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

WRIT PETITION NO. 2518 OF 2019

Gateway Leasing Pvt. Ltd.,] ... Petitioner.
A company incorporated under the]
Companies Act, 1956, having its]
registered office at 6W, 6th Floor,]
Merchant Chamber -41, New Marine]
Lines, Mumbai -400 020.]

V/s.

1. Assistant Commissioner of]
   Income Tax-1 (1)(2), Aayakar]
   Bhavan, Maharshi Carve Marg,]
   Mumbai -400 020.]
   ]
2. Deputy Commissioner of]
   Income Tax 1(1) (2), Room No.533,]
   Aayakar Bhavan, Maharshi Carve]
   Marg, Mumbai – 400 020.]
   ]
3. Principal Commissioner of]
   Income Tax -1 at Room No.387,]
   3rd Floor, Aayakar Bhavan, Maharshi]
   Carve Marg, Mumbai – 400 020.]
   ]
4. Union of India,]
   through the Secretary, Dept. of]
   Revenue, Ministry of Finance,]
   North Block, New Delhi-110001]...Respondents.

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Mr. Madhur Agarwal, Advocate a/w. Mr. Jas Sanghavi i/by PDS Legal for the Petitioner.

Mr. Suresh Kumar, Advocate for the Respondents.

CORAM : UJJAL BHUYAN AND MILIND N. JADHAV, JJ.

DATE : MARCH 11, 2020.

ORAL JUDGMENT :

1 Heard Mr. Madhur Agarwal, learned counsel for the Petitioner and Mr. Suresh Kumar, learned standing counsel, Revenue, for the Respondents.

2 By filing this petition under Article 226 of the Constitution of India, Petitioner seeks quashing of notice dated 31.03.2019 issued under section 148 of the Income Tax Act, 1961 by the Assistant Commissioner of Income Tax, Circle 1(1)(2), Mumbai i.e. Respondent No.1 as well as the order dated 26.08.2019 passed by the Deputy Commissioner of Income Tax, Circle 1(1)(2), Mumbai i.e. Respondent No. 2, rejecting the objections raised by the Petitioner to re-opening of assessment

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under section 147 of the Income Tax Act, 1961 (briefly "the Act", hereinafter).

3 Case of the Petitioner is that it is a company registered under the Companies Act, 1956, engaged in the business of financing and investing activities, as a non-banking financial company registered with the Reserve Bank of India. It is an assessee under the Act.

4 For the assessment year 2012-13, Petitioner filed return of income on 20.09.2012 declaring total income of Rs. 90,630.00. Initially, the return of income was processed under section 143(1) of the Act. Petitioner's case was however selected for scrutiny pursuant to which notices under section 143 (2) as well as under section 142(1) were issued alongwith questionnaire. During the course of assessment proceedings, details of income, expenditure, assets and liabilities were called for and examined. Following reply submitted by the Petitioner pursuant to such notices and

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after examination of the details filed, Assessing Officer computed the total income of the Petitioner at Rs. 90,630.00, vide the assessment order dated 28.03.2015 passed under section 143(3) of the Act.

5 On 31.03.2019 Respondent No. 1, who was in the meanwhile conferred jurisdiction to assess the Petitioner's income, issued notice to the Petitioner under section 148 of the Act stating that he had reasons to believe that Petitioner's income chargeable to tax for the assessment year 2012-13 had escaped assessment within the meaning of section 147 of the Act. Proceeding to assess/re-assess the income for the said assessment year, Respondent No. 1 called upon the Petitioner to submit return in the prescribed form for the said assessment year. It was further mentioned that said notice was issued after obtaining necessary satisfaction of the Principal Commissioner of Income Tax-1, Mumbai.

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6 Petitioner sought for the reasons for issuing notice under section 148 of the Act vide letter dated 09.04.2019, referring to the decision of the Supreme Court in the case **GKN Driveshafts (India) Ltd., vs. I.T.O., 259 ITR 19**. Petitioner also filed return of income under section 148 of the Act, returning the income at Rs. 90,630.00 as originally assessed by the Assessing Officer under section 143(3) of the Act.

