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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Judgment delivered on: 05.12.2024***

\+ W.P.(C) 12784/2019

SUBHASH CHANDER DABAS .....Petitioner

Through: Mr. Ramesh Singh, Sr. Adv. with Mr. Sumit K. Batra, Mr. Manish Khurana, Ms. Priyanka Jindal & Ms. Hage Nanya, Advs.

Versus

ASSISTANT COMMISSIONER OF INCOME TAX .....Respondent

Through: Mr. Vipul Agrawal, SSC with Mr. Gibran Naushad & Ms. Sakshi Shairwal, JSCs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. The writ petitioner impugns the proceeding for reassessment commenced in terms of Section 148 of the **Income Tax Act, 1961**[1] and pertaining to **Assessment Year**[2] 2012-13. Since the proceedings for reassessment were commenced prior to the procedure for reassessment coming to be recast by virtue of Finance Act, 2021, it was the procedure as prevalent at the relevant time which was adopted

[1] Act
[2] AY

by the respondents.

2. For the purposes of considering the challenge which stands raised, we deem it apposite to take note of the following facts. The petitioner for AY 2012-13 had filed its Return of Income on 30 September 2012. The said Return was ultimately assessed in accordance with Section 143(3) of the Act and saw the passing of an assessment order on 26 March 2015.

3. On 31 March 2019 the impugned notice under Section 148 came to be issued. The respondents in the course of those notice proceedings supplied a copy of the reasons on the basis of which an opinion was formed that income had escaped assessment. The note carrying those reasons, and which stands placed on our record as Annexure A-16, is reproduced hereinbelow:-

> "**Recording of reasons for re-opening of assessment u/s 147 of the Act-**
>
> The assessee filed his return of income for A.Y. 2012-13 on 30.09.2012 declaring total income of Rs.10,75,400/-. The assessee is a builder engaged in the business of construction and development of property. The case of Assessee was selected for scrutiny and notice u/s 143(2) of the Act was issued on 10.09.2013. Assessment proceedings were completed u/s 143(3) of the Act vide order dated 26.03.2015 accepting the income returned.
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> 2. Thereafter, information has been received from the Joint Director of Income Tax (Investigation), OSD, Unit 1(1), New Delhi vide letter F.No.JDIT(OSD)(Inv.)/U-1(1)/Dabas/2018-19/3169 dated 28.03.2019 that as per information received, Sh. Subhash Dabas, prop. Of Tirupati Construction has constructed flats in the Delhi States Newspaper Employee Federation CGHS, Sector-19, Dwarka, New Delhi. The society was initially comprised of several members who were relative of Sh. Subhash Dabas. The benami flats were booked in the name of relatives and later sold to the prospective unsuspecting buyer for huge amounts. The total construction cost of society was initially comprised of several members who were relative of Sh. Subhas Dabas. The benami flats were booked in the name of relatives and later sold to the prospective unsuspecting buyer for huge amounts. The total construction cost of society was Rs.7514 Cr. But the total deposits

in the accounts of society were Rs.126.90 Cr. Also a sum of Rs.55 Cr. Has been transferred from the accounts of society to the companies/firms/prop. concern where Sh. Subhash Dabas is director/partner/proprietor. After the benami flats become freehold the same were sold to prospective buyers for higher price and the same consideration of these flats was deposited into the accounts of society from where the same was transferred to the accounts of Sh. Subhash Dabas, his relatives/friends and his companies/firm/prop. concern.

