IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 25.07.2022

Delivered on: 09.09.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P. Nos.3275, 3276 and 3277 of 2014

Kalanithi Maran

…. Petitioner in W.P.Nos.3275 & 3276 of 2014

Kavery Kalanithi

…. Petitioner in W.P.No.3277 of 2014

Vs.

1. The Joint Commissioner of Income Tax,
   Non-Corporate Range 10(1),
   No.121, Mahatma Gandhi Road,
   Chennai – 600 034.

2. The Deputy Commissioner of Income Tax,
   Non-Corporate Circle 10(1),
   No.121, Mahatma Gandhi Road,
   Chennai – 600 034.

(Respondents cause title amended vide
Order dated 25.07.2022 made in
WMP No.14929, 14926 and 14923 of 2022)

…. Respondents in all W.Ps

Common Prayer in all W.Ps: PETITIONs under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorari calling for

the records relating to the notice issued by the 2nd respondent dated 28.03.2013 under Section 148 of the Income Tax Act, 1961 and the consequential order dated 27.01.2014 in proceedings ACIT/Media Circle I/148/2013-14 of the 3rd respondent and quash the same.

For Petitioner
in W.P.No.3277 of 2014 : Mr.AL.Somayaji
Senior Counsel
For Mr.K.GirishNeelakantan

For Petitioner
in W.P.Nos.3275 & 3276 of 2014: Mr.SatishParasaran
Senior Counsel
For Mr.K.GirishNeelakantan

For Respondents in all W.Ps : Mr.R.Sankaranarayanan
Additional Advocate General
Assisted by
Mrs.HemaMuralikrishnan
Senior Standing Counsel

C O M M O N O R D E R

The petitioners are assessees under the provisions of the Income Tax Act, 1961 (in short 'Act') before the respective respondents/Assessing Officers. Detailed submissions of Mr.A.L.Somayaji and Mr.Sathish Parasaran, learned Senior Counsels appearing for Mr.B.K.Girish Neelakantan, learned counsel for the petitioners and Mr.Sankaranarayanan, learned Additional Solicitor General

appearing for Mrs.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents have been heard.

2. These Writ Petitions, along with several others challenging proceedings for re-assessment, were originally dismissed by a Division Bench of this Court on 04.07.2014 as against which some of the assessees including these petitioners approached the Hon'ble Supreme Court that set aside the orders passed by this Court remanding the matters to the file of the learned single Judge for consideration, vide orders dated 21.11.2016 and 08.12.2016.

3. The submissions advanced on behalf of the petitioners are taken conjointly, seeing as, barring some differences, relevant facts remain largely the same in both cases. The challenge is to proceedings for re-assessment in terms of the Income tax Act 1961 (in short 'Act') for the periods 2008-09 and 2009-10 in the case of Mr.Kalanidhi Maran (in short and referred to hereinafter as 'Petitioner A') and 2009-10 in the case of Mrs.Kaveri Kalanidhi (in short and referred to hereinafter as 'Petitioner B').

4. Returns of income (ROI) were filed by the petitioners within time. Both petitioners state that they are promoter directors of a company by the name and style of Sun Direct Pvt Ltd (in short 'sun direct'/'company') and that, barring this, there is no other relationship between the petitioners and the company.

5. In the case of petitioner A, the ROI was taken up for scrutiny, a questionnaire under Section 142(1) issued on 20.06.2011 and certain details called for by the assessing officer in regard to the return. In response, the petitioner submitted various documents to substantiate the ROI filed. My attention is drawn, in specific, to a cash flow statement wherein, the investment of petitioner A in the company was reflected, under the head 'payments'. The specific entry, as aforesaid, reads thus:

Cash Flow Statement – FY 2008-09

Opening Balance – CUB – 01.04.2008 .....

Add: Receipts

.....

Less: Payments

Investment in Sun Direct *26,38,78,950*

.....

6. The petitioners aver that the factum of investment by the petitioners in Sun Direct, and the pricing methodology adopted was well within the knowledge of the assessing authority, as the assessing officer was common to both the petitioners and Sun Direct. In this connection, the petitioners draw attention to Schedule I of the Annual Report of Sun Direct, (page 67 of compilation dated 20.07.2022) that reads as follows:

Sun Direct TV (P) Ltd.

Schedules to the financial statements for the year ended 31.03.2008

	As on March 31, 2008	As on March 31, 2007
Schedule I		
Authorized Share Capital 380,000,000 Equity Shares of Rs.10/- each (Previous Year 200,000,000 Equity Shares of Rs.10/- each)	**3,800,000,000**	2,000,000,000
Issued, Subscribed and Paid up Share Capital *198,387,097 (150,000,000) Equity Shares of Rs.10/- each fully paid* *(During the year the Company had issued 39,677,420 Equity Shares of Rs.10 each of a premium of Rs.69.57 per share to South Asia Entertainment Holdings Limited and 8,709,677 Equity Shares of Rs.10/- each at par to Mr.Kalanithi Maran on 10th December 2007)*	**1,983,870,970**	1,500,000,000
Schedule 2		
Reserves & Surplus		
Securities Premium Account Receipts during the year -Refer Note in Schedule No.1	**2,760,358,109**	

7. The Schedule set out the details of issued, subscribed and paid up share capital and there is a disclosure therein, italicized above for clarity, to the effect that the shares of the company had been issued at a premium to one, South Asia Entertainment Holdings Limited, and at par to the petitioners

herein. I will refer to this aspect of the matter more in detail, in the paragraphs to follow.

