IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2022

CORAM

THE HONOURABLE MR. JUSTICE R. MAHADEVAN
and
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

Writ Appeal No. 2344 of 2021
and
CMP. Nos. 14895 of 2021 and 799 of 2022

M/s. Kone Elevator India Private Limited
represented by its Director
Mr. C.V.S. Krishna Kumar
Son of C.V. Seshadri
Prestige Centre Court, 9th Floor
The Forum Vijaya Mall
Plot No.183, NSK Salai
Arcot Road, Vadapalani
Chennai - 600 026 .. Appellant

Versus

The Assistant Commissioner of Income Tax
Corporate Circle 4 (2)
Room No.433, 4th Floor, Main Building
No.121, Mahatma Gandhi Road
Nungambakkam, Chennai - 600 034 .. Respondent

Appeal filed under Clause 15 of Letters Patent against the Order dated 16.07.2021 passed by the learned Judge in W.P. No. 28176 of 2018.

For Appellant : Mr. G. Baskar

For Respondent : Mr. Prabhu Mukunth Arunkumar
Senior Standing Counsel (Income Tax)

JUDGMENT

R. MAHADEVAN, J.

The appellant/assessee has filed this intra-court appeal, challenging the order dated 16.07.2021 passed by the learned Judge in W.P. No. 28176 of 2018.

2.The case put forth by the appellant before the writ court would run thus:

(i) The appellant is a company engaged in the business of design, manufacture, supply, erection and installation of lifts and supply, erection and installation of escalators, besides engaged in maintenance of erected elevators and escalator. For the Assessment year 2013-2014, the appellant filed their return of income on 29.11.2013 admitting a taxable income of Rs.196,13,24,550/-. Along with the same, they also enclosed Form No.3CEB disclosing the international transactions that they had during the previous year. On scrutiny of the return of income, as there were overseas transactions involved, the assessing officer referred the matter to the Transfer Pricing Officer (TPO) as contemplated under section 92CA(1) of the Income Tax Act (in short, "the Act") on 31.08.2015. The said Transfer Pricing Officer, in turn, issued a notice dated 08.09.2015 under section 92CA(2) calling upon the appellant to furnish certain information. In response, the appellant, through

their representative, submitted the documents sought for by the Transfer Pricing Officer.

(ii) The Transfer Pricing Officer, by his report dated 31.10.2016, recommended an upward adjustment of Rs.25,73,41,261/- towards international transactions effected by the appellant. On receipt of the same, the Assessing Officer passed a draft assessment order dated 30.12.2016, as required under Section 144C of the Act, which was served on the assessee on 03.01.2017. Even though the draft assessment order was received by the appellant, they did not file any objection before the Assessing Officer within 30 days as required under Section 144C(2) of the Act. Similarly, the assessing officer also did not pass further orders within the period of limitation. Thereafter, notice dated 27.03.2018 under Section 148 of the Act was issued by the Assessing Officer, after expiry of the period of limitation to proceed further on the basis of the report submitted by the Transfer Pricing Officer. In response, the appellant filed their return electronically on 19.04.2018 and subsequently, sent a letter dated 20.04.2018 seeking the reasons for reopening the assessment. The respondent also sent a communication dated 20.08.2018 intimating the reasons for reopening the assessment.

(iii) On receipt of the communication dated 20.08.2018, the appellant submitted their objections vide letter dated 14.09.2018 on the ground that due

to the failure on the part of the assessing officer to complete the assessment in time, the appellant cannot be made to suffer. Notwithstanding the objection so raised, the Assessing Officer issued a notice under section 143 (2) of the Act requiring the appellant to attend an enquiry in the office of the assessing officer on 09.10.2018 with all documentary evidence. Accordingly, the representative of the appellant appeared and produced the required documents. However, the assessing officer passed an order of rejection dated 11.10.2018 stating that there is no irregularity or illegality in issuing the notice under Section 148 of the Act for taking up the assessment with respect to the provisions of section 153 of the Act.

(iv) Assailing the order dated 11.10.2018 passed by the respondent, the appellant preferred Writ Petition bearing No. 28176 of 2018 stating *inter alia* that the reopening of assessment is illegal and beyond the scope of jurisdiction.

3.The learned Judge, on appreciation of the rival submissions, dismissed the aforesaid writ petition by observing that the power of reopening under section 147 of the Act cannot be restricted even in such circumstances, the TPO submitted a report and a draft assessment order is passed with reference to certain materials available, and the Assessing Officer has reason to believe

that the income chargeable to tax escaped assessment, then he is well within his powers to invoke section 147/148 of the Act. Aggrieved over the said order of the learned Judge, the assessee is before this court with the present intra court appeal.

