IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 4793 OF 2021

Arvind Sahdeo Gupta,
aged about 34 years,
Residing at Plot No. J-4, MIDC Phase III,
Akola – 444105, Maharashtra, India,
Occ. Business.

PETITIONER

.....VERSUS.....

1. Income Tax Officer, Ward – 1,
Akola, Aayakar Bhawan, Gorakshan Road,
Akola, Maharashtra – 444001,
Email : akola.ito1.1@incometax.gov.in.

2. Additional/ Joint/ Deputy/ Assistant Commissioner of Income Tax/
Income-tax Officer, National Faceless Assessment Centre,
Delhi, Email : delhi.dcit2.1.neac@incometax.gov.in.

3. Pr. Commissioner of Income Tax – 1,
Aayakar Bhawan, Civil Lines, Nagpur.

4. The Union of India,
through its Secretary, Department of Revenue,
Ministry of Finance, Government of India,
New Delhi – 110002.

5. Central Board of Direct Taxes,
through its Chairman, Ministry of Finance,
North Block, New Delhi – 110002.

RESPONDENTS

Shri Kapil Hirani, Advocate for the petitioner.
Shri Anand Parchure, Advocate for the respondents.

CORAM : A. S. CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

ARGUMENTS WERE HEARD ON : JUNE 27, 2023

JUDGMENT IS PRONOUNCED ON : AUGUST 8, 2023

JUDGMENT :(PER : A.S. CHANDURKAR, J.)

Rule. Rule made returnable forthwith and heard the learned Counsel for the parties.

2] The challenge raised in this Writ Petition is to the notice dated 24/3/2020 that has been issued by the Income Tax Officer Ward – 1, Akola under Section 148 of the Income Tax Act, 1961 (for short "Act of 1961"). A further consequential prayer seeks quashing of the assessment that has been completed by virtue of order dated 29/9/2021.

3] The challenge raised to the notice issued under Section 148 of the Act of 1961 is principally on the grounds that the said notice has been issued on incorrect facts, no reasons have been given while deciding the objections raised by the petitioner to the re-opening of the proceedings and the same have been decided without passing any speaking order. In addition, it is urged that the re-opening of the proceedings is without there being any independent application of mind and no reasons to believe have been indicated by the Income Tax Officer (for short "ITO") in that regard.

4] The facts relevant for considering the challenge are that on 24/3/2020, the ITO issued notice under Section 148 of the Act of 1961 stating therein that he had reasons to believe that the income chargeable to tax for the Assessment Year 2013-14 had escaped assessment within the meaning of Section 147 of the Act of 1961. The petitioner was

accordingly called upon to deliver a return in the prescribed form for the said Assessment Year within a period of thirty days from service of the notice. The reasons for re-opening of the proceedings under Section 147 of the Act of 1961 as indicated were that from the information received and enquiry as made, it was clear that the assessee – petitioner had made investment in the purchase of shares and had earned profit from the sale of shares. The petitioner however had not offered for taxation the amount of income earned on the sale of shares of Rs.9,90,314/-. Thus, the petitioner had failed to disclose his true and correct total income while filing the return of income for the said year. As period of more than four years had lapsed from the end of the Assessment Year, sanction to issue notice under Section 148 of the Act of 1961 had been obtained from the Principal Commissioner of Income Tax under Section 151 of the Act of 1961. On 23/2/2021, notice under Section 142(1) of the Act of 1961 came to be issued calling upon the petitioner to furnish the details of the bank account and documents as referred to in the Annexure therein. The bank account statement of the petitioner's account maintained with the HDFC Bank for the period from 1/4/2012 to 31/3/2013 was sought by the ITO. Thereafter, on 24/5/2021, similar notice under Section 142(1) of the Act of 1961 was issued seeking information with regard to each debit and credit entry exceeding Rs.50,000/- in the bank account of the petitioner maintained with the HDFC Bank. The petitioner responded to