8. An assessment order came to be passed in terms of Section 143(3) of the Act in the case of petitioner A on 30.11.2011. The order has been passed after scrutiny, and at paragraph 2 thereof, the heads under which income has been admitted in the ROI, being 'salary', 'house property', 'short term capital gains' and 'other sources', have been noted by the officer.

9. As regards petitioner B, the ROI was not taken up for scrutiny and only an intimation was issued in terms of Section 143(1) of the Act. However, petitioner B would urge that, seeing as she was assessed in the same circle as that of petitioner A, and insofar as the issues earmarked for reassessment are one and the same, the distinction drawn between a scrutiny assessment under Section 143(3) and an intimation under 143(1), is artificial and contrary to law.

10. While this was so, and within four years from the end of the relevant assessment year, the respondent, being of the view that there has been escapement of income to tax, issued notices under Section 148 of the Act. Both petitioners responded stating that the ROIs filed originally be taken as filed in response to the notices under Section 148. Reasons recorded on the basis of which the reassessments had been initiated, were sought.

11. The reasons, common in W.P.Nos.3275 and 3276 of 2014 in the case of petitioner A, read as follows:

"As requested in your letter dated 26.04.2013, the reasons for reopening your assessment for the AY 2008-09 are furnished as under:

"Mr.Kalanidhi Maran, PAN: AFGPM8138N is a promoter Director in M/s. Sun Direct TV Pvt. Ltd., Chennai and assessed in Media Circle I, Chennai. He has filed his return of income for the assessment year 2009-10 on 28.07.2009 returning income of Rs.33,11,96,260/-. The case was taken up on scrutiny and an order u/s 143(3) was passed on 30.11.2011 assessing the income at Rs.33,39,11,300/-

In the computation of income enclosed by him along with the return of income, he had disclosed the following income, namely:

Income from Salary from M/s.Sun TV Network Ltd	*:*	*32,41,09,600*
Income from House property	*:*	*3,37,398*
Income from other sources	*:*	*67,49,257*
Gross Total Income	*:*	*33,11,96,255*
	or	*33,11,96,260*

In the assessment made u/s 143(3) dated 30.11.2011, an addition of Rs. 27,15,043/- under Income from Other Sources were made.

Subsequent to the assessment made on 30.11.2011, it is found that Shri Kalanidhi Maran, the promoter Director has been allotted shares by M/s. Sun Direct TV Pvt. Ltd. at par during the financial year relevant to the Assessment Years 2008-09 and 2009-10, whereas on the same dates, a company by the name of M/s. South Asia Entertainment Holdings Ltd (SAEHL) has been issued shares at a premium of Rs.69.57/-.

The allotment of shareholding by Shri S. Kalanidhi Maran in M/s. Sun Direct TV Pvt. Ltd is as under:

Date of Allotment	*No.of shares*	*Value Per*	*Premium, if any per*	*Total Value*	*Remarks*

		Share (Rs.)	*share (Rs.)*		
18.02.2005	*14,50,00,000*	*10*	*0*	*1450000000*	*Promoter allotment*
27.06.2005	*(11,80,00,000)*	*10*	*0*	*(1180000000)*	*Transfer of share to wife, another Director*
10.12.2007	*8709677*	*10*	*0*	*87096770*	*Allotment without premium**
02.04.2008	*13233974*	*10*	*0*	*132339740*	*Allotment without premium**
31.07.2008	*9873191*	*10*	*0*	*98731910*	*Allotment without premium**
30.09.2008	*3280730*	*10*	*0*	*32807300*	*Allotment without premium**

M/s. South Asia Entertainment Holdings Ltd was allotted shares on 10.12.2007, 02.04.2008, 31.07.2008 and on 30.09.2008 at a premium of Rs.69.57 for the allotment of shares of 3,96,77,420, 14704415, 10970211 and 3645256 shares respectively. Since the percentage of shares allotted to M/S.SAEHL is below 26%, it did not have any controlling stake in the Company. The value of the shares allotted to it is at Rs.79.57 per share including premium of Rs.69.57. However, the promoter Director was allotted shares at par.

Section 2(24) (iv) of the Income-tax Act, 1961 defines that income includes the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such a person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid. Any perquisite or profits in lieu of salary is taxable under the provisions of Chapter IV-A of the Act.

Further, clause (iv) of Section 28 provides that the value of any benefit or perquisite, whether convertible into money or not,

arising from business or the exercise of profession shall be chargeable to income-tax under the head "profits and gains of business or profession".

Based on the above, I am satisfied that by allotting shares at par to its Director, Shri.Kalanidhi Maran on 02.04.2008, 31.07.2008 and on 30.09.2008, while allotting shares at a premium of Rs.69.57 per share to SAEHL, the company has given a value of benefit but for such benefit, the some would have been payable by Shri.Kalanidhi Maran. The income escaped assessment on the allotment of shares of 26387895 at the premium of Rs.69.57 per share works out to Rs.18358,05,855/- during the assessment year 2009-10,

Further, the interest of the assessee in M/s. South East Entertainment Holdings Ltd and its Parent company, M/s. Astro All Asia Networks Plc., which are incorporated outside India, is also to be looked into.

Thus, the assessee was given excess relief which comes within the purview of clause (i) of Explanation 2 to section 147.

The above information has come to the notice subsequent to the original assessment made on 27.12.2010. In view of the above reasons recorded, I am satisfied that there is reason to believe that income chargeable to tax has escaped assessment for A.Y. 2009-10 in the case of Shri.Kalanidhi Maran to the extent of Rs.183,58,05,855/- Therefore, I am satisfied that this is a fit case for issue of notice u/s 148 of the Act to bring the above escaped income chargeable to tax by reopening the assessment for Assessment Year 2009-10. Accordingly, I am issuing notice u/s 148 of the Income-tax Act, 1961 for AY 2008-09."