4.1. The learned counsel appearing for the appellant submitted that based on the report of the Joint Commissioner of Income Tax, Transfer Pricing Officer-2, Chennai, under Section 92CA (3) of the Act, the respondent passed the draft assessment order on 30.12.2016 under Section 143(3) r/w section 92CA of the Act, to which, the appellant / assessee did not file any objection/appeal either to the assessing officer or to the Dispute Resolution Panel (DRP). In such circumstances, the Assessing Officer ought to have passed a final order of assessment on the basis of the draft assessment order, on or before 31.03.2017, being the end of one month from the end of the month, in which the period for filing objections under Section 144C(2) of the Act expires. Instead of doing so, the Assessing Officer issued the notice dated 27.03.2018 under section 148 of the Act to reopen the assessment to rectify his own failure in passing the final assessment order in accordance with the mandate of provisions of section 144C(2) within the time limit provided under section 144C(4). Elaborating further, the learned counsel submitted that the reasons for reopening the assessment made by the Assessing Officer is also

legally unsustainable, as there was no fresh material as required under section 147 and the additions pointed out were also as made in the draft assessment order. While so, it cannot be said that the income earned by the assessee had escaped assessment and it requires reassessment. However, the learned Judge erred in dismissing the writ petition, by observing that there is scope for reopening the assessment under section 147 of the Act even in cases where no assessment order is passed under section 144C(4) of the Act. It is also contended that the learned Judge failed to appreciate that by virtue of issuing notice under Section 148 of the Act, the limitation for passing the final assessment order, pursuant to the draft assessment order, cannot be extended, whereas, the assessing officer, to cover up his failure to pass the final assessment order within the time, had issued the notice under Section 148 of the Act on 27.03.2018, by which he sought to indirectly achieve what he could not achieve directly.

4.2. In support of his contention, the learned counsel for the appellant placed reliance on the below mentioned decisions:

(i)In ***KLM Royal Dutch Airlines v. Assistant Director of Income Tax [(2007) 292 ITR 0049 (Del)***], a Division Bench of the Delhi High Court held that "*scrutiny assessment should have culminated in an order under section*

143(3) and it is not permissible in law for the assessing officer to attempt to invoke section 147 to enlarge the time available for framing the assessment". It was further held in Para No.7 that *once an inquiry has been initiated by the Assessing Officer, it cannot but result in either the return being accepted as having been correctly computed by the concerned assessee or for an assessment being conducted and concluded thereon by the AO. The provisions of s.147 would have no role to play at this stage of the proceeding.* Ultimately, in paragraph no.15, it was held as follows:

> *"15. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no fresh evidence or material could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year it would have to be assumed that since proceedings had not been opened under s.143 (2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to s.147, provided fresh material had been received by the ÄO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of s.147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law."*

(ii)In ***T. Manavedan Tirumalpad and another v. Commissioner of Income Tax [(1955) 28 ITR 615 (Mad)],*** in paragraph no.6, a Division Bench of this Court held as follows:

> *"6.The third of the questions referred to this Court under s.66 (1) of the Act is easiest disposed of. It is true that the forest income amounting to Rs.29,853-15-3 was not taxed in the asst. yr.1941-42. But even on 28th Feb., 1942, the ITO knew that this item of income was liable*

to be taxed but that it has not been taxed. He deferred levying tax on that item of the assessee's income till the assessee furnished the further particulars that the ITO required. The ITO decided that the forest income was assessable, and that it was not agricultural income entitled to exemption from tax. The quantification of the tax, however, was deferred. It was just a case of piecemeal assessment in the course of the proceedings in the asst. yr. 1941-42. Sec.23 of the Act does not provide for such piecemeal assessment. It was true that a portion of the assessee's income had not been taxed, and in that sense it had escaped assessment. But that escape was fully known to the ITO even before 28th Feb., 1942, and was the result of a procedure deliberately adopted by the ITO, a procedure which turned out to be wrong in law. There could be, in the circumstances of this case, no fresh discovery after 28th Feb., 1942, that the forest income had escaped assessment in 1941-42. A deferred assessment is not discovery of escaped assessment. Sec.34 could not have been called in aid to complete an assessment deliberately deferred. Authority is not wanting either to negative the contention of the Department; see Debi Prasad Malviya vs. CIT (1952) 22 ITR 539 where the learned Judges referred to two earlier decisions, Fazal Dhala vs. CIT (1944) 12 ITR 341 and Chuni Lal Nayyar vs. CIT (1951) 20 ITR 568. We answer the third question in the negative and in favour of the assessee."