7 By letter dated 31.05.2019, Respondent No. 2 furnished the reasons for re-opening of the assessment. It was stated that information was received from the Investigation Wing of the Income Tax Department that a search and seizure action was carried out in the premises of one Shri Naresh Jain which revealed that a syndicate of persons were acting in collusion and managing transactions in the stock exchange, thereby generating bogus long-term capital gains/ bogus short-term capital loss and bogus business loss entries for various beneficiaries.

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8 From the materials gathered in the course of the said search and seizure action, it was alleged that Petitioner had traded in the shares of M/s. Scan Steel Ltd. and was in receipt of Rs. 23,98,014.00 which the Assessing Officer believed had escaped assessment within the meaning of section 147 of the Act. It was also alleged that Petitioner had failed to disclose fully and truly all material facts necessary for its assessment for the assessment year 2012-13 for which notice under section 148 of the Act was issued.

9 Petitioner submitted objections to reopening of assessment proceedings on 26.06.2019. Referring to the reasons recorded and furnished, it was contended on behalf of the Petitioner that the original assessment was completed under section 143(3) of the Act where all the details of purchase and sale of shares of M/s. Scan Steels Ltd., also known as Clarus Infrastructure Realties Ltd. (earlier known as Mittal Securities Finance Ltd.), were disclosed. While denying that the Petitioner

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had any dealing with the parties whose names cropped up during the search and seizure action, it was stated that purchase and sale of shares were done by the petitioner through registered broker of Bombay Stock Exchange. Payment for the purchase of shares were made by cheque through the Bombay Stock Exchange, the price being as per prevailing market price. Thus there was no apparent reason to classify the receipt of Rs. 23,98,014.00 as having escaped assessment. Therefore, it was contended that the decision to reopen assessment was nothing but change of opinion, which was not permissible in law. That apart, it was contended that the impugned notice under section 148 of the Act was issued on 31.03.2019 and was received by the Petitioner on 04.04.2019 i.e. beyond 31.03.2019. The notice was posted on 02.04.2019. On that basis it was contended that though the notice was dated 31.03.2019 but the same was posted after closure of financial year and thus was barred by

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limitation being beyond six years. Other grounds were also raised by the Petitioner.

10 Respondent No. 2 by his letter dated 26.08.2019 informed the Petitioner that its objections to issuance of notice under section 148 of the Act was duly considered but on the grounds and reasons mentioned therein, the same was rejected.

11 Aggrieved, present writ petition has been filed, seeking the reliefs as indicated above.

12 This Court by order dated 01.10.2019, prima facie, took the view that the impugned notice was dispatched after 31.03.2019 which made the impugned notice beyond the statutory period of six years and thus without jurisdiction. While granting time to Respondents to file reply affidavit, interim stay was granted to the impugned notice dated 31.03.2019.

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13 Respondents have filed affidavit-in-reply controverting the averments made in the writ petition. It is stated that the impugned notice was issued after recording reasons under section 148 (2) of the Act and after obtaining sanction of the Principal Commissioner of Income Tax-I, Mumbai, as required under section 151(1) of the Act. It is stated that in response to the notice under section 148 Petitioner had furnished return of income on 09.04.2019, declaring total income of Rs. 90,630.00 wherein Petitioner claimed TDS credit of Rs. 34,05,533.00 and sought refund of a sum of Rs. 34,05,533.00. It is stated that on scrutiny of the computation made by the Assessing Officer, it was found that Petitioner had received refund of Rs. 26,13,268.00 with interest of Rs. 2,87,463.00 which was reduced while determining the tax liability. In the return of income tax filed, Petitioner did not reduce the amount of refund received by him which prima facie resulted in excess claim of refund to the tune of Rs. 26,13,268.00, which refund was already granted. It is

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stated that furnishing of the details of purchase and sale of shares of Mittal Securities Ltd., (Scan Steels Ltd.) did not amount to full and true disclosure of material facts before the Assessing Officer, who in his assessment order totally relied upon the submissions of the Petitioner and had accepted the same without cross verification. It is further stated that the challenge to the impugned notice is untenable. Besides, the Act provides for a host of remedial measures in the form of appeals and revisions.

13.1 Regarding issuance of the impugned notice, as alleged by the Petitioner to be beyond 31.03.2019, it is stated that the notice was handed over to the postal authorities on 31.03.2019. The postal receipts to that effect have been annexed.

