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

WRIT PETITION NO. 3597 OF 2019

Chhagan Chandrakant Bhujbal
5th Floor, Militia Apartment,
Mathar Pakhadi Road, Mazgaon,
Mumbai – 400 010, Maharashtra. ….Petitioner

V/s.

1. Income Tax Officer Ward 20(1)(3),
Room No.114, 1st Floor, Piramal
Chamber, Lalbaug, Parel,
Mumbai – 400 012.

2. Commissioner of Income Tax-20
Mumbai, having office at
Piramal Chamber, Lalbaug, Parel,
Mumbai – 400 012. …Respondents

Mr. K. Gopal a/w Mr. Jitendra Singh and Mr. Om Kandalkar i/b Mr. Satendra Kumar Pandey for Petitioner.
Mr. Sham V. Walve for Respondents.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 8th DECEMBER 2021

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. Since pleadings in the petition are completed, we have decided to dispose the petition at admission stage itself.

2. Petitioner is impugning notice dated 31st March, 2019 issued under Section 148 of the Income Tax Act, 1961 (the Act) stating that respondents have reasons to believe that income chargeable to tax for the

A.Y. 2012-13 has escaped assessment within the meaning of Section 147 of the Act.

3. Thereafter, petitioner was provided reasons for re-opening by communication dated 28th September, 2019. The reasons reads as under :

> *1. The assessee has filed return of income for the A.Y. 2012-13 on 30.03.2013 declaring total income of Rs.3,72,997/-.*
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> *2. In this case credible information received vide letter bearing No.DDIT(Inv)/Unit-6(3)/Information/2018-19 dated 30.03.2019 has been received in this office on 31.03.2019 by email at 05:47 PM, from Dy. Director of Income Tax (Inv.)-6(3), Mumbai wherein it is stated that "the suspect person have defrauded the Maharashtra Government by preparing fabricated/bogus documents and used them as genuine documents. The accused persons especially the public servants by misusing their designation under criminal conspiracy committed acts like to cheat government and to cause financial loss and to gain the developer M/s. K.S. Chamankar Enterprises". It is also mentioned that accused mentioned has in criminal conspiracy misrepresented the facts to the Govt and dishonestly got the plot for the building of State Central Library on BOT basis allocated to M/s.India Bull Real Tech Limited.*
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> *3. In view of the above facts, I have reasons to believe that income to the extent of more than Rs.1,00,000/- chargeable to tax has escaped assessment for A.Y. 2012-13. Accordingly, the proceedings u/s. 147 of the Income Tax Act, 1961 are duly attracted in order to frame proper assessment to bring to tax appropriate income. It is therefore a fit case for issuance of notice u/s.148 of the Income Tax Act, 1961.*
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> *4. In this case more than four years but not more than six years have lapsed from the end of the assessment year under consideration. Thus, the notice u/s. 148 is issued after obtaining prior approval of the Pr. Commissioner of Income Tax, Range-20, Mumbai as required under the provisions of section 151(1) of the Income Tax Act, 1961.*

4. Petitioner replied to this notice with the reasons by a letter dated 10th October, 2019 objecting to the re-opening. The objections filed

by petitioner was disposed by an order dated 17th October, 2019 rejecting the objections. Thereafter, petitioner, by submissions dated 5th November, 2019, complied with notice issued under Section 142(1) of the Act. On 11th December, 2019 petitioner was issued notice to show cause as to why the amount of Rs.3,13,00,000/- being transaction effected on 10th May, 2011 and 1st October, 2011 in a particular bank account between two parties should not be added to the income under Section 69A of the Act being unexplained money. It is at that stage petitioner filed this petition and ad-interim stay was granted by an order dated 19th December, 2019.

