

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

WRIT PETITION NO.3059 OF 2015

Shashikiran Janardhan Shetty
having his office at 5th Floor,
Diamond Square, CST Road, Kalina,
Santacruz (East), Mumbai-400 098

... Petitioner

Versus

1. Assistant Commissioner of Income-tax,
Central Circle-8(1),
having his office at Room No.656, 6th Floor,
Aayakar Bhavan, Maharshi Karve Road,
Mumbai-400 020.

2. Principal Commissioner of Income-tax,
Central-4, having his office at
Room No.660, 6th Floor,
Aayakar Bhavan, Maharshi Karve Road,
Mumbai-400 020

3. Union of India
through Ministry of Finance,
North Block,
New Delhi-110 001

... Respondents

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Mr. J.D. Mistri, Senior Advocate a/w Mr. Madhur Agrawal, Mr. B.V. Jhaveri, Mr. Fenil Bhatt and Ms. Bhargavi Rawal for the Petitioner.

Mr. Suresh Kumar for the Respondents.

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**CORAM : DHIRAJ SINGH THAKUR &
KAMAL KHATA, JJ.**

PRONOUNCED ON : 27 JUNE 2023

: J U D G M E N T :

Per DHIRAJ SINGH THAKUR, J.

. The Petitioner in the present Petition challenges the notice under Section 148 of the Income Tax Act, 1961 (“the Act”) dated 1 July 2014, whereby the assessment for the assessment year 2009-10 is sought to be reopened. The Petitioner also challenges the Order dated 25 November 2015, whereby the objections raised by the Petitioner to the reopening were rejected.

2 Briefly stated the material facts are as under :-

- (i) The Petitioner states that with a view to give shape to the project of the Ship Building Yard, the Petitioner through his flagship company, M/s. Allcargo Logistics Limited along with M/s IL&FS Limited set up a joint venture company M/s Sealand Warehousing Pvt. Ltd. The said joint venture company entered into an MoU between the Petitioner and one Mr. Vasudev Ramdas Thacker (hereinafter referred to as “Vasudev Thacker”), promoter of a company known as M/s. Srimaa Ashapura Port Pvt. Ltd. and acquired 90 per cent shares of the said company from its various shareholders with a view to get control over the ownership of 367 acres of land at Mandvi, Kutch, Gujarat. For the SEZ project, the

Petitioner claims that two Special Purpose Vehicle companies were created in joint venture with IL&FS Limited, namely, M/s Avash Logistic Park Pvt. Ltd. (hereinafter referred to as “Avash Logistic”) and M/s Sealand Ports Pvt. Ltd, which had acquired 1156 and 1460 acres of contiguous land.

- (ii) The case of the Petitioner is that for the purpose of business of ship repairing/building and setting up of Special Economic Zone, Mr. Vasudev Thacker was appointed as a consolidator for acquisition of the entire land bank for the aforesaid business. It is stated that the joint venture companies made payments to various parties as per the instructions of Mr. Vasudev Thacker for the purpose of acquisition of land.
- (iii) A search and seizure action is stated to have been carried out by the Department at various locations of M/s Allcargo Logistics Limited and other group companies including residences of the directors on 10 July 2009. In the course of the search, a statement was recorded on oath under Section 132(4) of the Act, wherein the Petitioner states that a disclosure of approximately Rs.23.27 crores was made representing the capital contribution in his personal capacity in the private limited company known as M/s India Tourist & Heritage Village Pvt. Ltd. as also on account of purchase of furniture and

repair of the property at Mangalore.

- (iv) It is stated that subsequently notice under Section 153A of the Act for six assessment years including assessment year 2009-10 was issued. Pursuant to which a return of income was filed under Section 153A declaring total income of Rs.27,56,84,930/-, which after verification and scrutiny resulted in an Order under Section 143(3) read with section 153A of the Act on 30 December 2009.

A notice under Section 148 of the Act dated 1 July 2014 was issued by the assessing officer seeking to reopen the assessment for the assessment year 2009-10 on the ground that income chargeable to tax had escaped assessment for the said assessment year 2009-10.

3 Reasons leading to the formation of the said belief were supplied to the Petitioner, which reads as under :

“Shri Shashikiran J. Shetty
A.Y.2009-10

01.07.2014

Reasons to believe that income chargeable to tax has escaped
assessment.