3. After receiving the above information, discreet enquiry was conducted by the Investigation Wing. On enquiry it has been found that few flats are still lying vacant and these flats were not sold and are still with Sh. Subhash Dabas. During F.Y.2011-12, total cash of Rs.6,20,31,500/- was deposited in the four bank accounts of society, the source of which is unknown. It has been noted from the bank account statement of the society that funds has been transferred from the account statement of the society that funds has been transferred from the account of The Delhi Newspaper Employees CGHS to the accounts of different companies, firms & concerns associated with Sh. Subhash Dabas. The society has transferred total of Rs.56 Cr. to …….. the payment made to different companies and firms is as under:-

S. No.	Name of Company/Firm	Amount
1.	Rainbow Capital Ltd.	42,50,000/-
2.	Tirupati Building & Offices Pvt. Ltd.	20,00,000/-
3.	**Tirupati Construction**	**31,47,99,000/-**
4.	Tirupati Constwell Pvt. Ltd.	23,90,17,000/-
	Total	56,00,66,000/-

3.1 Further, following amount was also transferred by the society to the companies/firms of Sh. Subhash Dabas during F.Y.2011-12:-

S. No.	Name of Company/Firm	Amount
1.	Rainbow Capital Ltd.	Nil
2.	Tirupati Building & Offices Pvt. Ltd.	Nil
3.	**Tirupati Construction**	**24,80,29,000/-**
4.	Tirupati Constwell Pvt. Ltd.	11,63,15,000/-
	Total	36,43,44,000/-

3.2 The assessee has declared total income of Rs.10,75,400/- during A.Y. 2012-13 comprising salary income of Rs.11,90,400/- and Rs.3,52,232/- from other sources. The assessee has declared loss of Rs.31,32,939/- from business & profession. M/s. Tirupati Construction prop. concern of assessee has received Rs.24,80,29,000/- from the society in F.Y. 2011-12 without

declaring the same in revenue. Moreover, the assessee has declared loss of Rs.31,32,939/- from business which is not commensurate with the huge transaction under by him. The reasons for transfer of fund from the society to assessee's concern are unknown as the assessee has not shown the receipt of above amount in his books of accounts.

4. From the above, it is clear that the assessee has received huge sum of Rs.24,80,29,000/- from the Delhi Store Newspaper Employees CGHS during F.Y. 2011-12 but the same was not recognized as income. Moreover, the assessee has declared loss of Rs.31,32,939/- from business and profession which is not commensurate with the huge transaction undertaken by him. Further, the assessee in his books of accounts has not shown receipt of amount from society. During the course of assessment proceedings, the assessee has not disclosed the transaction between ……..

5. The scrutiny assessment of Sh. Subhash Dabas for A.Y. 2012-13 was completed u/s 143(3) of the Act. However, neither the above information was in possession of department at the time of completion of scrutiny assessment nor the assessee has declared the same during assessment proceedings.

5.1 In this case, a return of income was filed for the year under consideration and regular assessment u/s 143(3) was made on 26.03.2015. Since, 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s.147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above.

5.2 I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment/reassessment proceedings and have noted that the assessee has not fully and truly disclosed the above material facts necessary for his assessment for the year under consideration.

5.3 It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

5.4 It is true that the assessee has furnished copy of statement of affairs along with return of income where various information/material were disclosed. However, the requisite full

and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has furnished details & documents during assessment proceedings, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of Section 147 of the Act.

5.5 It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/reassessment. It is important to highlight here that material facts ……..and the same may be embedded in books of account & financial statement in such a manner that it would require due diligence by the AO to extract these information. For aforestated reasons, it is not a case of change of opinion by the AO.

5.6 In view of the above facts, I have reason to believe that an amount of Rs.24,80,29,000/- chargeable to tax has escaped assessment for A.Y. 2012-13 due to failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment and therefore, this is a fit case for initiation of action u/s 147/148 of the I.T. Act 1961.

6. In this case **more than four years** have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 has been obtained separately from Principal Commissioner of Income Tax (Central)-2, New Delhi as per the provisions of Section 151 of the Act."

4. As is evident from the above, the allegation essentially was that the petitioner although having received a sum of INR 24,80,29,000/- from the **Delhi States Newspaper Employee Cooperative Group Housing Society**[3] during **Financial Year**[4] 2011-12, had failed to account for the same in his books and acknowledging the same as being income received. It was the receipt of this income which formed the basis for the **Assessing Officer**[5] forming the opinion that the petitioner had failed to render a full and true disclosure and thus the

[3] DSNE CGHS
[4] FY
[5] AO

Proviso to Section 147 being fulfilled.