From the above reasoning, it is clear that there is escapement of Income chargeable to tax for the AY 2009-10 and the notice u/s 148 issued on 28.03.2013 is valid.

In connection with the above, you are requested to furnish the following details:

Details of shares allotted to you by M/s. Sun Direct TV Pvt. Ltd. during the FY relevant to AY 2009-10 like, No. of shares, Value per share, Premium, if any, Date of allotment and total value of shares.

Your case is posted for hearing on 07.08.2013 @ 11.30 a.m. You are requested to appear before the undersigned on the

hearing date either in person or through an authorised representative authorised for this purpose and produce the details called for. In case of failure, the 147 proceedings for the AY 2009-10 will be finalised based on material available on record as per law."

12. The reasons, recorded in the case of petitioner B, read as follows:

"As requested in your letter dated 26.04.2013, the reasons for reopening your assessment for the AY 2008-09 are furnished as under:

"Mrs. Kaveri Kalanidhi, PAN: AGIPK2942F is a promoter Director in M/s. Sun Direct TV Pvt. Ltd., Chennai and assessed in Media Circle I, Chennai. She has filed her return of income for the assessment year 2009-10 on 29.09.2009 returning income of Rs.32,72,74,380/-. The case was taken up on scrutiny and an order u/s 143(3) was passed on 30.11.2011 assessing the income at Rs.33,39,11,300/-.

In the computation of income enclosed by her along with the return of income, she had disclosed the following income, namely:

Income from Salary		
from M/s. Sun TV Network Ltd	*:*	*32,41,09,600*
Income from House property	*:*	*2,29,795*
Income from Other sources		
(interest & Share from Trust)	*:*	*3,00,000*
Short Term Capital Gains	*:*	*1,05,358*
Gross Total Income	*:*	*32,72,74,380*

Subsequent to this, it has come to knowledge of this Assessing Officer through the letter of the 0/0 The CCIT, Chennai dated 26.07.2012 enclosing the letter of the DGIT, Investigation, New Delhi that Smt. Kavery Kalanidhi, the promoter Director has been allotted shares by M/s. Sun Direct TV Pvt. Ltd. at par during the financial year relevant to the assessment year 2009-10, whereas on the same dates, a company by the name M/s. South Asia Entertainment Holdings Ltd. (SAEHL) has been issued shares at a premium of Rs.69.57.

The allotment of shareholding to Smt. Kavery Kalanidhi in M/s. Sun Direct TV Pvt. Ltd. is as under:

Date of Allotment	*No. of Shares*	*Value per share (Rs.)*	*Premium, if any per share (Rs.)*	*Total Value*	*Remarks*
18.02.2005	*5000000*	*10*	*0*	*50000000*	*Promoter allotment*
27.06.2005	*(11,80,00,000)*	*10*	*0*	*(1180000000)*	*Transfer of share to wife, another Director*
02.04.2008	*455836887*	*10*	*0*	*455836870*	*Allotment without premium**
31.07.2008	*34007656*	*10*	*0*	*340076560*	*Allotment without premium**
30.09.2008	*11300294*	*10*	*0*	*113002940*	*Allotment without premium**

M/s. South Asia Entertainment Holdings Ltd was allotted shares on 02.04.2008, 31.07.2008 and on 30.09.2008 at a premium of Rs.69.57 for the allotment of shares of 14704415, 10970211 and 3645256 shares respectively. Since the percentage of shares allotted to M/S.SAEHL is below 26%, it did not have any controlling stake in the Company. The value of the shares allotted to it is at Rs.79.57 per share including premium of Rs.69.57. However, the promoter Director was allotted shares at par.

Section 2(24)(iv) of the Income-tax Act, 1961 defines that 'income' includes "the value of any benefit or perquisite, whether convertible into money or not, obtained from a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such a person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid". Any perquisite or profits in lieu of salary is taxable under the provisions of Chapter IV-A of the Act.

Further, clause (iv) of Section 28 provides that the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable to income-tax under the head "profits and gains of business or profession".

Based on the above, am satisfied that by allotting shares at par to its Director, Smt.Kavery Kalanithi on 02.04.2008, 31.07.2008 and on 30.09.2008 while allotting shares at a premium of Rs.69.57 per share to SAEHL, the company has given a value of benefit but for such benefit, the some would have been payable by Smt.Kavery Kalanithi. The income escaped assessment on the allotment of shores of 90891637 at the premium of Rs.69.57 per shore works out to Rs.6,32,33,31,186/- during the assessment year 2009-10.

Further, the interest of the assessee in M/s. South East Entertainment Holdings Ltd and its Parent company, M/s. Astro All Asia Networks Plc, which are incorporated outside India, is also to be looked into.

Thus, the case of the assessee comes within the purview of clause (b) of Explanation 2 to Section 147 as no scrutiny has taken place earlier in this case for AY 2009-10.

In view of the above reasons recorded, I am satisfied that there is reason to believe that income chargeable to tax has escaped assessment for A.Y. 2009-10 in the case of Smt.Kavery Kalanithi to the extent of Rs.6,32,33,31,186/-. Therefore, I am satisfied that this is a fit case for issue of notice u/s 148 of the Act to bring the above escaped income chargeable to tax by reopening the assessment for Assessment Year 2009-10. Accordingly, am issuing notice u/s 148 of the Income-tax Act, 1961 for AY 2008-09."

From the above reasoning, it is clear that there is escapement of income chargeable to tax for the AY 2009-10 and the notice u/s 148 issued on 28.03.2013 is valid.