(iii)***Smt. Sova Sarkar and others v. ITO [1983 (139) ITR 386 (Cal)],***

wherein, in paragraph no.14, a Division Bench of the Calcutta High Court held thus:

"14. It thus appears to be well-settled that when a return has been filed by an assessee, it cannot be ignored by the ITO and he will have no jurisdiction to issue a notice under s.148 without completing the assessment on the return filed by the assessee. Even though a return is invalid in the sense that it is not correct and complete within the meaning of s.139 of the IT Act, 1961, the ITO cannot ignore or disregard the same for the purpose of issuing a notice udner s.148 of the Act, unless the return can be regarded as not a return in the eye of law as in the case of the two illustrations given above. In the instant case, the ITO acted on the returns filed by the appellant, issued notices under s.143 (2) and heard the appellant for the assessment years in question under s.143 (3), but without completing the assessments he took recourse to reopen the assessments under s.147 by issuing the impugned notices under s.148 of the Act. In our view, the ITO has acted without jurisdiction in issuing the impugned notices."

(iv)In **Gemini Leather Stores v. ITO [1975 (100) ITR 1 (SC)],** the Hon'ble Supreme Court held that taking recourse under Section 147 of the Act to cure the defect committed by the Assessing Officer in not completing the assessment within the period stipulated under the Act, is legally impermissible. The relevant paragraph of the said decision is extracted below:

> *"The law laid down in Calcutta Discount Co Ltd v. Income-tax Officer [1961 41 ITR 191 (SC) has been restated in several subsequent decisions of this Court : Commissioner of income tax vs. Hemachandra Kar (1970) 77 ITR 1 (SC), Commissioner of Income Tax v. Bhanji Lavji (1971) 79 ITR 582 (SC) and Commissioner of Income Tax vs. Burlop Dealers Ltd., (1971) 79 ITR 609 (SC), to name only a few. In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income Tax Officer discovered. After this discovery, the Income-Tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inference as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the income tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income Tax Officer had all the material facts before him when he made the original assessment. He cannot now take recourse to section 147 (a) to remedy the error resulting from his own oversight."*

(v)In ***Parashuram Pottery Works Co. Ltd. v. Income Tax Officer [(1977) 106 ITR 001 (SC)]*** the Hon'ble Supreme Court held that there must be a point of finality in all legal proceedings and that stale issues should not be re-activated beyond a particular stage. Paragraph no.15 which is relevant, is reproduced hereunder:

"15. It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should be familiarise themselves with the relevant provisions and become well-versed with the law on the subject. Any remission on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stall issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as the income tax assessment orders are concerned, they cannot be reopened on the source of income escaping assessment under s.147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, this cannot be said in the present case. The appeal is consequently allowed, the judgment of High Court is set aside and the impugned notices are quashed. The parties in the circumstances shall bear their own costs throughout."

(vi)In ***Trustees of H.E.H. the Nizam's Supplemental Family Trust v. Commissioner of Income Tax, [2000 (109) Taxman 193 (SC)]*** it was held by the Hon'ble Supreme Court as follows:

"7.It is not disputed that the return filed with the refund application under section 237 is a valid return and the ITO can initiate proceedings for assessment on the basis of the return so filed. The only question that falls for consideration for us is ; if in the circumstance of the case it could be said that the note recorded by the ITO in his file on 10.11.1965 is an order, which concluded the assessment proceedings for the assessment year 1962-63 before he initiated proceedings under section 147. It is also not disputed that that this note/order of 10.11.1965 terminating the assessment proceedings for the assessment year 1962-63 was never communicated to the trustees till 16.07.1970 and that too in a reply to the letter sent by the trustees. According to the High Court, the note, which is an order, did terminate the assessment proceedings. The High Court was of the view that the first part of the order gave reasons and the second part of the order clearly spoke of the conclusion which read: "Hence, no credit for tax deducted at source is to be allowed here."

8.It is settled law that unless the return of income already filed is disposed of, notice for re-assessments under section 148 cannot be issued i.e., no reassessment proceedings can be initiated so long as the

assessment proceedings pending on the basis of the return already filed are not terminated. According to the revenue, it is immaterial whether the order is communicated or not and that the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated..... "

(vii)The aforesaid decision was followed in ***Standard Chartered Finance Limited v. Commissioner of Income Tax, Bangalore, [(2016) 67 Taxmann.com 54 (SC)]*** and it was held by the Hon'ble Supreme Court in paragraph no.3, as follows:

"3. After hearing the learned counsel for the parties, we are of the opinion that the High Court has wrongly not acted upon the ratio laid down in Trustees of H.E.H. The Nizam's Supplement Family Trust v. CIT [2000] 109 Taxman 193(SC) (supra) which squarely applies in the instant case in favour of the assessee. The ratio of the said judgment is that in those situations where there is no assessment order passed, there cannot be a notice for re-assessment inasmuch as the question of re-assessment arises only when there is an assessment in the first instance."