13.2 Finally, Respondents have justified issuance of the impugned notice and re-opening of the assessment and in this connection a reference has

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been made to the report of the Investigation Wing as per which the Petitioner had diluted its income by adopting manufactured and pre-arranged transactions which were never disclosed to the Assessing Officer. Such an action was nothing but a failure on the part of the Petitioner to make a full and true disclosure of all material facts. Petitioner's contention that all primary facts were disclosed by it have been disputed. That apart, it is contended that Principal Commissioner of Income Tax-1 had applied his mind and thereafter, granted approval to the issuance of notice under section 148 of the Act.

14 Petitioner has filed rejoinder affidavit. It is stated that in the return of income filed pursuant to the impugned notice dated 31.03.2019, petitioner could not reduce the amount of refund already received as the online ITBA system did not provide for any separate column for reduction of the said amount already refunded. In any event, the said amount of

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Rs. 26,13,268.00 and interest were not the reasons for reopening assessment. All details about the purchase and sale of shares of Mittal Securities Ltd., were furnished; Assessing Officer was not required to give findings on each issue raised during the course of the assessment proceedings. Assessing Officer had applied his mind and granted relief to the petitioner in the assessment order. Normally when submission of assessee is accepted, no finding is given in the assessment order.

15 In the course of hearing, Mr. Agarwal, learned counsel for the Petitioner referred to the postal receipts which indicate that the impugned notice was delivered by Income Tax Department to the Petitioner through the post office on 31.03.2019 at 3.34 p.m.. Therefore, he submits that Petitioner would not press upon this ground as raised in the writ petition.

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15.1. Primary contention of Mr. Agarwal is that the reasons given for re-opening assessment do not make out a case for invoking jurisdiction under section 147 of the Act. The so called information allegedly received by the Respondents were in-fact furnished by the Petitioner in the course of the original assessment. It is another matter that Assessing Officer did not refer to all the primary facts placed before him by the Petitioner in the assessment order but that cannot be a ground for re-opening assessment. He therefore submits that at the most it can be construed to be re-appreciation of the materials already on record and in the circumstances, it would be a case of change of opinion which is not permissible for re-opening of a concluded assessment. His further submission is that grounds as furnished by the Respondents for re-opening of the assessment and the averments made in the affidavit by the Respondents, justifying the re-opening of assessment, are at variance. His contention is that the reasons given for re-opening of the

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assessment cannot be enlarged and improved upon by way of affidavit filed subsequently. That apart, it is contended that Principal Commissioner of Income Tax-1 had mechanically granted approval to Respondent No.1 to re-open the assessment which has vitiated the impugned notice.

16 On the other hand Mr. Suresh Kumar, learned standing counsel, Revenue, for the Respondents submits that not only the impugned notice was handed over to the Petitioner by the Income Tax Department on 31.03.2019 at about 3.34 p.m. but a copy of the same was served upon the Petitioner before end of the day on 31.03.2019. He further submits that the reasons furnished are good grounds to justify re-opening of the assessment of the Petitioner. Writ petition is premature inasmuch as it has assailed the impugned notice; whereas the Act provides for a host of alternative remedies to the

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Petitioner which are adequate and efficacious. Therefore, the writ petition should be dismissed.

17 Submissions made by learned counsel for the parties have been considered. We have also perused the materials on record.

18 At the outset, we may advert to the reasons furnished by Respondent No.2 for re-opening of the assessment. As already noticed above, reasons were furnished to the Petitioner vide letter dated 31.05.2019. The reasons furnished are extracted hereunder :

> "The return of income for the year, declaring total income of Rs.90,630.00 was filed by the assessee on 20.09.2012. The assessment was completed on 28.03.2015 by accepting the returned income.
>
> An information has been received from the Investigation Wing that a search and seizure action was carried out on Shri Naresh Jain and his associates by the DIT (Inv.)-2, Mumbai on 19.03.2019 which was concluded on