In connection with the above, you are requested to furnish the following details:

Details of shares allotted to you by M/s. Sun Direct TV Pvt. Ltd. during the FY relevant to AY 2009-10 like, No. of shares, Value per share, Premium, if any, Date of allotment and total value of shares.

Your case is posted for hearing 13.08.2013 @ 11.30 a.m. You are requested to appear before the undersigned on the hearing date either in person or through an authorised representative authorised for this purpose and produce the details called for. In case of failure, the 147 proceedings for the AY 2009-10 will be finalised based on material available on record as per law.

13. Before proceeding, I must mention that the officer has undeniably erred in stating in the reasons recorded, that the ROI of petitioner B was scrutinized and an order under Section 143(3) passed, as admittedly, only an intimation was issued and the matter rested there. The error has been corrected both in the impugned order and the counter filed. Be that as it may, it is an admitted fact that only an intimation has been issued in the case of Petitioner B and no scrutiny order was passed. Hence nothing turns on this error in the reasons recorded, though it was clearly to have been avoided.

14. The procedure for re-assessments has been settled by the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd vs Income Tax Officer and Ors* (259 ITR 19), and the relevant paragraph reads thus:

"We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income tax Act is issued, the proper course of action for the noticee is to file return and if he so

desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking Order before proceeding with the assessment in respect of the abovesaid five assessment years."

15. In line therewith, the petitioners filed objections on 15.11.2012 to the assumption of jurisdiction by the authority. Both petitioners stoutly stood by their returns, as filed originally. They maintained that full disclosure had been made therein and there was thus no avenue under the Act for re-assessment of the income. They also advanced detailed submissions on the merits or otherwise of the proposed additions.

16. In the case of petitioner A, the assumption of jurisdiction is challenged on the specific ground that the original assessments were completed under scrutiny after looking into all necessary and relevant materials and hence the present proceedings are contrary to law, being, but a review of the original assessment. Petitioner B also adopts the same defence, that the proceedings constitute a review of the original assessment, though this stand is to be tested in light of the fact that there has been no scrutiny in her case.

17. Before me, petitioner B, points to the complete identity in facts as well as legal position in the case of both petitioners, barring the fact that one is

a scrutiny assessment (in the case of petitioner A) and the other, in her case, an intimation in terms of Section 143(1) of the Act. All assessments, including those in the hands of the company have been made by officers in the same charge/circle and hence the mere fact that her assessment was not under scrutiny should, according to her, hardly matter.

18. The petitioners also made an application before the Joint Commissioner of Income tax (in short 'JCIT') praying that he issue appropriate directions to the officer for conduct and completion of the proceedings. The JCIT, by his order dated 21.01.2014, took stock of the fact that there had been 'information' on the basis of which the proceedings for re-assessment had been initiated. He thus directed the officer to decide the matter appropriately, taking careful note of the objections filed, and in a fair manner. In conclusion he directs the officer to dispose the objections by way of a speaking order taking note of all decisions cited by the petitioners.

19. Since detailed submissions have been advanced on the merits, I summarise the same below. Though the reasons are identical in the cases of both petitioners, barring the dates and amounts of investment, the stand on merits is different.

20. Section 2(24)(iv) includes within the ambit of 'income', *the value of any benefit or perquisite, whether convertible into money or not, obtained from*

a company either by a director or by a person who has a substantial interest in the company, or by a relative of the director or such a person, and any sum paid by any such company in respect of any obligation which, but for such payment, would have been payable by the director or other person aforesaid.

21. Section 28(iv) provides *that the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession shall be chargeable to income-tax under the head "profits and gains of business or profession*. According to the petitioner, neither of the provisions as aforesaid would be applicable to his case.

22. Section 17(2), which is an inclusive definition of the term 'perquisite', contains clause (vi) which deals with the value of any specified security or sweat equity shares allotted or transferred directly or indirectly by the employer or former employer, free of cost or at a concessional rate.

23. The impugned enhancement could only have been made, according to petitioner A, invoking the provisions of Section 17(2)(vi) that takes effect from 01.04.2010, applicable from the next financial year onwards. Prior to its substitution, clause (vi) dealt with the value of Fringe Benefit tax or amenities, not relevant to this matter. Thus, even assuming that the notional value of a 'benefit' or' perquisite' would be taxable, such liability cannot be fastened for a

period prior to the insertion of the relevant provision, and in the absence of a charging mechanism.

24. In this context, the petitioner refers to the judgment in the case of *Commissioner of Income Tax, Bangalore V. Infosys Technologies Limited* ((2008) 2 SCC 272), drawing particular attention to the following paragraphs, extracted below:

> *4. For the assessment year 1999-2000, the AO held that the total amount paid by the employees consequent to the exercise of option was Rs. 6.64 crores whereas the market value of those shares was Rs. 171 crores. He held that the "perquisite value" was the difference between the market value and the price paid by the employees for exercise of the option. He, therefore, treated Rs. 165 crores as "perquisite value" on which TDS was charged at 30%. It was held that the respondent-assessee was a defaulter for not deducting TDS under Section 192 amounting to Rs. 49.52 crores on the above perquisite value of Rs. 165 crores. Similar orders were also passed by the AO for assessment years 1997-98 and 1998-99. These orders were confirmed by CIT(A). No weightage was given by both the authorities to the lock in period. Both the authorities took into account the "perquisite value" as on the date of exercise of option.*
>
> *6. Whether tax had to be deducted under Section 192 of the 1961 Act, by the respondent-assessee, on the amount earned by its employees from exercise of stock option granted to them by the company through the Trust, is the question which arises for determination in these civil appeals.*
>
> *7. In the case of Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors. MANU/SC/0317/1985 : [1985]155ITR144(SC) this Court held that there are four*

components of tax. The first component is the character of the imposition, the second is the person on whom the levy is imposed, the third is the rate at which tax is imposed and the fourth is the value to which the rate is applied for computing tax liability. It was further held that if there is ambiguity in any of the four concepts then levy would fail. In this case, we are concerned with the forth concept. There is one more principle which is required to be noted. A benefit/receipt under the 1961 Act must be made taxable before it can be regarded as "income".