5.1. Per contra, the learned senior standing counsel appearing for the respondent would contend that after filing the return of income for the assessment year under consideration by the assessee, since there were international transactions involved, the case was referred to the TPO under section 92CA of the Act; and the TPO inturn, passed an order under section 92CA (3) of the Act, based on which a draft assessment order was passed by the assessing officer and the same was also communicated to the assessee. However, the assessee neither accepted the draft order nor filed objections to the same, within a period of 30 days either to the Dispute Resolution Panel and

the Assessing Officer. Thereafter, the Assessing Officer did not pass the final assessment order within the time limit as contemplated under section 144C(4), but issued the notice dated 27.03.2018 under section 148 for reopening the reassessment and also communicated the reasons for the same on 28.08.2018. Upon receipt of the same, the appellant did not challenge section 148 notice, but filed its objection on 14.09.2018 for reopening the assessment, which was rejected by order dated 11.10.2018. The said order of rejection was challenged by the appellant in WP.No.28176 of 2018, which was rightly dismissed by the learned Judge, by order dated 16.07.2021.

5.2. According to the learned senior standing counsel appearing for the respondent, section 153 (1) of the Act is to complete the assessment proceedings and pass an order under Section 143 or 144 within 21 months if referred to TPO under section 92CA and it shall be extended by 33 months under section 153 (3) of the Act. In case, no assessment order is passed within the prescribed time limit under section 153(1) r/w 153(3) and section 144C(4), the Assessing Officer can issue notice under section 148 to assess or reassess under section 147 for the reasons to believe that the income of the assessee had escaped assessment. In the present case, admittedly, a reference was made to the TPO and therefore, section 153 (3) of the Act is applicable to the actions

resorted to by the respondent. It is also submitted that there is no embargo or bar under section 149 for the respondent to seek to reopen the assessment proceedings by issuing notice under section 148, where assessment or scrutiny assessment has not been done / left without passing an order of assessment.

5.3. The learned senior standing counsel for the respondent further contended that Section 144C(4) of the Act empowers the assessing officer to pass an order of assessment under sub section (3) and it nowhere has an overriding effect upon Sections 147, 148 and 149 (1) (a) of the Act. Therefore, it cannot be said that the assessing officer has not passed an order of assessment under Section 144C(4) of the Act and notice issued under section 148 to assess or reassess under section 147 within the time limit prescribed under section 149(1) of the Act, is barred by limitation. It is also submitted that the provisions of the Income-tax Act are clearly and precisely worded to suit various situations; in a situation, where scrutiny assessment starts and an assessment order is not passed, under the fiscal statute, the remedy available for the Income Tax Department, lies under Section 148 read with Section 147, Section 149 (1) and 153 (2); the provisions of the Act permits the assessing officer to issue notice under section 148 in such situations and further explanation 2(b) of section 147 will come to the rescue of the assessing officer. Therefore, the notice dated 27.03.2018 issued under Section 148 of the

Act is in order and in conformity with the provisions of the Act.

5.4. As regards the decisions relied on the side of the appellant, the learned senior standing counsel appearing for the respondent submitted that the decision in *KLM Royal Dutch Airlines case (supra)* cannot be made applicable to the present case, in view of the fact that as against the said judgment, an appeal was preferred before the Honourable Supreme Court in C.A. No. 8469-8650 of 2011, but it was subsequently dismissed as withdrawn on 11.04.2018, leaving the substantial questions of law open for consideration in an appropriate case. The other decisions relied by the learned counsel for the appellant cannot be applicable to the facts of the present case, as the same are factually distinguishable. Stating so, the learned counsel submitted that taking note of all the aspects, the learned Judge rightly dismissed the writ petition filed by the appellant challenged the order rejecting the objections to the reassessment proceedings and hence, the same does not call for any interference by this court.

6.This court considered the submissions made by the learned counsel for both sides and perused the materials available on record.

7.The facts remain undisputed are that for the assessment year 2013-

2014, after filing the return of income by the assessee, as there were international transactions disclosed, the matter was referred to the TPO on 31.08.2015. The TPO, in turn, submitted his report dated 31.10.2016, based on which, the respondent passed a draft assessment order under section 143(3) r/w section 92CA of the Act, on 30.12.2016. Admittedly, the appellant did not question the said draft assessment order either by submitting their objections to the assessing officer or by preferring an appeal to the Dispute Resolution Panel (DRP). The Assessing Officer also did not pass final assessment order, within the period of limitation. However, the assessing officer sent a notice dated 27.03.2018 under section 148 of the Act for reopening the assessment. On receipt of the same, the appellant filed their return of income electronically on 19.04.2018 *inter alia* sought the assessing officer to disclose the reason for reopening the assessment. By communication dated 20.08.2018, the reasons for reopening the assessment were furnished to the appellant. Thereafter, the appellant filed its objections on 14.09.2018 and the same were rejected by the assessing officer, by order dated 11.10.2018, which was impugned in the writ petition.

8.It is seen from the order impugned herein that the writ court, considering the facts and circumstances of the case, has formulated two issues for determination, which are as follows:

(i)whether the Assessing Officer can issue notice under section 148 of the Act when the Assessing Officer has not passed an assessment order under section 144C(4) of the Act?

(ii)Whether the Assessing Officer can cover up the lapses and whether there is such provision under the Income Tax Act to do so?