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21.03.2019. The search action covered the syndicate of persons who were acting in collusion and executing managed transactions in the stock exchange thus generating bogus long-term capital gains/ bogus short-term capital loss/ bogus business loss entries for various beneficiaries. This search action unraveled the workings of the syndicate and brought on record the make-believe nature of paper work that is manufactured in order to show the arranged transactions as legitimate market transactions. Statement of Shri Shirish Shah, recorded during the course of search action u/s 132 (4) of the Act in which he had admitted under oath that with the help of various people, manipulated the share prices of various scrips in order to provide bogus entries of long term capital gain, short term capital loss and business loss. Evidence has also been gathered during the search action establishing the links between Naresh Jain – the operator, promoters of various scrips, share brokers, exit providers and intermediaries who acted in collusion in order to facilitate the transactions on the exchanges. During the year, relevant to the A.Y. 2012-13, Shri Jain used the following scrips to provide bogus entries, which are as under :

Sr.No.	Scrip Code	Name
1.	504378	NYSSA Corporation Ltd.
2.	505343	Monotype India Ltd.
3.	508860	Diamant Infrastructure Ltd.
4.	511672	Scan Steels Ltd.

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5.	523810	Divine Multimedia (I) Ltd.
6.	531866	Aagam Capital Ltd.
7.	533427	VMS Industries Ltd.

Shri Jain had also admitted that he had helped Shri Bhavesh Pabri and Hemant Sheth for front running in the scrip of M/s. Scan Steels Ltd.. The brokers who helped him for this are M/s. Arcadia Shares and Stock Brokers P. Ltd., M/s. SSJ Finance & Securities P. Ltd., and M/s. S.P. Jain Securities P. Ltd. Perusal of information furnished shows that the assessee had traded in this share and was in receipt of Rs. 23,98,014/-. Therefore, I have a reason to believe that this income had escaped assessment within the meaning of section 147 of the Act.

It is, therefore, inferred from the above discussion that the assessee has failed to disclose fully and truly all material facts necessary for its assessment for the A.Y.2012-13. Therefore, the issue could not be verified by the A.O. during the course of assessment proceedings. Even otherwise, it is pertinent to mention that Explanation-1 to section 147 provides that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso to the said section.

In view of the above discussion, I have reason to believe that income chargeable to tax

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> amounting to Rs. 23,98,014/- has escaped assessment within the meaning of section 147 of the Act read with the provisos thereto. Notice u/s. 148 of the Income Tax Act, 1961, is therefore, issued to assess such income and also any other income chargeable to tax which has escaped assessment and which may come to notice subsequently in the course of the proceedings under this section."

19 From the above, it is seen that according to Respondent No. 2 information was received from the Investigation Wing about search and seizure action carried out in the premises of Shri Naresh Jain on 19.03.2019 which concluded on 21.03.2019. The search action revealed that a syndicate of persons were acting in collusion and had managed transactions in the stock exchange, thereby generating bogus long-term capital gains, bogus short term capital gains and bogus business loss entries for various beneficiaries. The search action unraveled the workings of the syndicate and brought on record the make believe nature of paper work that is manufactured in order to show the

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arranged transactions as legitimate market transactions. Statements of various persons were recorded in the course of the search action. In his statement Shri Naresh Jain stated that during the assessment year 2012-13, he had used scrips of seven entities to provide bogus entries which included the scrip of M/s. Scan Steels Ltd.. Further, information revealed that the Petitioner had traded in the shares of M/s. Scan Steels Ltd., and was in receipt of Rs. 23,98,014/-. Therefore, Respondent No. 2 stated that he had reasons to believe that this income had escaped assessment within the meaning of section 147 of the Act.

20 Thus what is discernible is that the main ground on which assessment is sought to be re-opened is that Petitioner had traded in the shares of Scan Steels Ltd., and was in receipt of Rs. 23,98,014/-, which the Petitioner failed to disclose fully and truly before the

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Assessing Officer and which Respondent No.2 believed had escaped assessment.