8. During the assessment years 1997-98, 1998-99 and 1999-2000 there was no provision in the said 1961. Act which made the benefit by way of ESOP taxable as income specifically. It became specifically taxable only with effect from 1.4.2000 when Section 17(2)(iiia) stood inserted.

9. At the outset, we may state that in these civil appeals we are not concerned with taxability but with the value of a perquisite.

…….

15. As stated above, unless a benefit/receipt is made taxable, it cannot be regarded as "income". This is an important principle of taxation under the 1961 Act. Applying the above principle to the insertion of Clause (iiia) in Section 17(2) one finds that for the, first time w.e.f. 1.4.2000 the word "cost" stood explained to mean the amount actually paid for acquiring specified securities and where no money had been paid, the cost was required to be taken as nil.

….

17. Be that as it may, proceeding on the basis that there was "benefit", the question is whether every benefit received by the person is taxable as income? In our view, it is not so. Unless the benefit is made taxable, it cannot be regarded as income. During the relevant assessment years, there was no provision in law which

made such benefit taxable as income. Further, as stated, the benefit was prospective.

Unless a benefit is in the nature of income or specifically included by the Legislature as part of income, the same is not taxable. In this case, the shares could not be obtained by the employees till the lock-in period was over. On facts, we hold that in the absence of legislative mandate a potential benefit could not be considered as "income" of the employee(s) chargeable under the head "salaries". The stock was non-transferable and the stock exchange was also accordingly notified. This is where the weightage ought to have been given by the AO to an important factor, namely, lock in period. This has not been done. It is important to bear in mind that if/the shares allotted to the employee had no realizable sale value on the day when he exercised his option then there was no cash inflow to the employee. It was not possible for the employee to know the future value of the shares allotted to him on the day he exercises his option. Even the cost of acquisition as "nil" came to be introduced in the 1961 Act by the Finance Act, 1999 only with effect from 1.4.2000. In fact, the later deletion of Clause (iiia) is an indicator of the Ineffective Charge.

25. They also refer to the judgment in the case of *Additional Commissioner of Income Tax V. Bharath V. Patel* ((2018 15 SCC 670) wherein the Hon'ble Supreme Court has considered the meaning and import of the terms 'benefit' and 'perquisite'. Paragraphs 21 and 22 are relied upon, extracted below:

21. Alternatively, the Revenue also contended that the case of the Respondent shall come within the ambit of the 28(iv) of the IT Act. At this juncture, we deem it appropriate, for the sake of

convenience, to refer Section 28(iv) of the IT Act which is reproduced herein below:

> *28. Profits and gains of business or profession.-The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession"-*
>
> *(iv) the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession.*

22.On a first look of the said provision, it is apparent that such benefit or perquisite shall have arisen from the business activities or profession whereas in the instant case there is nothing as such. The applicability of Section 28(iv) is confined only to the case where there is any business or profession related transaction involved. Hence, the instant case cannot be covered Under Section 28(iv) of the IT Act for the purpose of tax liability.

26. Reference is also made to the judgment of the Calcutta High Court in the case of *Commissioner of Income Tax V. PRS Oberoi* (183 ITR 103). In all, petitioner A argues that if at all there is any 'benefit' gained or 'perquisite' earned, which fact is in itself denied, the applicability of Section 28(iv) would only be confined to business or professional transactions. In the case of *PRS Oberoi* (supra), the assessee was a Director and there was no employer-employee relationship between the assessee and the company warranting application of Section 28(iv) of the Act. So too in the present case. Hence, the ratio of the aforesaid decisions, support his case, on all fours.

27. As far as petitioner B is concerned, the argument focuses upon the provisions of Section 56(2)(vii) of the Act, proceeding on the premise that this forms the basis of the impugned proceedings. The provisions themselves have been inserted with effect from 01.10.2009 to apply in relation to transactions undertaken on or after such date only. In the present case, the acquisition of shares has been on various dates prior to 01.04.2009 and hence there is no justification whatsoever to have invoke the statutory provision in her case.

28. The Explanatory notes to the provision at the time of insertion are circulated, drawing attention to paragraph 24 dealing with 'Taxation of certain transactions without consideration or for an inadequate consideration as income from other sources'. Specific reference is made to paragraphs 24.6 and 24.7, that read as under:

> *24.6. Consequential amendment has been made in section 2 by inserting sub-clause (xv) in clause (24) thus expanding the definition of income to include any sum of money or value of property referred to in clause (vii) of sub-section (2) of section 56. Further, section 49 has also been amended by way of inserting a new sub-section (4) providing that for the purposes of computing capital gains, if the transaction of receipt of the asset is subject to tax under clause (vii) of sub-section (2) of section 56, then the cost of acquisition of the asset shall be the stamp duty value (for immovable property) or fair market value (for asset being a movable property) as the case may be.*
>
> *24.7 Applicability – These amendments have been made applicable with effect from 1st October, 2009 and will accordingly apply for transactions undertaken on or after such date.'*

29. According to the petitioner, it is in the background of this amendment that the impugned proceedings have been initiated, albeit misconceived as the amendment to Section 2(xv) and 56(2)(vii), if at all applicable would only be with effect from 01.10.2009, in respect of transactions undertaken on or after the aforesaid date. Since the transactions in the present case are long prior to the effective date of 01.10.2009, the provision and consequently, its impact, would have no relevance to her case.