After elaborate analysis, the learned Judge has answered the aforesaid issues in favour of the Revenue and accordingly, dismissed the writ petition, by order dated 16.07.2021 with the following observations:

> *"21. In the present case, reopening of assessment is made within a period of four years. Therefore, the proviso clause may not have any application. Perusal of Section 147 of the Act and its scope undoubtedly is wider enough to cover numerous circumstances, wherein the Assessing Authority can invoke if he has reason to believe that any income chargeable to tax has escaped assessment. Many other circumstances are also elaborated in explanation (1) and explanation (2) to Section 147 of the Act. As far as the reopening of assessment is concerned, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. As far as the reopening of assessment is concerned, if the Assessing Officer has reason to believe that any income chargeable to tax escaped assessment for any assessment year. Therefore irrespective of the assessment order and within the period of limitation contemplated under the proviso clause the Assessing Officer is empowered to reopen the assessment by following the procedures contemplated.*
>
> *22. There is no other condition stipulated under Section 147 of the Act with reference to the procedures contemplated under Section 92CA or under Section 144C of the Income Tax Act. Contrarily section 144C(4) states that the Assessing Officer shall notwithstanding anything contained in section 153 or section 153B pass an assessment order. Therefore there is a scope for reopening of assessment even in cases where no assessment order is passed under sub-clause (4) to section 144C of the Act. Undoubtedly, in the present case, the petitioner assessee had not raised any objection. Therefore, under sub-clause (4) the Assessing Officer is empowered to pass an order of assessment, however, he has not passed any orders and has chosen to reopen the assessment by invoking the powers conferred under section 147 of the Act. Section 147 of the Act*

provides power to assess or re-assess. The section did not contemplate the stages under which such assessment or re-assessment can be made. For this purpose, Chapter XIV of the Act is to be read cogently to form an opinion that the assessment or re-assessment shall be made at any point unless there is a specific prohibition contemplated under any of the clauses under Chapter XIV of the Act. When there is no embargo under Section 147 of the Act with reference to the stages under which reopening can be made there is no impediment for the Assessing Officer to invoke powers under Section 147 of the Act and in the present case, no assessment order has been passed and therefore, the Assessing Officer is empowered to invoke section 147 and issue notice under section 148 of the Act.

23. As far as the arguments advanced on behalf of the petitioner though the Transfer Pricing Officer submitted his report determining the Arm's Length Price with reference to the international transactions, the disallowance under section 40(a) was also considered by the Assessing Authority when these aspects were considered and a draft assessment order is passed, then there is no scope for invoking section 147 of the Act.

24. What is necessary for invoking section 147 of the Act is that any income chargeable to tax has escaped assessment. That being the heart and soul of the provision and if the Assessing Officer has reason to believe, then he is empowered to issue notice under Section 148 of the Act. Thus the stages under which the reopening can be made are wider enough to cover the circumstances which all are prevailing in the case of the petitioner also. There is no restriction to assess or re-assess any income chargeable to tax has escaped assessment except the restrictions imposed under the proviso clause with reference to the time limit prescribed as well as the additional conditions for invoking the provision beyond the period of four years. Admittedly, in the present case reopening is within the period of four years and therefore, the assessment and re-assessment shall be made if the Assessing Officer has reason to believe.

.....

26.The reasons stated above would reveal that after passing of the draft assessment order on 30.12.2016 it transpired that the assessee Company would filing its objection before the learned Dispute Resolution Panel against the order. However, when a copy of the objections before the learned Dispute Resolution Panel was called for from the assessee, the assessee feigned ignorance. Hence, as the assessee's income i.e, the additions and disallowances as mentioned above has escaped assessment for the year 2013-14 and to bring the same to tax, the assessment has been reopened.

.....

28.Close reading of the disposal of objections would reveal that the respondent has considered the objections including the judgments relied on by the petitioner. The findings would reveal that "merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make

additions but which failed on account of setting aside of the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment". With reference to the reasons stated in proceedings dated 20.08.2018, the objections raised were considered by the authority and reasonings are also given.

29.This Court is of the considered opinion that the satisfaction of the reasons alone are to be considered by the High Court. The sufficiency of the reasons cannot be gone into by the High Court. The sufficiency of the reasons may differ from case to case, however, the principle is that the reasons as well as the findings would be sufficient to form an opinion that the Assessing Officer has reason to believe. If the reasons furnished passed the test, then the assessee is bound to co-operate for the re-assessment proceedings. Therefore, the High Court cannot go into the adjudication of the reasons furnished with reference to certain materials. If the reasons furnished are prima facie satisfied with reference to the ingredients contemplated under section 147 of the Act, then the authority must be allowed to continue the proceedings. The assessee is getting further opportunity to submit their documents or explain the nature of transaction, etc before passing the final order of assessment/re-assessment. Thus the intervention after initiation and before completion must be expected to be cautious and only on certain grounds wherein the assessee could able to establish that the authority reopened has no jurisdiction or directly in violation of the provisions of the Act.