5. The petitioner is stated to have filed its response to that notice and thereafter approached this Court by filing the instant writ petition. On 06 December 2019, we had entertained the writ petition and passed an interim order to the effect that while proceedings may go on, any order of assessment, if framed, would not be given effect to. Pursuant to the liberty so accorded, the respondents have proceeded to frame a final order of assessment dated 31 December 2019.

6. It is, however, relevant to note that in the counter affidavit which came to be filed in these proceedings, the respondents candidly admit that no amounts were received by the petitioner from DSNE CGHS individually. They allege that the money from the aforenoted entity was routed to M/s Tirupati Construction and in which the petitioner is a majority shareholder by virtue of owning 99.62% of its shares. It is on that basis that in the final order of assessment drawn pursuant to the liberty accorded by this Court, that they now seek to treat the receipt in the hands of M/s Tirupati Construction received from M/s Tirupati Constwell as deemed dividend, taxable in the hands of the writ petitioner by virtue of Section 2(22)(e) of the Act. Basis the above, an addition of INR 7,66,19,067/- has been proposed.

7. The aforesaid recordal of facts is borne out from the following averments which are taken in paragraph 8 of the counter affidavit and which is reproduced hereinbelow:

> "**8.** It is submitted that during the course of re-assessment proceedings on careful perusal of bank statement of M/s. Delhi States Newspaper Employee Federation CGHS, Sector-19, Dwarka, New Delhi, it has been found that submission of the assessee is partially correct. It was noticed from the balance sheet of M/s. Tirupati Constwell Pvt. Ltd. as well as M/s. M/s Tirupati Construction Co. (Prop. Concern of Shri Subhash Chander Dabas)

that M/s. Tirupati Constwell Pvt. Ltd. has advanced of Rs.9,32,15,010/- interest free loan to the M/s. Tirupati Construction Company which is proprietorship concern of the Petitioner. Although, the Assessing Officer may be incorrect while recording reasons that the money was given by the M/s. Delhi States Newspaper Employee Federation CGHS to Shri Subhash Dabas but during the assessment proceedings, it has been found that money was ultimately reached to the assessee not directly but through company in which he is major shareholder i.e.99.62% of the total shareholding. In other words, the assessee, Sh. Subhash Chander Dabas, proprietor of M/s Tirupati Construction has received Rs.9.32 crore from the M/s. Delhi States Newspaper Employee Federation CGHS through M/s Tirupati Constwell Pvt. Ltd. in which he is a major shareholder owning 99.62% of total shareholding. Vide the reassessment order dated 31.12.2019 the aforesaid amount has been assessed as deemed dividend as per the provision of Section 2(22)(e) of the Act and an addition of Rs.7,66,19,067/- has been made to the returned income of the Petitioner assessee."

8. However, and as is manifest from the above, there is an evident and apparent disconnect between the reasons which had been originally recorded for initiation of reassessment action and the disclosures which are now made and stand embodied in the final assessment order which has come to be passed.

9. For the purposes of evaluating the challenge to the Section 148 action we would have to necessarily confine our inquiry to the reasons which had been originally recorded. This since it would be that material which would be pertinent for the purposes of evaluating whether the formation of opinion was valid. Tested on the aforesaid principles, it becomes apparent that the Section 148 proceedings would not sustain.

10. As was noticed in the preceding parts of this decision, the solitary allegation which constituted the basis for formation of opinion that income had escaped assessment was an alleged receipt of INR 24,80,29,000/- by the petitioner from the DSNE CGHS. The

respondents themselves have subsequently found that the said allegation would not sustain. Consequently, the very edifice on which the reassessment action was based stands effaced.