30. Petitioners also submit that that there has been no re-assessment in the cases of other similarly placed assesses who had engaged in identical transactions. Hence they allege that they were being singled out for differential treatment. In the objections to assumption of jurisdiction, petitioners have enumerated instances where shares were allotted at par to the promoters and at a premium to overseas investors, identical to the present case. In none of the aforesaid cases has the revenue made any addition in the hands of the promoters. A compilation dated 04.02.2014 and comprising 9 annexures is filed that contains the extract of the financials of the companies stated to have engaged in similar issue of shares at differential pricing.

31. The instances cited are:

1.State Bank of India's IV with Australian Insurance Major
2.India First Life Insurance Company Limited
3.Canara HSBC Oriental Bank of Commerce Life Insurance

Company Limited
4.Apollo Munich Health Insurance Company Limited (formerly Apollo DKV Insurance Company Limited)
5.Just Dial Limited
6.TVS Automobiles Solutions Limited
7.Pipavav Shipyard Limited
8.Shriram Housing Finance Limited

The above, in summary, are the submissions of the petitioners.

32. I now advert to the submissions advanced on behalf of the respondents in defence of the impugned proceedings. Firstly, and on jurisdiction, they point out that the reasons for re-assessment in case of both petitioners disclose that information had been received on 26.07.2012 from the office of the Chief Commissioner of Income Tax, Chennai, enclosing a letter of the Director General of Income Tax, Investigation, New Delhi.

33. The aforesaid communication draws attention to the transactions of share allotment at issue, and the differential pricing adopted qua promoters and other investors. It is upon consideration of the aforesaid information that the respondent has recorded his belief that income has escaped assessment. Thus, there is new and tangible material at the heart of the impugned proceedings that validates the assumption of jurisdiction. The argument that the proceedings are based upon a mere change of opinion is factually erroneous as would be apparent from a reading of the reasons.

34. The case of both petitioners, particularly Petitioner B, hardly merits consideration in a challenge under Article 226 of the Constitution of India as the Court, in such challenges, will restrict the examination only to the legal infirmities touching upon the assumption of jurisdiction and is not expected to traverse the merits.

35. There was no scrutiny of the ROI filed by Petitioner B, leaving the field open for the officer to initiate proceedings for escapement, based on valid and tangible material received. They rely on the judgments in the case of *ACIT V. Rajesh Jhaveri Stock Brokers (P) Ltd.* (161 Taxmann 316) and *Deputy Commissioner of Income Tax V. Zuari Estate Development and Investment Co. Limited* (63 Taxmann.com 177) in this regard.

36. As regards the merits, the respondents would argue that Section 2(24)(xv) read with Section 56(2)(vii) would apply only to income under the head 'other sources', whereas in the present case, the provision invoked is 2(24)(iv), that deals with 'salary'. Hence, these arguments have no merit whatsoever. In any event, all energies of the revenue are expended on the challenge to the assumption of jurisdiction and the submissions on merits are addressed only peripherally.

37. The respondents would reiterate that the merits of the matter are at large, seeing as the challenge is now to be tested and decided only in the

context of assumption of jurisdiction and no further. To this, Mr.Somayaji would retort that the question of jurisdiction should be seen contextually, taking note of the merits as well. While one facet of jurisdiction would flow from the specific statutory conditions, another facet of jurisdiction hinges upon the merits of the matter as well, as there would be no avenue to reopen the assessment if there was an apparent lack of justification to do so, in law.

38. If the reasons, based upon which the re-assessment is initiated, contain no merit whatsoever, in law, then, notwithstanding that the procedural and statutory requirements may be satisfied by the respondents, the re-assessment would still fail. To counter, revenue would cite and rely upon a slew of decisions as set out below to explain the scope of judicial review when it comes to a challenge to quasi-judicial proceedings:

(i) *Sonia Gandhi V. ACIT* (2018) 97 taxmann.com (Del)

(ii) Acorus Unitech Wireless (P) Ltd. V. ACIT (2014) 43 taxmann.com 62 (Delhi)

(iii) Choksi Vachharaj Makani & Co. V. ACIT (2016) 76 taxmann.com 17 (Delhi)

(iv) Yogendrakumar Gupta V. ITO (2014) 46 taxmann.com 56 (Guj.)

(v) Yogendrakumar Gupta V. ITO(2014) 51 taxmann.com 383 (SC)

(vi) Mohan Ravi V. ITO (2019) 112 taxmann.com 373 (Md)

(vii) Raymond Woolen Mills V. ITO (199) 236 ITR 34 (SC)

39. They submit that the scope of judicial review, in such matters, must be restricted to an examination of whether the officer concerned has the requisite authority to proceed with the matter. In the case of both petitioners, the re-assessments have been initiated within a period of 4 years and based on new information that has come to the attention of the officer. Thus there is no merit whatsoever in the challenge, that is liable to be rejected and the re-assessments directed to be proceeded with.

40. I have heard all learned senior counsel at length, perused the affidavits and case-law in detail and set out my order below with reasons assigned for my decision.

41. The Income Tax Act provides for a scheme of re-assessment and sets out strict timelines within which such re-assessment has to be initiated and concluded. Section 148 provides for the issuance of a notice upon the Assessing Officer having recorded his 'reason to believe' that there been escapement of tax in the case of an assessee. There is some responsibility cast upon the Assessing Officer to ensure that re-assessments are not initiated merely to get over lapses or mistakes that had been committed at the first instance, by the officers of the Department.