21 Before adverting to the initial assessment order passed under section 143(3) of the Act dated 28.03.2015, it would be apposite to advert to the averments made by the Respondents in the affidavit in reply, more particularly the reasons given to justify re-opening of the assessment. In para 3.3 of the affidavit in reply, it is stated that the Petitioner had disclosed TDS credit of Rs. 34,05,533.00 and claimed refund of the said amount. On perusal of the tax assessment form prepared and issued by the Assessing Officer alongwith the assessment order, it was noticed that Petitioner was issued a refund of Rs. 26,13,268.00 alongwith interest of Rs. 2,87,463.00 which was reduced while determining the tax liability which thereafter stood at 'NIL'. But in the return filed, Petitioner had not reduced the amount of refund already received by him, which prima facie, resulted in

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excess claim of refund to the tune of Rs. 26,13,268.00 being refund already granted. However, this was not the ground for reopening the assessment as per the reasons furnished to the Petitioner on 31.05.2019 viz., that petitioner had traded in the shares of M/s. Scan Steels Ltd. and was in receipt of Rs. 23,98,014.00 which Respondent No. 2 stated that he had reasons to believe had escaped assessment. Thus, this contention of the Respondents is beyond the reasons furnished for re-opening of the assessment.

22 In para 3.4 of the affidavit in reply it is stated that though the Petitioner had furnished details relating to purchase and sale of shares of Mittal Securities Ltd., (now Scan Steels Ltd.,), but that did not amount to full and true disclosure of all material facts unless true and real facts are disclosed before the Assessing Officer. Assessing Officer had not discussed in the assessment order about the genuineness or

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camouflage nature of the transactions of purchase and sale of shares of Mittal Securities Ltd. by the Petitioner.

23 From the above, it is seen that what Respondent No. 2 contends is that though Petitioner had disclosed details of the transactions pertaining to purchase and sale of shares of Mittal Securities Ltd., (now Scan Steels Ltd.), Petitioner did not disclose the real colour / true character of such transactions and therefore, he did not make a full and true disclosure of all material facts which was also overlooked by the Assessing Officer.

24 Reverting back to the original assessment proceeding, we find from the materials on record that after the Petitioner had filed the initial return of income on 20.09.2012, Assessing Officer had issued notice to the Petitioner under section 142(1) of the Act dated 07.08.2013, calling upon the Petitioner to produce the following documents :-

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> "1. Reasonably detailed note on the nature of business including details of addresses, phone number of all premises – Office, Branch, Godown, Workshop etc..
>
> 2. Complete set of audited accounts, Tax Audit Report u/s. 44AB with all schedules, computation of income and income tax and hard copies of returns.
>
> 3. Any other details and /or documents for the purpose of assessment."

24.1 By another notice of even date, Petitioner was informed by the Assessing Officer that there were certain points in connection with the return of income submitted by the Petitioner about which he would like some further information. Accordingly, Petitioner was asked to appear before the Assessing Officer and to produce any documents, accounts and any other evidence on which it relied upon in support of the return filed.

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25 On 10.06.2014 Assessing Officer issued another notice under section 142(1) of the Act, calling upon the Petitioner to submit the particulars mentioned therein including the details regarding increased authorized share capital with the list of the shareholders and details of purchase of equity shares of Rs. 7,04,92,390.44 with details of payment. Petitioner has stated that in response to such notice, all relevant details were furnished to the Assessing Officer. Finally, Assessing Officer issued another notice under section 142 (1) of the Act on 19.03.2015, calling upon the Petitioner to furnish in writing the details party-wise with name, address and PAN with supporting evidence who had subscribed for security premium reserve or how it was created and details of statement / transactions mentioned at serial no. 2 which stated that in case of capital gain/ loss, it should provide a comprehensive chart with regard to sale and purchase of securities/shares quoted/ unquoted as well as dividend received. It was further stated that in case of

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capital loss whether the loss was adjusted after dividends in terms of section 94(7) of the Act. In his response, Petitioner informed the Assessing Officer on 19.03.2015 itself that there was no increase in the security premium reserve during the said assessment year. No capital gains were earned during the said year by the Petitioner. It had not received any dividend income during the said year too. Hence, question of applicability of section 94(7) did not arise. Petitioner did not make any investment nor was there any inventory of shares; no dividend was earned during the year. Alongwith the said letter relevant documentary evidence in respect of the concerned transactions were enclosed.

26 Thereafter, assessment order was passed on 28.03.2015, wherein Assessing Officer had noted that during the course of scrutiny details of income, expenditure, assets and liabilities were called for, examined and placed on record. After perusing all

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details and after examination of those and upon discussion, total income was computed in terms of the return filed by the Petitioner. As already noted above, the assessment order was passed under section 143(3) of the Act. It was mentioned therein that representative of the Petitioner had attended the assessment proceedings from time to time and had filed details with explanations.

