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

WRIT PETITION NO.2350 OF 2022

Ashraf Chitalwala,
aged 63 years, residing at 35A
Meher Apts. Anstey Road, Off
Altamount Road, Mumbai 400 026.
PAN: AABPC3984E ...Petitioner

Versus

1. Deputy Commissioner of Income Tax-3(3)(1), Mumbai, Room No.609, Aaykar Bhavan, M.K.Road, Mumbai 400020.

2. The Joint Commissioner of Income Tax-Range 3(3), Aaykar Bhavan, M.K.Road, Mumbai 400029.

3. The Union of India Through the Secretary, Ministry of Finance, Government of India, North Block, New Delhi-110001.

4. National Faceless Assessment Centre, 2nd Floor, E-Ramp, Jawaharlal Nehru Stadium, Delhi-110003. ...Respondents

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Mr. Dharan Gandhi with Ms. Aanchal Vyas, for the Petitioner.
Ms. Swapna Gokhale for the Respondent-Revenue.

CORAM K. R. SHRIRAM &
DR. N. K. GOKHALE, JJ.
DATED: 5th September, 2023

JUDGMENT:- (Per Dr. N. K. Gokhale, J.)

1. **Rule**. Rule is made returnable forthwith. Heard parties by consent.

2. The Petitioner has assailed notice dated 26th March 2021 issued by the Deputy Commissioner of Income Tax under section 148 of The Income Tax Act 1961 (**"the Act"**) seeking to reopen the assessment for the assessment year 2015-16, order dated 24th March 2022 disposing the objections of the Petitioner and the assessment order dated 24th March 2022 under Section 147 of the Act read with Section 143(3) read with Section 144(B) of the Act. Petitioner also seeks an order restraining the Respondents from taking any action pursuant to the assailed orders.

3. The facts of the case in brief are as follows:

The Assessment Year ('**AY**') under consideration is 2015-16. The Petitioner an individual resident of India filed his original return of income on 27th September 2015 and later a revised return on 7th December 2015. A notice dated 1st February 2017 issued under Section 143(2) of the Act initiated a scrutiny assessment. A specific query was raised regarding details of sale and purchase transactions of immovable property in the Assessment Year under consideration. By reply dated 13th February 2017 and 22nd February 2017, the Petitioner furnished all required details. Assessment order dated 25th May 2017 was passed after considering the submissions of the Petitioner.

4. A notice dated 26th March 2021 under section 148 of the Act was issued to reopen the AY 2015-16 assessment. Another Notice under Section 142(1) of the Act was also issued requiring the Petitioner to file return of income in response to notice under Section 148 of the Act. The Petitioner filed the return of his income by replies dated 31st July 2021 and 2nd August 2021. The Petitioner sought the reasons recorded by the AO to issue notice under Section 148 of the Act but it is the case of the Petitioner that a copy of the recorded reasons has not been furnished to him till date. Once again by notice of 12th December 2021 followed by a reminder dated 24th January 2022, the Petitioner was specifically asked to explain the claim of deduction under Section 54(F) of the Act. The Petitioner brought to the attention of the AO that he had already furnished the details but resubmitted the details required and once again placed on record that the reasons recorded have not been communicated to him despite innumerable requests. The Petitioner was required to show cause as to why the claim of deduction under Section 54(F) of the Act should not be disallowed by a notice in the form of a Draft assessment order of 16th March 2022.

5. Despite detailed submissions given by the Petitioner, the impugned order dated 24th March 2022 was passed by the

Respondent No.4 disposing his objections in the proposed Assessment. The assessment order dated 24th March 2022 as well as notice for levy of penalty dated 24th March 2022 were also issued. All these are impugned in this Petition.

6. Mr. Gandhi learned Counsel appearing for the Petitioner assails the orders mainly on four grounds:-

i. There is no failure on the part of the Petitioner to disclose truly and fully material facts;

ii. The re-assessment is purely on the basis of change of opinion;

iii. There is no new tangible material; and

iv. Even on merits, there is no income that has escaped assessment.

7. At the very outset, Mr. Gandhi places reliance on the decision of the Supreme Court in the matter of ***GKN Driveshafts (India) Ltd. v D.C.I.T.***[1] to canvas his case that the reasons recorded are to be conveyed to the assessee, on the basis of which he gets an opportunity to file his objections. He reiterates the chronology of events to indicate the lapse of the AO in complying with the mandate of law.

1 (2003 259 ITR 19 (SC).