42. To this end, the proviso to Section 147 places a further embargo upon the officers in cases of initiation of proceedings beyond four years, to state that

if the assessee concerned has filed a return under Section 139 and such return has been scrutinized by way of an order of assessment, it is incumbent upon the Assessing Officer to establish and satisfy certain pre-conditions prior to assuming jurisdiction.

43. The impugned proceedings in both cases, have been initiated within a period of four years and there is hence, no need to traverse to the proviso or to the statutory conditions set out thereunder. That apart, the assessment of petitioner B has been completed only by way of an intimation and has not been selected for scrutiny. Thus, in the case of petitioner B, there is very little that stands in the way of the Income Tax Department initiating proceedings for a re-assessment.

44. Needless to state, though the reasons recorded must stand prima facie scrutiny that they are not apparently arbitrary or illegal, Courts do not traverse much into this arena as it normally considered to be beyond the pan of preliminary judicial scrutiny, and falling within the realm of subjective satisfaction of the officer. This test will thus be restricted to an overall and prima facie evaluation of the reasons, only to determine if arbitrariness, illegality or irrationality is writ large thereupon. It is on the anvil of the above tests that I commence the discussion and first take up the case of petitioner B as it is legally, the simpler of the two matters before me.

45. The admitted legal and factual position in the case of Petitioner B is as follows:

(i) A return of income has been filed within time.

(ii) The return was, admittedly, not taken up for scrutiny.

(iii) The impugned notice under Section 148 has been issued on 28.03.2013 within a period of four years.

(iv) The procedure as prescribed in the context of *GKN Driveshafs Vs. Income Tax Officer* [259 ITR 19] was triggered by the petitioner adopting the return filed originally as filed in compliance of the notice and seeking the reasons for re-assessment.

(v) The reasons disclose that the jurisdictional Assessing Officer had received information from the Director of Income Tax, New Delhi based upon which, he arrived at a prima facie belief that the income disclosed by the petitioner might call for enhancement, and income had, as it were and prima facie, escaped assessment to tax.

46. In my considered view, the case of petitioner B, falling within the admitted facts and circumstances as set out above, would have to be relegated to the Assessing Officer for continuation of the proceedings as it fails the tests statutorily enshrined as well as judicially developed by the Courts.

47. This is for the reason that (i) there has been no scrutiny of the return at the first instance and no 'opinion' has been formed by the officer. Thus, the question of review or change of opinion does not arise (ii) the officer thus has six years from the end of the relevant assessment year to initiate proceedings which he has, within time (iii) new/tangible material/information has come to the notice of the assessing officer post-assessment based upon which he has formed a prima facie belief that income has escaped assessment (iv) the procedure prescribed in the case of GKN Driveshafts has been followed by the officer thus far (v) what follows is for the officer to proceed with the assessment and finalise the same after hearing the officer, either accepting the stand of the petitioner or framing a speaking order confirming the proposal for assessment.

48. One of the common arguments advanced by the petitioners is that it is the communication of the DGIT Investigation that has triggered the re-assessment and thus there is no independent ‘reason to believe’ or belief on the part of the assessing officer to have commenced the impugned proceedings. This argument is misconceived for the reason that while it is the communication of the DGIT that constitutes new and tangible information conveyed to the assessing officer, the reasons recorded disclose the officer’s

belief that such information indicates escapement of income, prima facie. In my considered view, this would suffice for purposes of initiation of proceedings.

49. In the cases of *Rajesh Jhaveri Stock Brokers* (supra) and *Zuari International* (supra), the Hon'ble Supreme Court had had occasion to deal with a similar set of facts as arising in this matter. Proceedings for re-assessment had been initiated beyond a period of four years but within six years in the former matter, whereas in the latter case, proceedings had been initiated within four years.

50. The relevant paragraphs in the aforesaid judgments are as follows:

In the case of Rajesh Jhaveri:

'. . . .

16.Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word"reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with Solicitude for the public exchequer with an in built idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd v. ITO [1991] 191 ITR 662, or initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the

first outcome of proceeding is not relevant. In other words, at the initiation stage, what is required is"reason to believe", but not the established fact of escapement of income. At the stage of issue of notice,the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing nicer is within the realm of subjective satisfaction ITO v. Selected Dalurband Coal Co. (P) Ltd. [1996] 217 ITR 597 (SC); Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).

17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (1)omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.'

In the case of Zuari:

'. . . .

2. After going through the detailed order passed by the High Court, we find that the main issue which is involved in this case is not at all addressed by the High Court. A contention was taken by the appellant-Department to the effect that since the assessee's return was accepted under Section 143(1) of the Income Tax Act, there was no question of "change of opinion" inasmuch as while accepting the return under the aforesaid provision no opinion was formed and therefore, on this basis, the notice issued was valid. We find that this aspect is squarely covered by the judgment of this part in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500/161 Taxman 316 in the following manner.—

> *"15. In the scheme of things, as noted above, the intimation under Section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under Section 143(1)(a) as it stood prior to 1-4-1989, the assessing officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the legislature i.e. to minimise the departmental work to scrutinise each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain, J.) in Apogee International Ltd. v. Union of India.*
>
> *16. It may be noted above that under the first proviso to the newly substituted Section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143(1) where (a) either no sum is payable by the ail*

assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any h assessing officer, but mostly by ministerial staff. Can it be said that any "assessment" is done by them? The reply is an emphatic "no". The intimation under Section 143(1)(a) was deemed to be a notice of demand under Section 156, for the apparent purpose of making machinery provisions to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under Section 143(1)(a), the question of change of opinion, as contended, does not arise."