11. We had in **ATS Infrastructure Limited v. Assistant Commissioner of Income Tax Circle 1 (1) & Ors.**[6], held that the formation opinion under Section 147 and the reasons which are taken into consideration for initiating action of reassessment cannot waiver or be one of changing hues. We deem it apposite to extract the following passages from our decision in *ATS Infrastructure*:

> **"6.** Our Court in *Commissioner of Income Tax-II* v. *Living Media India Ltd.* had pertinently observed that additional reasons cannot be provided or recorded by the Assessing Officer subsequent to the issuance of a notice under Section 148 of the Act. We deem it apposite to quote the following passage from that decision:—
>
> > "13. With regard to the additional reasons which were recorded subsequent to the issuance of notice under section 148 of the said Act, we have already observed that this could not have been done by the Assessing Officer. The validity of the proceedings initiated upon a notice under section 148 of the said Act would have to be judged from the stand point of the reasons which existed at the point of time when the section 148 notice was issued. The additional reasons cannot be provided or recorded subsequent to the issuance of notice under section 148. It is, of course, open to the Assessing Officer, if some other information comes within his knowledge to issue another notice under section 148 for different reasons. But that is not the case here. On the basis of the very same notice issued under section 148, the Assessing Officer has recorded additional reasons subsequent to the issuance of notice and this is impermissible in law."
>
> **7.** It becomes pertinent to observe that the validity of the proceedings initiated upon a notice under Section 148 of the Act would have to be adjudged from the stand point of the reasons which formed the basis for the formation of opinion with respect to escapement of income. That opinion cannot be one of changing

[6]2024 SCC OnLine Del 5048

hues or sought to be shored upon fresh reasoning or a felt need to make further enquiries or undertake an exercise of verification. Ultimately, the Court would be primarily concerned with whether the reasons which formed the bedrock for formation of the requisite opinion are tenable and sufficient to warrant invocation of Section 148 of the Act.

8. We in this regard find the following pertinent observations which appear in a decision of the Bombay High Court in *Indivest Pe. Ltd.* v. *Additional Director of Income-tax5*.

> "11. Reading the reasons of the Assessing Officer, it is evident that there is absolutely no tangible material on the basis of which the assessment for the assessment year 2006-2007 could have been reopened. Upon the return of income being filed by the assessee both in the electronic form and subsequently in the conventional mode, the assessee received an intimation under section 143(1). The Assessing Officer would have been legitimately entitled to issue a notice under section 143(2) within the statutory period. That period has expired. We must clarify that the non-issuance of a notice under section 143(2) does not preclude the Assessing Officer from reopening the assessment under section 147. For that matter, as has been held by the Supreme Court in *Asst. CIT* v. *Rajesh Jhaveri Stock Brokers P. Ltd.*, (2007) 291 ITR 500 (SC), the failure of the Assessing Officer to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when an intimation under section 143(1) has been issued. But it is also a settled principle of law that when the Assessing Officer issues a notice under section 148, at that stage the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief (*Rajesh Jhaveri* (supra). At that stage, an established fact of the escapement of income does not have to be proved, since it is not necessary that the Assessing Officer should have finally ascertained that income has escaped assessment. The nature of the jurisdiction of the Assessing Officer which was dealt with by the judgment of the two learned judges of the Supreme Court in *Rajesh Jhaveri's case* was revisited in a decision of three learned judges in *CIT* v. *Kelvinator of India Ltd.*, (2010) 320 ITR 561 (SC). The Supreme Court has held that though after April 1, 1989, a wider power has been conferred upon the Assessing Officer to reopen an assessment, the power cannot be exercised on the basis of a mere change of

opinion nor is it in the nature of a review. The Supreme Court has laid down the test of whether there is tangible material on the basis of which the Assessing Officer has come to the conclusion that there is an escapement of income. The Supreme Court held thus (page 564):

> "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 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 fulfilment of certain precondition 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 April 1, 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 section 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 section 147 of the Act. However, on receipt of representations from the companies against omission of the words 'reason to believe', Parliament reintroduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer.