27 At this stage, we may briefly refer to the relevant legal provisions.

28 Section 147 of the Act deals with “income escaping assessment”. Section 147 says that if the Assessing Officer has 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

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his notice subsequently in the course of the proceedings under section 147 of the Act.

28.1 The first proviso to section 147 is important. As per this proviso, where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no action shall be taken under section 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

28.2 Section 149 deals with time limit for notice under section 148. As per clause (a) of sub-section (1), no notice under section 148 shall be issued for the

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relevant assessment year, if four years have elapsed from the end of the relevant assessment year unless the case falls under clause (b) or clause (c). Clause (b) says that no notice shall be issued if four years have elapsed but not more than six years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year. Clause (c) deals with a situation where limitation is extended upto sixteen years but the escaped income must relate to any asset located outside India.

29 Insofar the present case is concerned, the assessment year is 2012-13. The assessment year ends on 31.03.2013. In this case impugned notice under section 148 of the Act was issued on 31.03.2019. Therefore, it is a case of re-opening of assessment under section 149 (1) (b) of the Act after expiry of four years but before expiry of six years.

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29.1. Of course the limitation point though pleaded in the writ petition, has been given up by the Petitioner following filing of affidavit by the Respondents which clearly shows that the re-opening notice was issued within the limitation period of six years.

30 In such a case, the first condition for invoking section 147 is that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment for the relevant assessment year. The second condition is that the Assessing Officer must arrive at the satisfaction that income chargeable to tax has escaped assessment for the said assessment year by reason of the failure on the part of the assessee to make a return under section 139 or to respond to a notice under section 142(1) or section 148 or due to the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

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31 The key or crucial expressions appearing in section 147 are “reason to believe” and “failure to disclose fully and truly all material facts necessary for assessment”.

31.1 Before dilating on these two expressions, it would be apposite to refer to section 148 of the Act, which deals with issue of notice where income has escaped assessment. As per sub-section (1), before making the assessment, re-assessment or re-computation under section 147, a notice in the prescribed form is required to be served upon the assessee by the Assessing Officer, calling upon him to file return of income in terms of such notice within the period specified and in such event the return so filed would be construed to be a return filed under section 139. As per sub-section (2) of the said section, the Assessing Officer shall before issuing any notice under section 148, record his reasons for doing so.

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31.2 In **GKN Driveshafts (India) Ltd.** (supra), Supreme Court held that when a notice under section 148 of the Act is issued, the proper course of action for the assessee is to file the return and if he so desires, to seek the reasons for issuing the notice. If sought for, Assessing Officer is bound to furnish the reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to the notice in which event the Assessing Officer would be under an obligation to dispose off the same by passing a speaking order.

32 Reverting back to the two expressions as noticed above, we may mention that these two expressions were examined and interpreted in great detail by the Supreme Court in **Income Tax Officer vs. Lakhmani Mewal Das,** reported in **103 ITR 437**. That was also a case where notice under section 148 of the Act was put to challenge. Though provisions of section 147 of the Act as it existed then have since

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been reconstructed and have undergone change, the two key expressions continue to retain their relevance in so far section 147 of the Act is concerned. It may further be noticed that in **Lakhmani Mewal Das** (supra), Supreme Court was considering validity of notice under Section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year. Supreme Court observed that in such a case, two conditions would have to be satisfied before an Income Tax Officer acquires jurisdiction to issue notice. These two conditions are -

1. He must have reason to believe that income chargeable to tax has escaped assessment; and
2. He must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee to make a return under section 139 for the asessment year under consideration or to disclose fully and truly all material facts necessary for his assessment for that year.

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32.1 Both the two conditions must co-exist in order to confer jurisdiction on the Income Tax Officer. Supreme Court observed that duty is cast upon the assessee to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income Tax Officer the books of accounts or other evidence from which material evidence with due diligence could have been discovered by the Income Tax Officer will not necessarily amount to disclosure contemplated by law but the duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that, his duty ends. It is for the Income Tax Officer to draw the correct inference from the primary facts. If the Income Tax Officer draws an inference, which appears subsequently to be erroneous, it would amount to change of opinion and mere change of opinion with regard to that inference would not justify initiation of action for re-opening assessment.