the said notices and supplied the documents demanded. On 24/8/2021, further notice under Section 142(1) of the Act of 1961 was issued in which it was stated that after perusing the bank statement, it was noticed that an amount of Rs.10,00,000/- was credited in the petitioner's account and on the next day, an amount of Rs.9,90,314/- was debited towards AA+ Commodities. The justification for the same was sought. The petitioner responded to the said query by stating that the amount of Rs.10,00,000/- had been received from Mayur Agro Trade Private Limited and he had not purchased any shares from the said Company. On 10/9/2021, yet another notice under Section 143(2) read with Section 147 of the Act of 1961 was issued to the petitioner and the reasons for re-opening the case were indicated that amount of Rs.9,90,314/- being the amount of income earned on the sale of shares had not been offered for taxation. On 13/9/2021, the petitioner responded to the said notice stating therein that the amount of Rs.9,90,314/- had not been credited in the petitioner's bank account but it was the amount of loss suffered by the petitioner in commodity trading that had been duly shown in the accounts for the Assessment Year 2012-13. On 17/9/2021, the objections raised by the petitioner on 13/9/2021 came to be disposed of by holding the said objections to be not acceptable/tenable. It is thereafter that the assessment order dated 29/9/2021 came to be passed and the income of the petitioner was assessed at Rs.1,55,30,950/-.

5] Shri Kapil Hirani, learned Counsel for the petitioner in support of the challenge to the notice issued under Section 148 of the Act of 1961 submitted that :

a] the re-opening of the assessment was based on incorrect facts and therefore the aforesaid notice was not sustainable. According to him, the reason for re-opening of the proceedings as indicated on 24/3/2020 was that according to the ITO, the petitioner had earned profit from the sale of shares. It was submitted that the petitioner had suffered loss of Rs.9,90,314/- and that amount had been debited in the petitioner's profit and loss account. Same was also included in the petitioner's return by showing it as a loss. The ITO on the incorrect fact that the said amount was towards profit from the sale of shares proceeded to seek re-opening of the proceedings. Referring to the decision in *Tata Sons Limited Vs. Dy. Commissioner of Income Tax and Others [Writ Petition No. 2545/2010* decided on *3/2/2022]* at the Principal Seat it was submitted that since the re-opening of the assessment was based on incorrect facts, the notice for re-opening was unsustainable. Reliance in that regard was also placed on the decisions in *Punia Capital Pvt. Ltd. Vs. The Assistant Commissioner of Income Tax & Ors. [Writ Petition No. 1091/2022* decided on *15/2/2023]* and *Ankita A. Choksey Vs. Income Tax Officer – 19 (1)(1) & Ors. [(2019) 411 ITR 207],* both delivered at the Principal Seat.

b] the objection raised to the notice was decided in a manner contrary to the law as laid down in *GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. [(2003) 1 SCC 72].* By the said decision, the Hon'ble Supreme Court has laid down that when objections are raised to the issuance of notice under Section 148 of the Act of 1961, the Assessing Officer is bound to furnish reasons for issuing the notice. On receiving such reasons, the noticee is entitled to file objections to the issuance of notice and the Assessing Officer is duty bound to dispose of the same by passing a speaking order. Since the Assessing Officer disposed of the objections raised by the petitioner without passing any speaking order, the same was contrary to the said directions. In addition to aforesaid, it was submitted that no reasons whatsoever were indicated by the ITO while disposing of the objections. The transaction in question pertained to the Assessment Year 2012-13 and not the Assessment Year 2013-14. This aspect went to the root of the matter but there was no consideration of the same.

c] notice under Section 148 of the Act of 1961 could be issued when there were reasons to believe that certain income had escaped assessment. In this regard, it was necessary for the ITO to independently apply his mind and thereafter consider as to whether the information on the basis of which the re-opening was proposed constituted material to believe the same. The ITO proceeded mechanically to re-open the

proceedings without there being any independent application of mind. Reference in that regard was made to the decisions in i) *The Pr. Commissioner of Income Tax – 5 Vs. M/s. Shodiman Investments Pvt. Ltd. [(2020) 422 ITR 337];* ii) *Akshar Builders and Developers Vs. Asstt. Commissioner of Income Tax – 28(1) Mumbai & Anr. [(2019) 411 ITR 602];* and iii) *Nivi Trading Limited Vs. Union of India & Anr. [(2015) 375 ITR 308].*

On this basis, it was urged that the notice issued under Section 148 of the Act of 1961 on 24/3/2020 was liable to be set aside. Though the assessment had been completed by passing order dated 29/9/2021 and the petitioner had filed an appeal by way of abundant precaution, the challenge in the present proceedings was restricted to the legality of the notice issued under Section 148 of the Act of 1961.