12. If the test of whether there exists any tangible material were to be applied in the present case, it would be evident that the Assessing Officer has not acted within his jurisdiction in purporting to reopen the assessment in exercising the powers conferred by section 148. There was a disclosure clearly by the assessee that it is a body corporate incorporated in Singapore, the principal business

of which is to invest in Indian securities; that the assessee is a tax resident of Singapore and that the profits which the assessee realised from its transactions in securities constituted its profits from business. The assessee stated that it had no permanent establishment in India as defined in article 5 of the DTAA and that based on the provisions of article 7 the profits of Rs. 131.70 crores from transactions in Indian securities were not liable to tax in India. The only basis on which the assessment is sought to be reopened is on the assumption that the provisions of section 115AD would stand attracted. That is on the assumption that the assessee is an FIL Though the attention of the Assessing Officer was drawn to the fact that the assessee is not an FII and that the provisions of section 115AD would not be attracted, the Assessing Officer persisted in rejecting the objections to the reopening of the assessment. In the order disposing of the objections which were raised by the assessee, the succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee. The validity of the notice reopening the assessment under section 148 has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently. While disposing of the objections of the assessee, the Assessing Officer has purported to state that the assessee had filed only sketchy details in its return filed in the electronic form. As we have noted earlier, the relevant provisions expressly make it clear that no document or report can be filed with the return of income in the electronic form. The assessee has an opportunity to do so during the course of the assessment proceedings if a notice is issued under section 143(2). The Assessing Officer was, in our view, not entitled, when he disposed of the objections to travel beyond the ambit of the reasons which were disclosed to the assessee. For all these reasons, we are of the view that the exercise of the jurisdiction under section 147 and section 148 in the present case is without any tangible material. The notice of reopening does not meet the requirements as elucidated in the judgment of the Supreme Court in *Kelvinator of India Ltd.*, (2010) 320 ITR 561 (SC) For these reasons, we make the rule absolute by quashing and setting aside the notice dated March 16,

> 2011, and the order passed by the Assessing Officer on December 20, 2011."
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> xxxx xxxx xxxx
>
> **11.** We also find merit in the submission of Mr. Kantoor who drew our attention to the First Proviso to Section 148 which reads as under:—
>
> > "148. Issue of notice where income has escaped assessment-Before making the assessment, reassessment or recomputation under Section 147, and subject to the provisions of Section 148A,-
> >
> > xxxx xxxx xxxx
> >
> > Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice."
>
> **12**. As is manifest from the above, the Proviso again ties the initiation of action to the existence of information which already exists or is in the possession of the AO and on the basis of which it comes to form the opinion that income liable to tax has escaped assessment. The provision thus fortifies our view that the foundational material alone would be relevant for the purposes of evaluating whether reassessment powers were justifiably invoked. Accordingly, and for all the aforesaid reasons we find ourselves unable to sustain the impugned reassessment action."

12. As is manifest from the enunciation of the legal position, it is ultimately the original reasons which may have been taken into consideration for the purposes of coming to the conclusion that income had escaped assessment alone which would merit consideration.

13. Regard must also be had to the fact that the petitioner had been originally assessed under Section 143(3) of the Act. The initiation of reassessment would have to consequently be compliant with the

Proviso to Section 147 as it stood at the relevant time and which read as under:

> "**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, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice 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:
>
> [**Provided further** that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:]"

14. As is evident from the above, a reassessment action would have been permissible, provided it were established that the petitioner had failed to make a "full and true disclosure" of all material facts. Obviously, and once it is conceded by the respondents themselves that the petitioner had not directly received any remittances from the DSNE CGHS, there would have been no occasion for the petitioner to have made a disclosure in its Return of Income. Accordingly, and for all the aforesaid reasons, we find ourselves unable to sustain the invocation of Section 148.

15. The writ petition is, accordingly, allowed. The impugned notice under Section 148 of the Act dated 31 March 2019 is hereby quashed. We, however, leave it open to the respondents to initiate proceedings afresh, if otherwise permissible in law.

16. We further observe that the final order of assessment was, in terms of our initial interim order, subject to the outcome of the present

petition. Since we have come to hold that the Section 148 notice itself is invalid, the said order dated 31 December 2019 also cannot sustain. It too, shall consequently, stand set aside.

YASHWANT VARMA, J

DHARMESH SHARMA, J

DECEMBER 5, 2024/kk