Sr.no	Event	Date
1.	Notice under section 148 was issued.	26.03.2021
2.	Petitioner filed return of his income.	31.07.2021
3.	Acknowledgment of return of income.	16.08.2021
4.	Petitioner sought reasons recorded by AO.	02.08.2021
5.	Notices under 142(1) received without providing recorded reasons.	28.12.2021 24.01.2022
6.	Petitioner filed a reply.	24.01.2022
7.	Notice under 143(2) issued as well as a show cause notice.	16.03.2022
8.	Petitioner objected to the notice issued for want of providing recorded reasons	
9.	Order disposing objections	24.03.2022
10.	Assessment Order was passed	27.03.2022

Thus, the Petitioner argues that having complied with the notice under Section 148 of the Act, it was imperative on the AO to provide reasons and the Respondents are in gross violation of law as laid down by the Apex Court.

8. It is also argued on behalf of the Petitioner that the impugned notice dated 26th March 2021 under Section 148 of the Act was issued after the expiry of four years from the end of the relevant assessment year and resultantly the first proviso to Section 147 of the Act shall apply. Mr. Gandhi submits that there was no failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment year under consideration. The

reopening of assessment is simply on the basis of verified facts on record and there is no allegation of any failure of the Petitioner.

9. Thirdly, Mr. Gandhi also brings to our notice the Petitioner's reply to the notice which contains substantive information including a detailed computation of capital gains, deductions claimed under Sections 54 and 54(F) of the Act, details regarding ownership of various properties of the Petitioner and details of transfer. Considering this, there can be no allegation of failure to disclose facts by the Petitioner. Reliance has been placed on the decision of the Apex Court in the matter of ***Gemini Leather Stores v. ITO***[2] to buttress the contention that failure of the assessing officer to make an enquiry does not indicate any failure/omission to disclose facts by the Petitioner if any income chargeable to tax has escaped assessment. Mr. Gandhi further says that since the Petitioner had furnished all the required details and answered specific queries as held in ***Aroni Commercials Ltd. v Deputy Commissioner of Income Tax 2(1), Mumbai & Anr.,***[3] the AO had clearly applied his mind while computing the capital gains and deductions under Sections 54 and 54(F) of the Act after forming a view. Hence, this is a clear case of change of opinion which is impermissible in law. He further

2 ITO (1975) 100 ITR 1 (SC).

3 2014 (44) taxmann.com 304 (Bombay).

reiterates that there is no new tangible material on the basis of which the assessment can be reopened.

10. Ms Gokhale, learned Counsel appearing for the Revenue contests the Petitioner's arguments on the grounds that, *firstly,* the request of the Petitioner was made through Income Tax Business Application ("**ITBA**") order sheet noting which went unnoticed by the AO by oversight;

Secondly, the Petitioner has never raised the issue of non-receipt of reasons and has placed reliance on the decision of the Apex Court in the matter of ***Union of India v Major General Madan Lal Yadav***[4] to say that no man can take advantage of his own wrong; *thirdly,* there is no change of opinion as the assessee had only filed primary details and so long as conditions of Section 147 of the Act are fulfilled, the AO is free to initiate proceedings. She also places reliance on the judgment in ***CIT v Kelvinator of India Ltd***[5].

Thirdly, Ms. Gokhale states that the Petitioner has not made a full and true disclosure. Hence, the AO is well within his rights to reopen the subject assessment;

Fourthly, that the reassessment is reopened as per the relevant

4 (1996) 4 SCC 127.
5 (2010) 320 ITR 561 (SC).

provisions of the Act after taking due approval from the Additional Commissioner of Income Tax. The original time-barring date for issue of notice under Section 148 of the Act for AY 2015-16 being 31st March 2020 stood extended by various Notifications of the Central Board of Direct Taxes ("**CBDT**") and hence the sanction has been accorded by the Competent Authority.

11. We have heard both the parties and perused the documents on record. Section 147 of the Act authorizes the reopening of any assessment of a previous year.[6] Section 148 contains conditions for reopening assessments, including the limitation period within which notices can be issued.[7] Alluding straight away to the decision of the Supreme Court in the *GKN DriveShafts* (supra) which clarifies that when a notice under Section 148 of the 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 the notice. The AO is bound to furnish reasons within a reasonable time. On the receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO

6. "147. Income escaping assessment.-If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):"

7. "148. Issue of notice where income has escaped assessment.—(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:"

is bound to dispose of the same by passing a speaking order.

