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, 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 Section 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 Section 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

2 (2010) 320 ITR 561 (SC).

arbitrary powers in the Assessing Officer."

12. If the test of whether there exists any tangible material were to be applied in the present case, it would be evident that the Assessing Officer has not acted within his jurisdiction in purporting to reopen the assessment in exercising the powers conferred by Section 148. There was a disclosure clearly by the assessee that it is a body corporate incorporated in Singapore, the principal business of which is to invest in Indian securities; that the assessee is a tax resident of Singapore and that the profits which the assessee realised from its transactions in securities constituted its profits from business. The assessee stated that it had no permanent establishment in India as defined in Article 5 of the DTAA and that based on the provisions of Article 7 the profits of Rs.131.70 Crores from transactions in Indian securities were not liable to tax in India. The only basis on which the assessment is sought to be reopened is on the assumption that the provisions of Section 115AD would stand attracted. That is on the assumption that the assessee is an FII. Though the attention of the Assessing Officer was drawn to the fact that the assessee is not an FII and that the provisions of Section 115AD would not be attracted, the Assessing Officer persisted in rejecting the objections to the reopening of the assessment. In the order disposing of the objections which were raised by the assessee, the succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee. The validity of the notice reopening the assessment under Section 148 has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently. While disposing of the objections of the assessee, the Assessing Officer has purported to state that the assessee had filed only sketchy details in its return filed in the electronic form. As we have noted earlier, the relevant provisions expressly make it clear that no document or report can be filed with the return of income in the electronic form. The assessee has an opportunity to do so during the course of the assessment proceedings if a notice is issued under Section 143(2). The Assessing Officer was, in our view, not entitled, when he disposed of the

objections to travel beyond the ambit of the reasons which were disclosed to the assessee. For all these reasons, we are of the view that the exercise of the jurisdiction under Section 147 and Section 148 in the present case is without any tangible material. The notice of reopening does not meet the requirements as elucidated in the judgment of the Supreme Court in **Kelvinator of India Ltd**. For these reasons, we make the rule absolute by quashing and setting aside the notice dated 16 March 2011 and the order passed by the Assessing Officer on 20 December 2011.

In the facts of the case, there shall be no order as to costs.

(Dr. D.Y. Chandrachud, J.)

(M.S. Sanklecha, J.)