30.As far as the lack of jurisdiction is concerned, numerous writ petitions are filed on the facts and circumstances. Such jurisdictional ground is popularly taken in order to overcome the entertainability of the writ petition as the proceedings at the budding stage is challenged. Therefore, the Courts are expected to be cautious. The jurisdictional point raised closely connected with the facts and circumstances must be adjudicated by the authority competent. When there is a blatant violation of provisions of law hitting the power directly, then alone writ proceedings can be entertained and not otherwise. Therefore, merely raising a jurisdictional ground is insufficient to interfere with the proceedings and the jurisdictional ground raised hitting the provisions directly alone would be acceptable ground for the purpose of entertaining a writ petition.

31.As far as the present writ petition is concerned, admittedly the case was referred under Section 92CA before the TPO who in turn submitted his report. Based on the report of the TPO, draft assessment order was passed as contemplated. The assessee has not submitted any objection either before the DRP or before the Assessing Officer. In view of the fact that objection was not received, it is contended that sub~clause (4) warrants passing a final assessment order by the authority. Admittedly, no such final assessment order is passed. Under these circumstances, there is no prohibition under section 147/148 of the Act for initiation of reopening of assessment.

32.A plain reading of the draft assessment order would mean that it is a draft and cannot be considered as final. Thus, any such draft assessment order is subject to alteration or changes. In this view of the matter, the discrepancies or materials tangible culled out from and out of such draft assessment order that also is an acceptable ground for the purpose of reopening of assessment under section 147 of the Act as the Assessing Authority has reason to believe that tax chargeable to tax escaped assessment."

The above order of the learned Judge dated 16.07.2021, is questioned in this appeal by the appellant / assessee.

9.At the outset, for the purpose of effective adjudication of the issues involved herein, it would be relevant to refer to the relevant provisions of the Act, which are as under:

"Income escaping assessment.

147. If any income chargeable to tax, in the case of an assessee, has escaped 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)

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under the section 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 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;

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year;

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

"Issue of notice where income has escaped assessment:

148. Before making the assessment, reassessment or re-computation, under section 147 and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139;

Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice;

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section."

*"**149.** (1) No notice under section 148 shall be issued for the relevant assessment year,____*

(a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of

(i) an asset;

(ii) an expenditure in respect of a transaction or in relation to an event or occasion; or

(iii) an entry or entries in the books of account,

which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April 2021, if a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021;

Provided further that the provisions of this sub-section shall not apply in a case, where a notice under section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated

under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before 31st day of March, 2021;

Provided also that for the purposes of computing the period of limitation as per this seciton, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded;

Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151."

"Time limit for completion of assessment, reassessment and recomputation.

Section 153. *(1) No Order of assessment shall be made under Section 143 or Section 144 at any time after expiry of twenty one months from the end of the assessment year in which the income was first assessable.*

Provided further that in respect of an order of assessment relating to the assessment year commencing on or after the 1st day of April 2019, the provisions of this sub-section shall have effect, as if for the words "twenty-one months, the words "eighteen months" had been substituted.

(2) No order of assessment, reassessment or recomputation shall be made under section 147 after the expiry of nine months from the end of the financial year in which the notice under section 148 was served.

Provided that where the notice under section 148 is served on or after the 1st day of April 2019, the provisions of this sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted.

(3) Notwithstanding anything contained in sub-sections (1) and (2), an order of fresh assessment in pursuance of an order under section 254 or section 263 or section 264, setting aside or cancelling an assessment may be made at any time before the expiry of nine months from the end of the financial year in which the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or section 264 is passed by the Principal Commissioner or Commissioner.

Provided that where the order under section 254 is received by the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner or, as the case may be, the order under section 263 or 264 is passed by the Principal Commissioner or Commissioner on or after the 1st day of April 2019, the provisions of this

sub-section shall have effect, as if for the words "nine months", the words "twelve months" had been substituted."

***"Section 144C(4)**. The Assessing Officer shall notwithstanding anything contained in section 153 or section 153(B) pass the assessment order under sub-section (3) within one month from the end of the month in which -*

(a)The acceptance is received, or

(b)The period of filing of objections under sub-section (2) expires."

Thus, it is clear that the provisions of law as extracted above, empower the assessing officer to assess, reassess the income or re-compute the loss or depreciation, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, subject to compliance of the mandatory requirements.

10.It is the specific case of the appellant / assessee that the assessing officer should have passed the assessment order under section 144C(4) of the Act within one month from the end of the month in which the period of filing of objections under sub section (2) expires. Having failed to do so, the assessing officer by issuing notice under section 148 of the Act, seeks to extend the limitation for passing the assessment order and to achieve it indirectly what he could not have achieved directly. Further, there was no income that escaped assessment, but the assessing officer reopened the assessment with respect to the very same income that was not finally assessed under section 143(3).