51. In conclusion, I find no infirmity in law in the initiation of proceedings for re-assessment relating to Petitioner B, and for the reasons as set out above, and applying the rationale of the judgments of the Hon'ble Supreme Court supra, order dated 27.01.2014 challenged in W.P.No.3277 of 2014 is confirmed and this writ petition is dismissed.

52. In the case of petitioner A, facts in relation to the allegedly offending transaction remain the same, barring differences in dates of share allotment, that are immaterial to decide the question of assumption of jurisdiction. I hence desist from referring to the same. In any event, the reasons for re-assessment in both the cases reveal clearly the specific details of the allegedly offending transactions and may be referred to, for clarity in this context. I leave it at that in the interests of brevity and for the reasons as above.

53. The impugned proceedings in the case of petitioner A were originally completed under scrutiny and this constitutes the sheet anchor of his argument. The re-assessment has been initiated just three days shy of the completion of four years, on 28.03.2013. The case of petitioner A would thus have to be tested in the context of whether the impugned proceedings constitute a review, impermissible in law.

54. The reasons disclose the receipt of information that was hitherto unavailable with the Assessing Authority. Though it is the specific case of the petitioner that the materials relied upon were available on record even at the first instance, there is nothing on record either by way of correspondences or any other material from the petitioner to indicate this. The financials of the company have filed before the Court to urge that the share pricing was duly disclosed therein and available with the officer.

55. That apart, the petitioner has also filed a copy of notice dated 26.08.2011 issued to the company and a copy of the financials of the company wherein, in the schedules for the year ended 31.03.2008 there is a disclosure made in regard to the differential pricing of the shares issued to the petitioners, at par, and those issued to South Asia Entertainment Holdings ltd., at a premium. In my view, these materials are of no avail to the petitioner as the

details were not produced in the course of the assessment of the petitioner and thus were unavailable to the officer while finalising these assessments.

56. In order to avail the benefit of the argument that the reassessment constitutes a review, the assessee must be in a position to establish that the documents/details relied upon in the 'reasons recorded' were part of *its own records* and not those of another assessee, even one connected to it. It might have made a difference had the petitioner referred to the details of differential pricing or the company's records in this regard in the course of the assessment, but this has not transpired as the pricing difference does not emanate from the cash flow statements or other details furnished by the petitioner.

57. The position is clear to the effect that the materials referred to in the reasons constitute new and tangible material, unavailable at the first instance to the officer. It is such information, as supplied by the DGIT Investigation, that the officer has considered to arrive at his prima facie belief that income may have escaped assessment to tax.

58. While it is a settled position that a re-assessment does not permit of a review, the critical difference between the one and the other is that while a review is premised upon the same material upon which two officers adopt differing views or even a situation where the same officer has had a change of heart/mind in regard to the view previously taken, a re-assessment has to

survive only based upon new material. The critical test is therefore as to whether the Department had in its possession any material over and above those available in the original records.

59. In this case, the reasons disclose so. The Assessing Authority refers to material received from the DGIT Investigation bringing to his notice information relating to the allegedly offending share allocation and pricing. This constitutes tangible material on the basis of which jurisdiction has been assumed. The Hon'ble Supreme Court in the case of *Commissioner of Income Tax. Delhi V. Kelvinator of India* (320 ITR 561), considered the impact of re-assessment proceedings initiated within four years, and upon noticing that there was no new material that had come to the possession of the Department held that the re-assessment was nothing but a review.

60. At paragraph 6, the Bench states as follows:

> *6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would*

give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove.....

61. The above discussion leaves me in no doubt that the assumption of jurisdiction in this case, is based upon additional material over and above what formed part of the records, that have lead to the belief that income has escaped assessment and not a review of existing materials that found part of the assessment records of the petitioners. This issue is answered in favour of the revenue.

62. One thing remains. The petitioners are right in stating that proceedings for re-assessment will stand vitiated if the reasons are themselves patently erroneous and egregious in law, warranting interference under Article 226 of the Constitution of India. This test calls for a very high degree/threshold

of acceptability of the arguments on merits, in which case, the apparent errors would constitute, by themselves, a jurisdictional error, that goes to the root of the matter to invalidate the jurisdiction assumed.

63. This is not a matter where I would conclude so. The merits of the matter involve interpretation of the statutory provisions cited and careful study of the judicial precedents relied upon. In my view, this is a matter for the assessing authority to decide, after hearing the petitioners, bearing note of the decisions cited.

64. Though I have, in the interests of completion of the narration recorded the submissions of the parties on the merits of the proposed addition, in light of my decision in the context of assumption of jurisdiction, it would be inappropriate to render an observation or finding in regard to the merits in these proceedings and hence, I desist.

65. The impugned orders are upheld and as a consequence, respondents will proceed with the re-assessment on merits. It is made clear that all arguments and defences as available to the petitioners may be advanced, barring that of assumption to jurisdiction. Seeing as the impugned proceedings relate to AY 2008-09 and 2009-10, proceedings shall be completed within a period of sixteen weeks from date of issuance of certified copy of this order, in accordance with law and in line with the provisions of natural justice.

66. These writ petitions and connected Miscellaneous Petitions are dismissed and there is no order as to costs.

09.09.2022

Index: Yes/No
Speaking order/Non-speaking order
Sl/ska

To

1. The Joint Commissioner of Income Tax,
   Non-Corporate Range 10(1),
   No.121, Mahatma Gandhi Road,
   Chennai – 600 034.

2. The Deputy Commissioner of Income Tax,
   Non-Corporate Circle 10(1),
   No.121, Mahatma Gandhi Road,
   Chennai – 600 034.

Dr.ANITA SUMANTH, J.

sl

W.P. Nos.3275, 3276 and 3277 of 2014

09.09.2022