6] Shri Anand Parchure, learned Counsel for the respondents at the outset raised an objection to the tenability of the Writ Petition on the ground that the assessment having been completed, all grounds of challenge including the challenge to the notice dated 24/3/2020 could be raised in a statutory appeal preferred by the petitioner. Referring to the decisions in i) *Anshul Jain Vs. Principal Commissioner of Income-tax [(2022) 449 ITR 256];* ii) *Commissioner of Income Tax & Ors. Vs. Chhabil Dass Agarwal [(2014) 1 SCC 603];* iii) *Gian Castings (P.) Ltd. Vs.*

Central Board of Direct Taxes [(2022) 140 taxmann.com 319]; and iv) *The State of Maharashtra & Ors. Vs. Greatship (India) Limited [Civil Appeal No. 4956/2022* decided on *20/9/2022]* it was submitted that the Writ Petition did not deserve to be entertained. Without prejudice to the aforesaid, it was submitted that the re-opening of the proceedings was legal and valid since the Assessing Officer had strong reasons to believe that the amount of Rs.9,90,314/- had escaped assessment. The objections to the re-opening had been decided after due application of mind and no fault with that adjudication could be found. Since there was no jurisdictional error, interference with the re-opening of the assessment was not warranted on the grounds urged by the petitioner. The validity of the assessment order could be determined on these very grounds in the appeal preferred by the petitioner. The Writ Petition was therefore liable to be dismissed.

7] In reply to the objection raised to the tenability of the Writ Petition, it was submitted by the learned Counsel for the petitioner that availability of an alternate remedy was not a bar to entertain the Writ Petition preferred under Article 226 of the Constitution of India. Referring to the decision in *M/s Godrej Sara Lee Ltd. Vs. The Excise and Taxation Officer-cum-Assessing Authority & Ors. [Civil Appeal No. 5393/2010* decided on *1/2/2023]* it was submitted that since re-opening of the proceedings was sought on incorrect and non-existent facts, the

challenge to the notice under Section 148 of the Act of 1961 ought to be entertained on merits. Reference was also made to the decision in *M/s Magadh Sugar & Energy Ltd. Vs. The State of Bihar & Ors. [Civil Appeal No. 5728/2021* decided on *24/9/2021]* to highlight the settled law in that regard.

8] We have heard the learned Counsel for the parties at length and with their assistance, we have perused the documents on record. We have also given due consideration to the rival submissions. At the outset, it would be necessary to consider the objection raised by the respondents to the maintainability of the Writ Petition on the ground that the order of assessment having been passed, it could be challenged on all grounds including the invalidity of the notice issued under Section 148 of the Act of 1961 by availing the statutory remedy. The difference between entertainability and maintainability of a proceeding has been succinctly explained by the Hon'ble Supreme Court in *M/s Godrej Sara Lee Ltd. (supra).* While the objection to "maintainability" goes to the root of the matter and if such objection is found to be of substance, the Court would be rendered incapable of receiving the lis for adjudication. On the other hand, the question of "maintainability" is within the realm of discretion of the High Court since writ remedy is discretionary in nature. It has been further observed that dismissal of Writ Petition on the ground that the petitioner has not availed the alternate remedy without examining as to

whether an exceptional case has been made out for such entertainment would not be proper. After referring to various earlier decisions, the exceptions on the basis of which a writ Court would be justified in entertaining a Writ Petition notwithstanding the availability of an alternate remedy were indicated which includes the aspect where the proceedings are without jurisdiction or the order in that regard is without jurisdiction. If a jurisdictional issue is raised and the controversy is purely a legal one that does not involve any disputed question of fact, then the Writ Petition does not deserve to be thrown out at the threshold. The decision in *M/s Magadh Sugar & Energy Ltd. (supra)* has laid down the said principles in its decision dated 24/9/2021.