11.On the other hand, it is the stand of the respondent that if the assessing officer does not pass an assessment order within the prescribed time limit under section 153(1) r/w section 153(3) and section 144C(4), he can issue notice under section 148 to assess or reassess under section 147. That apart, in such a situation, where scrutiny assessment starts and an assessment order is not passed, explanation 2(b) of section 147 will come to the rescue of the Assessing Officer. Therefore, the notice dated 27.03.2018 issued under section 148 is in order and in conformity with the relevant provisions of the Act.

12.This court is not inclined to accept the case projected by the appellant / assessee. The basic requirement for invocation of section 147 is that the assessing officer has the reason to believe that income chargeable to tax, had escaped assessment; and after recording the reasons for reopening the assessment, the assessing officer has to issue notice under section 148 to the assessee. In the present case, the return of income filed by the assessee, was subjected to scrutiny. As there were international transactions involved, the case was referred to TPO, for determining the Arm's Length Price, who in turn filed his report, and based on the report of the TPO, the respondent passed the draft assessment order. Thereafter, the assessing officer, after having found

that certain income had escaped assessment, reopened the assessment. Admittedly, the notice under section 148 was issued to the appellant within the period of limitation and the same was also not put to challenge by the appellant / assessee. But, what was challenged in the writ proceedings by the appellant is the rejection of their objections to the said notice by the respondent. While so, it cannot be said that the reassessment proceedings initiated by the assessing officer under section 147 of the Act, without completing the original assessment, is not proper. Further, there is no embargo under section 147 of the Act, to issue notice under section 148, where assessment order has not been passed, after starting scrutiny proceedings; and section 144C(4) only states that the assessing officer has to pass an assessment order in accordance with the provisions of the Act and it nowhere states that section 148 notice can be issued only after passing an assessment order. Therefore, the learned Judge has rightly concluded that the assessing officer is empowered to invoke section 147 of the Act, if he has reason to believe that the income chargeable to tax escaped assessment, in the cases, where no assessment orders are passed under sub clause (4) to section 144C.

13.Though the learned counsel for the appellant /assessee made an argument that when the TPO submitted his report, based on which, the

assessing officer passed the draft assessment order, to which, the assessee did not file any objection, the assessing officer should have passed the final assessment order under section 144C(4), within the time contemplated under the Act, the same does not inspire the confidence of this court, as the order of the TPO is separate and independent from the power conferred on the Assessing Officer under section 147 of the Act and the same cannot be construed as a conclusive one. That is the reason, the learned Judge has opined that the draft assessment order is not confined actually to the report of the TPO and hence, there is a scope of reassessment.

14.As regards the contention raised on the side of the appellant / assessee that reopening of assessment by the assessing officer is only to cure the defect of not passing the final assessment order under section 144C(4) of the Act within the time stipulated under the Act, the same cannot be countenanced by this court. Concededly, after passing of the draft assessment order, the assessing officer commenced the reassessment proceedings, within the limitation period. As rightly contended by the learned senior standing counsel appearing for the respondent, as per Explanation 2 of section 147, the Assessing Officer is free to reexamine correctness of a regular assessment and decide whether the tax assessed, rate applied, relief and allowances granted,

etc., are in terms of the provisions of the Act and if not to revise the assessment in terms of section 147 of the Act. In the light of the same, the assessing officer, who has reason to believe that certain income chargeable to tax, has escaped assessment, reopened the assessment by issuing notice under section 148 of the Act to the appellant. As such, it cannot be stated that the Assessing Officer initiated the reassessment proceedings by issuing notice under section 148 to the assessee for rectifying the lapses of not passing the final assessment order under section 144C(4) of the Act.

15.At this juncture, it is pertinent to refer to the decision in the case of ***Krishna Developers and Company v. Deputy Commissioner of Income-tax, [(2017) 94 taxmann.com 166 (Guj)]***, *a* Division Bench of the Gujarat High Court had an occasion to consider a case, where the assessee questioned the order of assessment on the ground that the notice of scrutiny assessment was never served before the end of relevant assessment year. The Appellate Authority without going into the merits of the case, allowed the appeal on the technical ground that no notice was served on the assessee under Section 143(2) of the Act. After the order was passed by the Appellate Authority, the Assessing Officer issued a notice for reopening the assessment. On appeal, the assessee contended that the original assessment having failed on the ground of

non-issuance of mandatory notice for scrutiny, the assessing officer cannot resort to the process of reopening of the assessment to cure the defect or to save limitation which had already lapsed. The said contention was rejected and the petition was dismissed in favour of the Revenue by the Division Bench of the Gujarat High Court. The relevant portion of the said decision may be quoted below for ready reference:

> *"20.Nothing contained in the language of section 147 would permit us to hold that even if all parameters to enable the assessing officer to assess or reassess the income by reopening the assessment are present, same may not be permitted in cases where the original assessment framed by the Assessing Officer has failed on any technical ground, such as in the present case. i.e., want of service of notice under section 143 (2) of the Act. Once the original assessment is declared as invalid as having been completed without the service of notice on the assessee within the statutory period, there would be thereafter no assessment in the eye of law. The situation, therefore, be akin to where the return of the assessee has been accepted without a scrutiny. Reopening of the assessment, if the Assessing Officer has the reason to believe that income chargeable to tax has escaped assessment, would be entirely permissible under section 147 of the Act. Merely on the ground that the reasons recorded by the Assessing Officer proceeded on the same basis on which the Assessing Officer initially desired to make additions but which failed on account of setting aside the order of assessment, would not preclude the Assessing Officer from carrying out the exercise of reopening of the assessment. In the present case, facts are peculiar. It is not as if the Assessing Officer, after notice certain discrepancies in the return of the assessee, slept over his right to undertake the scrutiny assessment. The scrutiny assessment was initiated by issuance of notice under Section 143 (2) of the Act on 23.09.2013. It was also dispatched for service to the assessee on 24.09.2013 by speed post on the last known address. The Commissioner (Appeals) however held that there was no proof of service of notice and since section 143 (2) requires service of notice, the assessment was framed without complying with the mandatory requirements.*
>
> *21.We may refer to some of the decisions on the point. In case of A G Group Corpn (supra), the court noticed that at one point the Revenue had reopened the assessment of the assessee. However, such assessment failed on the ground that the reasons were not recorded by the Assessing Officer for issuing such a notice. On the same ground, the Revenue issued*

fresh notice of reopening which was challenged before the High Court. The High Court held that when the earlier order stood annulled on the ground of lack of fulfillment of the basic requirement under section 147 of the Act, there was no bar against reopening the assessment once again on the same grounds after following due procedure in accordance with law.

....

24.In case of CIT v. Vishal Gupta [2012] 22 taxmann.com 82 / 210 Taxman 65 (Mag) (Delhi), issue very similar to case on hand came up for consideration. It was a case where the assessment for the assessment years 1995-966 and 1996-1997 were quashed by the Tribunal on the ground that statutory notice under section 143(2) of the Act was not served on the assessee within the stipulated period. The Assessing Officer thereafter recorded his reasons and issued notice for reopening of the assessment. The orders of such assessment were set aside by the Tribunal on the ground that the original assessment was set aside; for want of service of notice under section 143(2) of the Act, reopening could not have been done. Reversing the decision of the Tribunal, the Delhi High Court observed as under:

> *11.The facts elucidated above clearly show that the tribunal has quashed / set aside the original proceedings on the technical ground that statutory notice under section 143(2) was not served on the respondent – assessee within the stipulated period of 12 months from the month in which return was filed.*
>
> *12.The Assessing Officer thereafter had recorded fresh reasons and issued notice under section 147/148 of the Act. The reasons to believe now recorded have to stand on their own legs and are separate from the reasons to believe, which were recorded earlier before initiation of the re-assessment proceedings, which abated. The said reasons to believe and issue of notice under section 147/148 of the Act cannot be faulted and rejected on the ground that in the earlier/ original assessment or re-assessment proceedings, notice under section 143(2) was not served on the assessee within the statutory time / period. This was a valid ground to quash the first / original assessment / re-assessment order, but it cannot be a ground to quash the re-assessment proceedings, which have been initiated afresh after recording reasons to believe. ...*
>
> *....*

27.In the result, petition is dismissed."

16.It is also pointed out that the aforesaid decision of the Gujarat High Court was put to challenge before the Hon'ble Supreme Court by the assessee by filing Special Leave to Appeal (C) No. 23760 of 2017, which was

ultimately, dismissed, by order dated 08.02.2018 reported in **(2018) 91 taxmann.com 306 (SC)** by observing that "*merely because reasons recorded by the assessing officer proceeded on same basis on which it initially desired to make additions, but which failed on account of setting aside order of assessment, it would not preclude the assessing officer from carrying out exercise of reopening of assessment*".

17.Thus, applying the aforesaid ratio decidendi, which holds the field, this court is of the opinion that the order of the learned Judge in justifying the reassessment proceedings initiated by the assessing officer under section 147 of the Act, after following the mandatory requirements of the Act, is perfectly correct and the same does not call for any interference by this court.

18.In fine, this intra-court appeal fails and is accordingly, dismissed. No costs. Consequently connected miscellaneous petitions are closed.

(R.M.D., J) **(M.S.Q., J)**

01.09.2022

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Index : Yes / no
Internet : Yes / No

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R.MAHADEVAN, J.
and
MOHAMMED SHAFFIQ, J.

rsh

WA No. 2344 of 2021

01.09.2022