5. We have heard Mr. Gopal, counsel for petitioner and Mr. Walve, counsel for respondents.

6. Mr. Gopal submitted that the notice dated 31st March, 2019 issued under Section 148 of the Act has not been validly issued and is without jurisdiction. Mr. Gopal submitted that (a) the reasons does not indicate what was the amount of income which has escaped assessment; and (b) the information based on which this notice itself has been issued was received only at 5.47 p.m., by respondent and the notice was issued at about 10.49 p.m., and therefore how could the authority which has granted the sanction by issuance of notice could be said to have applied his mind to the proposal put up before him for approval.

Mr. Gopal relied on judgment of this court in ***German Remedies***

Ltd. vs. Deputy Commissioner of Income-Tax[1] to submit that to grant or not to grant approval under Section 151 of the Act to re-open an assessment is coupled with a duty and the commissioner was duty bound to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. Mr. Gopal submitted that such power cannot be exercised casually, in a routine and perfunctory manner.

Mr. Gopal relying on another judgment of this court in *Principal Commissioner of Income-tax 5 vs. Shodiman Investments (P) Ltd.*[2] submitted that notice has to be set aside because the reasons recorded even does not indicate the amount which according to the Assessment Officer has escaped assessment.

7. Mr. Walve submitted that petitioner never had any problem when he received notice dated 31st March, 2019 or when he received the reasons for re-opening or when the objections filed were rejected by the order dated 17th October, 2019.

Mr. Walve submitted that even if the objections were rejected, petitioner participated in the assessment proceedings and made submissions and filed documents vide letter dated 5th November, 2019 in compliance with notice issued under Section 148(1) of the Act. But petitioner suddenly woke up and decided to challenge the notice issued under Section 148 of the Act itself when petitioner received Show Cause Notice dated 11th

1 [2006] 287 ITR 494 (Bom)
2 [2018] 93 taxmann.com 153 (Bombay)

December, 2019 as to why the amount of Rs.3,13,00,000/- should not be added to the income under Section 69A of the Act. Having participated in the assessment proceedings, petitioner at this stage cannot challenge the notice. He relied upon a judgment of this court in ***Amaya Infrastructure (P.) Ltd. vs. Income Tax Officer Ward 12(1)(1)***[3].

Mr. Walve submitted that therefore the court should not exercise its jurisdiction under Article 226 of the Constitution of India and dismiss the petition and direct petitioner to participate in the assessment proceedings and if petitioner is aggrieved by the assessment order, petitioner may challenge that order as per the alternative remedy prescribed under the Act.

8. Mr. Gopal in rejoinder submitted that petitioner decided to file this petition when petitioner got to know the reasons after receiving further notice under Section 142(1) of the Act on 11th December, 2019.

9. This is a notice that has been issued after expiry of four years from the end of the relevant assessment year. There has been no scrutiny assessment done under Section 143(3) of the Act and the assessment has been processed under Section 143(1) of the Act. Therefore, proviso to Section 147 of the Act would not apply. In such a case governing test has been formulated in the judgment of the Hon'ble Supreme Court in

3 [2017] 79 taxmann.com 345 (Bombay)

Commissioner of Income Tax vs. Kelvinator of India Ltd.[4] and the Hon'ble Apex Court has enunciated the principle as follows:

> *"Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" falling which, we are afraid, s. 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment 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 reopening 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, the Assessing Officer has power to reopen, 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 s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer".* (emphasis supplied).

In ***Export Credit Guarantee Corporation of India Ltd. vs. Additional Commissioner of Income Tax and Ors.***[5] the court held

> *The Assessing Officer even within a period of four years cannot reopen an assessment merely on the basis of a change of opinion. The Assessing Officer has no power to review an assessment which has been concluded. But where he has tangible material to come to the conclusion that there is an escapement of income from assessment, the power to reopen can be exercised. The expression "reason to believe" in Section 147 has been*

4 [2010] 320 ITR 561 (SC)
5 [2013] 350 ITR 651 (Bom)

construed in the judgment of the Supreme Court in Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC), to mean a cause or justification. However, at the stage when the Assessing Officer reopens an assessment, it is not necessary that the material before the Court should conclusively prove or establish that income has escaped assessment. A reason to believe at the stage of reopening is all that is relevant. This aspect must be emphasized because it clearly emerges from the judgment of Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC).