In *Chhabil Das Agarwal (supra)* challenge to the order of assessment was entertained by the High Court. In that context the Hon'ble Supreme Court held that when an equally efficacious alternate remedy was available to the petitioner, the High Court ought not to have entertained the Writ Petition. In the present case, challenge is to the notice issued under Section 148 of the Act of 1961 against which no statutory remedy for challenging the same is available.

9] We may indicate that the challenge raised in the Writ Petition is to the notice issued under Section 148 of the Act of 1961 dated 24/3/2020 as well as the consequential order of assessment that has been

completed vide order dated 29/9/2021. The learned Counsel for the petitioner has restricted his challenge only to the legality of the said notice dated 24/3/2020 and has urged that there is no alternate remedy available for challenging the same. He submitted that the order of assessment is not intended to be challenged in the present proceedings and by way of abundant precaution, a statutory appeal has been filed. If the challenge to the notice dated 24/3/2020 is not found to be acceptable, the petitioner would then pursue the appeal that has been preferred for challenging the order of assessment.

10] Considering the grounds of challenge that have been put forth by the petitioner namely that the re-opening of the assessment is based on incorrect facts rendering the notice to be unsustainable, the objections raised to the notice being decided in a manner contrary to the decision in *GKN Driveshafts (India) Ltd. (supra)* coupled with other ancillary challenges, it is found that such challenge can be examined since the same go to the root of the matter. The legal position as regards the effect of such challenge is settled by various decisions of the Hon'ble Supreme Court and this Court. On the limited touchstone based on the decisions referred to hereinabove, we are inclined to consider such challenge subject to an exceptional case being made out. The order of assessment is not being examined in the present proceedings. The conditions specified in Section 147 of the Act of 1961 have been held to

be jurisdictional in nature in *Cedric De Souza Faria Vs. Deputy Commissioner of Income Tax [(2018) 400 ITR 30].* The distinction between a jurisdictional error and error of law/fact within jurisdiction has been referred to by the Hon'ble Supreme Court in *Anshul Jain (supra).* The decision in *Chhabil Dass Agarwal (supra)* has been considered by the Division Bench in *Ajay Ajit Tanna Vs. Union of India & Ors. [Writ Petition No. 5098/2022* decided on *8/3/2023]* and by referring to the exception to rule of alternate remedy, it has been held that if the Statutory Authority has not acted in accordance with the provisions of the enactment in question, extraordinary jurisdiction could be exercised. In the said decision, failure on the part of the Assessing Officer to comply with the directions of the Hon'ble Supreme Court was one of the reasons for entertaining challenge to the notice issued under Section 148 of the Act of 1961 in writ jurisdiction. In *Greatship (India) Limited (supra),* the Hon'ble Supreme Court held that challenge to an assessment order could not have been entertained in exercise of writ jurisdiction. Ratio of this decision therefore would not apply to the facts of the present case.

11] Coming to the challenge as raised to the notice issued under Section 148 of the Act of 1961, it is seen that pursuant to the notice dated 24/3/2020, reasons for re-opening the case under Section 147 of the Act of 1961 were furnished by the Assessing Officer. According to the Assessing Officer, the petitioner had made investment in the purchase of

shares and had earned profit from the sale of shares. An amount of Rs.9,90,314/- was stated to be credited to the bank account of the petitioner but he had not offered the said amount during the Financial Year 2012-13 pertaining to the Assessment Year 2013-14 for taxation. In this regard, when the objection raised by the petitioner is considered, it is seen that the said amount is towards loss suffered by the petitioner in commodity trading pertaining to the Financial Year 2011-12, Assessment Year 2012-13. The said amount was stated to be paid to M/s AA+ Commodities on 31/3/2012. It thus becomes clear that the said amount relates to the Assessment Year 2012-13 and not the Assessment Year 2013-14 as indicated in the notice. Further amount of Rs.9,90,314/- has been shown as amount of loss sustained by the petitioner which was debited in his account and not credited as mentioned in the notice. The said amount was also included in the return filed by the petitioner.