12. In the instant case perusal of letters dated 13th February 2017 and 22nd February 2017, (Exhibits 'B-2' and 'B-3' at page 61/63) clearly show that the Petitioner has furnished substantive information and answered the specific queries raised by the AO in his letter dated 1st February 2017 including detailed information of his properties and the transactions of sale and purchase. Paragraphs 5 and 6 of letter at Exhibit B-3 read as thus:

> *"5. Assessee, his three brothers and a sister jointly owned two properties – known as 'Chitalwala Building' and 'Rehmat Manzil'. Both these properties were bought by Saifee Burhani Upliftment Trust (SBUT). Working of LTG on sale of these properties is attached as Annexure D of our submission dated 13.02.17. Deed of Conveyance of these two properties are enclosed herewith, marked Annexure F and Annexure G respectively. Assessee and his brothers and sister had inherited these properties on death of their parents. Both properties were originally bought before 01-04-1981. As such valuation as on 01-04-1981 is taken as cost. Valuation Report given by Patwardhan & Associates – Govt Registered Valuers, in respect of both properties is also enclosed herewith, marked Annexure H.*
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> *6. Apart from the above two properties (mentioned in para 5), assessee's mother had tenancy right of the third floor in Chitalwala Building. On her demise, rights in tenancy devolved upon her sons and daughter. This tenancy right was surrendered to SBUT for a consideration of Rs.10,35,00,000. Deed of Surrender is enclosed herewith marked Annexure I. There being no cost, entire sale consideration is taxable as LTG. Assessee's share in this is included in his total income. Detailed working of assessee's share and LTG are given in Computation Income Returned already placed on record.*
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> *Assessee has claimed deduction / exemption u/s 54EC and 54F as per relevant investment proofs enclosed herewith, marked Annexure C and Annexure D."*

13. Based on the information and replies to the specific queries as provided by the Petitioner, the AO passed the assessment order on 25th May 2017. Clause 4 of the assessment order *inter alia* considers income from 'house property'. The assessment order is clearly passed on the basis of information furnished by the Petitioner including relating to his immovable property. Yet, the AO has issued a notice under Section 148 of the Act on 26th March 2021 clearly after a period of four years. That being so, the first proviso of Section 147 of the Act is clearly applicable.[8] The test, therefore, is whether the assessee has disclosed fully and truly all material facts necessary for his assessment for that AY. The contents of the aforementioned letters are sufficient to hold that the Petitioner has disclosed information regarding the transactions of his immovable property and that also in response to specific queries raised during assessment proceedings. In these circumstances the Petitioner has clearly proved his credit worthiness by disclosing the relevant material and the Revenue cannot claim protection of the exception in the first proviso to Section 147 of the Act. The relevant finding in the decision relied upon by the Petitioner in the matter of *Gemini Leather Stores* (*supra*) reads as follows:

8 Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

> *"……Once all the primary facts are before the Assessing Authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else far less the assessee to tell the Assessing Authority what inferences, whether of facts or law, should be drawn."*

From the facts in the present case, it is evident that the AO had within his possession all the primary facts and it was for him to make necessary enquiry and draw proper inferences. Thus, the AO did not do and it is even admitted by the Respondents that the AO failed to appreciate the information provided by the Petitioner by 'oversight'.

Thus, it cannot be said that the income chargeable to tax for the AY under consideration has escaped assessment by reason of the omission or failure on the part of the Petitioner to disclose fully and truly all material facts. The AO had all the material before him when he made the original assessment.

14. Another ground of objection by the Petitioner is that the assessment cannot be reopened on a mere change of opinion and more particularly, in the absence of any fresh tangible material. The first assessment order is based upon the information and details provided by the Petitioner including material relating to his immovable property and the deductions under Section 54(F) of the Act have been computed on the basis of the material provided by the Petitioner. Thus, the AO had in his possession all the primary facts

and it was for him to make necessary inquiries and draw proper inference as to whether deductions as claimed under Section 54(F) of the Act were to be allowed or otherwise while working the computations. In a decision of this court in the matter of ***Ananta (P) Ltd. v Deputy Commissioner of Income Tax, Central Circle 5(3), Mumbai,***[9] it has been held as follows:

> *"16. .....When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view."*

15. It will also be useful to reproduce paragraphs 12 and 14 of *Aroni Commercials (supra)* which reads as under:

> *"12. Therefore the power to reassess cannot be exercised on the basis of mere change of opinion i.e. if all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under Section 147/148 of the Act is not permissible. The powers under Section-147/148 of the Act cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under Sections 147/148 of the Act only on satisfaction of the jurisdictional requirements. Further, the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented*

9 (2021) 131 taxmann.com 52 Bombay.