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32.2 The grounds or reasons which led to formation of the belief that income chargeable to tax has escaped assessment must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exists reasonable grounds for the Income Tax Officer to form the above belief that would be sufficient to clothe him with jurisdiction to issue notice. However, sufficiency of the grounds is not justiceable. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant. To this limited extent, initiation of proceedings in respect of

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income escaping assessment is open to challenge in a court of law.

32.3 Dilating further, Supreme Court held that reasons for formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. But it has to be borne in mind that it is not any and every material howsoever vague and indefinite or distant, remote and far-fetched which would warrant formation of the belief relating to escapement of income. Moreover, powers of the Income Tax Officer to reopen assessment, though wide are not plenary. The words of the statute are “reason to believe” and not “reason

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to suspect". Reopening of assessment after the lapse of many years is a serious matter.

33 It may be mentioned here that the proposition of law enunciated in **Lakhmani Mewal Das** (supra) has withstood the test of time and is being consistently applied while examining challenge to a notice issued under section 148 of the Act.

34 In **Prashant S. Joshi -vs- ITO, 324 ITR 154,** this Court observed that the basic postulate which underlines section 147 is formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. In other words, the Assessing Officer must have reason to believe that income chargeable to tax for a particular assessment year has escaped assessment for the relevant assessment year before he proceeds to issue notice under section 148. The reasons which are recorded by the Assessing Officer for re-opening an

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assessment are the only reasons which can be considered when the formation of the belief is impugned. Recording of reasons distinguishes an objective from a subjective exercise of power and is a check against arbitrary exercise of power. The reasons which are recorded cannot be supplemented subsequently by affidavits. The question as to whether there was reason to believe within the meaning of section 147 that income has escaped assessment must be determined with reference to the reasons recorded by the Assessing Officer. Even in a case where only an intimation is issued under section 143(1), the touchstone to be applied is as to whether there was reason to believe that income had escaped assessment.

35 Having discussed the above, we may once again revert back to the reasons furnished by Respondent No. 2 for re-opening of assessment under section 147 of the Act. After referring to the information received following search and seizure action carried out

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in the premises of Shri Naresh Jain, it was stated that information showed that Petitioner had traded in the shares of M/s. Scan Steels Ltd., and was in receipt of Rs. 23,98,014.00 and therefore, Respondent No. 2 concluded that he had reasons to believe that this amount had escaped assessment within the meaning of section 147 of the Act.

36 First of all it would be evident from the materials on record that Petitioner had disclosed the above information to the Assessing Officer in the course of the assessment proceedings. All related details and information sought for by the Assessing Officer were furnished by the petitioner. Several hearings took place in this regard where-after the Assessing Officer had concluded the assessment proceedings by passing assessment order under section 143 (3) of the Act. Thus it would appear that Petitioner had disclosed the primary facts at its disposal to the Assessing Officer for the purpose of assessment. He

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had also explained whatever queries were put by the Assessing Officer with regard to the primary facts during the hearings.

37 In such circumstances, it cannot be said that Petitioner did not disclose fully and truly all material facts necessary for the assessment. Consequently, Respondent No. 2 could not have arrived at the satisfaction that he had reasons to believe that income chargeable to tax had escaped assessment. In the absence of the same, Respondent No. 2 could not have assumed jurisdiction and issued the impugned notice under section 148 of the Act.

38 That apart, Respondents have tried to traverse beyond the disclosed reasons in their affidavit which is not permissible. The same cannot be taken into consideration, while examining validity of notice under section 148. As has been held in **Prashant S. Joshi** (supra), the reasons which are

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recorded by the Assessing Officer for re-opening an assessment are the only reasons which can be considered when the formation of the belief is impugned; such reasons cannot be supplemented subsequently by affidavit (s).

39 Therefore, in the light of the discussions made above, we are of the view that the attempt made by Respondent No.2 to reopen the concluded assessment is not at all justified and consequently the impugned notice cannot be sustained.

40 Accordingly, we allow the Writ Petition by setting aside the impugned notice dated 31.03.2019 issued under section 148 of the Act and also the impugned order dated 26.08.2019. However, there shall be no order as to costs.

(MILIND N. JADHAV, J.) (UJJAL BHUYAN, J.)

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