12] The effect of re-opening the assessment based on wrong facts or conclusions has been considered in *Tata Sons Limited (supra).* It has been held that if the reasons for re-opening the assessment are based on incorrect facts or conclusions, the notice issued for re-opening cannot be sustained. A similar view has been taken in *Punia Capital Pvt. Ltd. (supra)* as well as in *Ankita A. Choksey (supra).* In paragraph 6 thereof, it has been observed that the reasons to believe that income chargeable to tax has escaped must be based on correct facts and if the facts as recorded

in the reasons are not correct and the assessee points out the same in his objections then the order on objections must deal with the same and *prima facie* establish that the facts stated in its reasons as recorded are correct. If the Assessing Officer has proceeded on fundamentally wrong facts to form reasonable belief that income chargeable to tax has escaped assessment and the Assessing Officer while disposing of the objections does not deal with the factual position asserted by the petitioner, it would be safe to conclude that the Revenue does not dispute the facts stated by the petitioner. On such facts, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment.

13] In the aforesaid context, if the order deciding the objections is perused, the same does not state that the facts mentioned by the petitioner were incorrect. In fact, no reasons whatsoever have been assigned and it is reiterated that the petitioner failed to declare any profit/ loss in the income tax return and hence the amount of Rs.9,90,314/- was treated as profit on the sale of shares. As stated above, despite specific objection that the said amount had been debited in the bank account of the petitioner and it pertained to the losses sustained in commodity trading having been shown in the accounts for the Financial Year 2011-12, Assessment Year 2012-13, it becomes clear that the objections have been decided without due application of mind. As held by the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd. (supra),* the

objections as raised have to be disposed of by a speaking order that could indicate due application of mind. As stated above, there are no reasons whatsoever assigned for turning down the objections and the facts stated in the notice dated 24/3/2020 are reiterated. It is seen that alongwith the objections dated 13/9/2021 copy of the account statement for the Financial Year 2011-12 was also attached. Same has not even been referred to while disposing of the objections on 17/9/2021. In *M/s. Shodiman Investments Pvt. Ltd. (supra),* it is held that application of mind has to be indicated while forming reasons to believe that income chargeable to tax has escaped assessment.

14] It is also to be noted that by issuing subsequent notice, the ITO has sought further information from the petitioner which information does not form the basis of the reasons assigned for re-opening the proceedings. This is clear from the notice dated 24/8/2021. The Division Bench in *Nivi Trading Limited (supra)* has held that if further details are sought or some verification is proposed by the officer, same cannot be a substitute for the reasons that have led the Assessing Officer to believe that an income chargeable to tax has escaped assessment.

15] From the aforesaid, it is clear that the notice dated 24/3/2020 issued under Section 148 of the Act of 1961 seeking re-opening of the assessment is based on incorrect facts. The objections

raised by the petitioner pointing out the relevant facts including the proper Assessment Year to which the said transaction pertained being Assessment Year 2012-13 coupled with the fact that the amount of Rs.9,90,314/- that was stated to be the amount being profit from the sale of shares having been explained to be the amount of loss, the objections having been decided without any speaking order and not dealing with the undisputed factual aspects leads to the conclusion that the re-opening of the assessment is without there being any reason to believe that the income has escaped assessment. In these facts, the notice dated 24/3/2020 suffers from fundamental factual errors. An exceptional case thus having been made out to interfere in exercise of writ jurisdiction, the impugned notice dated 24/3/2020 issued under Section 148 of the Act of 1961 is quashed and set-aside. Consequentially, further steps taken by the respondents based on said notice would no longer survive.

16] Rule is made absolute in the aforesaid terms with no order as to costs.

(MRS. VRUSHALI V. JOSHI, J.) (A.S. CHANDURKAR, J.)

Sumit