"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 ... At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not 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 Officer is within the realm of subjective satisfaction."

8. To hold that the Assessing Officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible. When an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to

> *law. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction.*
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> (emphasis supplied)

10. Therefore, the test to be applied is whether there was reason to believe that income had escaped assessment and whether the Assessing Officer has tangible material before him for the formation of that belief. Once tangible basis has been disclosed for re-opening the assessment, it would not be appropriate for this court to prevent an enquiry whatsoever by the Assessing Officer. In this case, the reasons indeed disclose what is that tangible material.

11. As regards the judgment of this court in ***German Remedies Ltd.*** (supra), relied upon by Mr. Gopal, we certainly agree with Mr. Gopal that the power vested in the commissioner under Section 151 of the Act to grant or not to grant approval to the Assessing Officer to re-open an assessment is coupled with duty and the commissioner is duty bound to apply his mind to the proposal put up to him for the approval in the light of the material relied upon by the Assessing Officer and such power cannot be exercised casually, in a routine and perfunctory manner. The court held in the facts and circumstances of that case that the approval in that case granted suffers from non-application of mind. It was in the peculiar facts and circumstances of that case. In the case at hand, there is nothing to indicate that there was

non-application of mind. Merely because information was received at 5.47 p.m. and the notice was issued by 10.49 p.m. would not mean that there has been non-application of mind. If we hold that it would be merely speculative and based on conjecture.

12. As regards ***Shodiman Investments (P) Ltd.*** (supra) relied upon by Mr. Gopal, again in the particular facts and circumstances of that case, the court concluded that the reasons do not indicate any link or nexus to connect that income chargeable to tax has escaped assessment. Moreover, in ***Shodiman Investments (P) Ltd.*** (supra) the facts were different and that was the case where assessment order had been passed under Section 143 (3) of the Act and the allegations was failure to disclose truly and fully all material facts by assessee.

13. On the submissions of Mr. Walve that petitioner having participated in the assessment proceedings, at this stage cannot challenge the notice. We would agree with Mr. Walve. In ***Amaya Infrastructure (P.) Ltd.*** (supra) petitioner had participated in the assessment proceedings and the court held that in such a case it would not be open for petitioner to now contend that this court should exercise its extra ordinary jurisdiction and prohibit the authorities in proceeding further with the impugned notice. Paragraph no.9 of the said judgment reads as under :

> *9. In this case, we find that the petitioners have filed detailed information called for by the Assessing Officer under Section*

> *142(1) and 143(2) of the Act and thus participated in the assessment proceedings. This having been done, it is not open for the petitioners to now contend that this Court should exercise its extra-ordinary jurisdiction and prohibit the Authorities from proceeding further with the impugned notice. This is particularly so as the question of jurisdiction has been raised by the petitioners before the Assessing Officer during the assessment proceedings under the Act. In the present facts, the petitioners have participated in the proceedings before the Assessing Officer. The objections to the reasons recorded by the Assessing Officer in support of the impugned notice during the assessment proceedings is to point out to him the reassessment proceedings are bad as the requirement of Sections 147 and 148 of the Act are not satisfied. It would be completely different scenario where the petitioners have not participated in the proceedings before the Assessing Officer and object to exercise of jurisdiction by the Assessing Officer at the very threshold and not while participating in the reassessment proceedings. In such cases, it is not a case of a party seeking identical relief by two parallel modes. The orders passed by the Assessing Officer are subject to effective, efficacious alternative remedy under the Act. Therefore, we see no reason to exercise our extra-ordinary jurisdiction in the facts of this case.*

14. In the circumstances, we do not see any reason to exercise our extra-ordinary jurisdiction under Article 226 of the Constitution of India and prohibit the authority from proceeding further in the matter.

15. Petition dismissed with no order as to costs.

(AMIT B. BORKAR, J.) (K.R. SHRIRAM, J.)