much less substituted by affidavit and /or oral submissions. Moreover, the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Moreover, the tangible material upon the basis of which the Assessing Officer comes to the reason to believe that income chargeable to tax has escaped assessment can come to him from any source, however, reasons for the reopening has to be only of the Assessing Officer issuing the notice. At the stage of issuing notice under Section 148 of the Act to reopen a concluded assessment the satisfaction of the Assessing Officer issuing the notice is of primary importance. This satisfaction must be prima facie satisfaction of having a reason to believe that income chargeable to tax has escaped assessment. At the stage of the issuing of the notice under section 148 of the Act it is not necessary for the Assessing Officer to establish beyond doubt that income indeed has escaped assessment.

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14. We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investement in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under Section 148 of the Act seeking to reopen assessment for A.Y.2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y.2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in

> *respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceedings even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment"*

Thus, it can be safely held that the reopening of the assessment order is clearly on the basis of a change of opinion and that too without surfacing of any tangible new information.

16. As noted earlier, a perusal of the communications reveal that there was nothing more to disclose and a person cannot be said to have omitted or failed to disclose information which clearly has been placed before the AO at the time of issuance of the first assessment order. The reliance placed by the Revenue upon the judgment of *Major General Madan Lal Sharma* (*supra*) is wholly inapplicable in so

far as we have concluded that there was no failure to disclose any information on the part of the Petitioner.

17. The response dated 2nd August 2021 submitted by the Petitioner to the notice dated 16th July 2021 issued under Section 142(1) of the Act clearly shows that the Petitioner has specifically sought reasons for reopening of the assessment for him to respond to the said notice. However, the ensuing communications of the Respondents do not reveal any such information being furnished to the Petitioner. The only justification offered by the Revenue seems to suggest an oversight of the AO to note the request of the Petitioner. The letter of 24th January 2022 issued on behalf of the Petitioner also reveals the truthfulness in the case of the Petitioner. Information relating to deductions under Section 54(F) of the Act was clearly provided by the Petitioner despite which no reasons recorded by the AO to justify reopening of the assessment were furnished to the Petitioner. Thereafter, the Draft assessment order in the form of a show cause notice dated 16th March 2022, was issued, which also did not contain any reasons as sought by the Petitioner. The reply of 21st March 2022 on behalf of the Petitioner also reiterates the background and facts of the case. The Petitioner has reiterated his objections of not being furnished any reasons recorded by the AO to reopen the

assessment in the said letter. This entire communication trail corroborates the arguments advanced by the Petitioner that the Respondents have failed to comply the mandatory requirement of furnishing the reasons recorded to reopen the assessment, once the Petitioner files his returns pursuant to the notice under Section 148 of the Act. It is settled law that the reasons for reopening an assessment can be tested and examined only on the basis of the reasons recorded at the time of issuing the notice under Section 148 of the Act. The Revenue has not even placed on record any document to suggest that the reasons recorded have been furnished to the Petitioner. On this ground alone the assessment order impugned herein deserves to be quashed.

18. In view of the foregoing, we are satisfied that the Petitioner had fully and truly disclosed all material facts necessary for the purpose of assessment. The AO issued the first assessment order after carefully scrutinizing the material furnished by the Petitioner. The Respondents have failed to furnish any reasons for reopening as mandated by law. There is not even a whisper in the entire communication trail as to what was not disclosed. In our view, thus, this is not a case where assessment should be permitted to be reopened on the reasonable belief that income has escaped

assessment on account of failure of the assessee to disclose truly and fully or material information necessary for computation of income. Consequently, the notice dated 26th March 2021, the order disposing objections dated 24th March 2022, the impugned assessment order and the impugned notice of remand dated 24th March 2022 as well as the impugned show cause notice for levy of penalty dated 24th March 2022 are quashed and set aside.

19. Rule is thus made absolute in terms of prayer clause (a) which reads as follows:

> "(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorary or a Writ in the nature of Certioraty or any other appropriate Writ, Order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the said notice dated 26 March 2021 (Exhibit D"), order disposing objections dated 24.03.2022 ("Exhibit P"), the impugned assessment order dated 24.03.2022 (Exhibit R1) and the impugned notice of demand dated 24.03.2022 (Exhibit R2) as well as the impugned show-cause notice for levy of penalty dated 24.03.2022 ("Exhibit R3").

20. There shall be no order as to costs. All interim and ad-interim orders, if any, stand vacated forthwith.

(DR. N. K. GOKHALE, J.) **(K. R. SHRIRAM, J.)**

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