A search and seizure action was carried out in the case of M/s Allcargo Group of companies, their directors and other important employees. The assessee being the MD of

the company was also covered u/s 132(1) of the Act. The assessee, in his statement u/s 132(4) of the Act on 03.09.2009, failed to explain the capital introduction of Rs.23 crores in company M/s Indian Heritage & Tourist Village Pvt. Ltd. and offered the said sum of Rs.23 crores and further sum of Rs.27,15,980 on account of loose papers seized which was offered to tax. A notice u/s 153A was issued and the assessee filed his return of income on 29.10.2009 declaring total income at Rs.27,56,94,9630/- inclusive of undisclosed income of Rs.23,27,15,980/-.

2 In the course of search it was observed that in the previous year relevant to assessment year 2009-10, the group concerns of assessee viz. M/s Sealand Ports Pvt. Ltd., M/s Avash Logistics Park Pvt. Ltd. and M/s Sealed Ware House Pvt. Ltd. issued cheques to various entry providers as capital expenditure for purchase of land but same was received in the form of cash by the assessee. It was noticed that the assessee engaged Shri Vasudev Thakkar, a land broker for acquiring the land and obtained bogus bills for generating cash. During the course of search, Shri Vasudev Thakkar admitted that he acted as an agent and facilitator for generation of cash by way of accommodation entries which was then given back to the assessee. On this basis, assessee gave a disclosure of Rs.23 crores in the year under consideration.

3 The assessee during the course of search assessment proceedings failed to furnish bank account statements of the aforesaid three concerns. After completion of the search assessments, it was observed that M/s Avash Logistics Park Pvt. Ltd. had maintained an account

No.000181300000985 with M/s Yes Bank Ltd. wherein following transactions were carried out with Mr.Vasudev Thakkar which was over and above the disclosure given by the assessee:

<u>M/s Avash Logistics Park Pvt. Ltd. Statement of M/s YES Bank</u> (Rs. In crores)			
Sr. No.	Date	Description	Amount (Rs.)
1	10.07.08	Shri Vasudev Thakkar	3.00
2	28.07.08	Shri Vasudev Thakkar	1.00
3	14.08.08	Shri Nishant Thakkar	1.00
4	09.09.08	Shri Nishant Thakkar	2.65
		Total	7.65 Crs

- 4 From the above, it can be concluded that M/s Avash Logistics Park Pvt. Ltd. had issued cheques to Shri Vasudev Thakkar and Shri Nishant Thakkar and cash was received by the assessee. The assessee had however failed to disclose the said transactions of M/s YES Bank Ltd. pertaining to M/s Avash Logistics Park Pvt. Ltd. This omission on part of the assessee has resulted in underassessment of taxable income.

In view of the above, I have reason to believe that income chargeable to tax of Rs.7.65 crores has escaped assessment within the meaning of section 147 of the I.T. Act, 1961. Therefore, I am satisfied that this is a fit case to issue notice u/s 148 r.w.s.147 of the I.T.Act, 1961.

(Dr. UMESH C PANDE)
Dy. Commissioner of Income
Cent.Cir.44, Mumbai”

5 Objections to the reopening were submitted by the Petitioner, which were rejected by virtue of the Order dated 24 November 2015, hence, the present Petition.

6 Mr. Mistri, learned Senior Counsel appearing for the Petitioner urged that the notice impugned under Section 148 of the Act did not satisfy the jurisdictional condition for invoking Section 147 of the Act. It was stated that since the assessment was being reopened after a period of four years from the end of the relevant assessment year, apart from the jurisdictional condition of reason to believe, the assessing officer had also to satisfy the condition that there was a failure on the part of the assessee to disclose fully and truly the material facts, which are necessary for the assessment. It was urged that reason for reopening of the assessment for the relevant assessment year was on account of alleged failure on the part of the Petitioner to furnish bank account statements pertaining to Avash Logistic bearing Account No.000181300000985 maintained with M/s YES Bank Ltd., in which transactions of Rs.7.63 crores were made reflecting payments made to Mr. Vasudev Thacker and his son Mr. Nishant Thacker, which according to the assessing officer had resulted in under assessment of the Petitioner's taxable income. It was urged

by Mr. Mistri that Avash Logistic was a separate legal entity, which was being assessed separately, and, therefore, there was no legal obligation on the part of the Petitioner to have furnished the bank statements pertaining to the said company and further, in case, the assessing officer did require such statements, the same could have been sought by the assessing officer and furnished by the Petitioner. In any case, it was urged that the said transactions mentioned in the reasons recorded had been the subject matter of scrutiny during the assessment proceedings in the case of Avash Logistic. Reference in this regard is made to the notice under Section 142(1) of the Act dated 4 December 2009, which was issued by the same assessing Officer Deepak J. Mehta, DCIT, Central Circle-44, Mumbai to Avash Logistic, requiring the said entity to produce books of accounts and bank statements, which were produced by the said entity under the covering letter dated 18 December 2009.

7 Mr. Mistri, took pains to take us through each of the four entries, which otherwise were reflected in the reasons recorded, to show that the bank statements pertaining to the said account contained all the entries which were before the assessing officer, who was the assessing officer common to both, i.e. to the Petitioner as also Avash Logistic. It was also urged that having gone through

the requisite records and the bank statements etc., an Order of assessment came to be passed in the said case of Avash Logistic on 29 December 2009 under Section 143(3) read with Section 153A of the Act and immediately after one day in the case of the Petitioner on 30 December 2009 under Section 143(3) read with Section 153A of the Act. It was, therefore, urged that the basis for reopening the assessment as laid down in the reasons recorded regarding failure on the part of the Petitioner to furnish the bank account statements pertaining to a different entity was not a sustainable reason, based upon which the assessing officer could form his belief that income had escaped assessment or that there was any failure to disclose fully and truly the material facts.

8 Mr. Suresh Kumar, learned Counsel appearing for the Respondents, on the other hand, tried to justify the reopening on the ground that Mr. Vasudev Thacker, to whom the payments had been made by the Petitioner had been generating cash for the Petitioner and that it was based upon the statement made by him that the Petitioner has made disclosure of Rs.23 crores for the assessment year 2009-10, which was also offered for taxation. Rs.23 crores is stated to be a difference between Rs.153 crores, which was allegedly paid to Mr. Vasudev Thacker and Rs.130

crores, which Mr. Vasudev Thacker admitted to have received from the joint venture companies.

9 We have heard learned Counsel for the parties at length. It is a settled principle of law that in case of reopening beyond the period of four years, the assessing officer has to satisfy the jurisdictional condition that there was failure to disclose fully and truly the material facts. Equally settled is the principle that the jurisdiction exercised under Section 148 of the Act by the assessing officer has to be tested on the touchstone of the reasons recorded, which can neither be improved subsequently, nor can any addition be made thereto in the reply or in the subsequent pleadings.

10 In the present case, it is failure on the part of the Petitioner to furnish the bank account maintained by a different legal entity, namely, Avash Logistic that has been made the basis for reopening the assessment. We fail to understand how this could be made a basis at all, as the document which is in the shape of bank statements pertained not to the Petitioner, but to Avash Logistic, which was being assessed separately and during which scrutiny assessment, the same bank account bearing No.000181300000985 had been scrutinized, which did reflect the payments having been

made to Mr. Vasudev Thacker and his son Mr. Nishant Thacker. The assessing officer in both cases was the same i.e. Mr. Deepak J. Mehta, DCIT, Central Circle-44, Mumbai, and the Orders of assessment under Section 143(3) read with Section 153A had been passed only one day apart, i.e. on 29 December 2009 and 30 December 2009.

11 Based upon the aforementioned facts, it cannot be said that there was any failure on the part of the Petitioner to disclose fully and truly the material facts during the regular assessment. Even otherwise, we are of the opinion that the assessing officer would have no reason for the formation of his belief that income had escaped assessment inasmuch as payments were made by the joint venture companies to Mr. Vasudev Thacker and to Mr. Nishant Thacker and reopening if at all ought to have been considered in those cases. Moreover, there was no tangible material with the assessing officer, which would form a basis for the assessing officer for his 'reason to believe' that payments made to Mr. Vasudev Thacker as also to his son Mr. Nishant Thacker resulted in generation of cash, which ultimately found its way to the Petitioner. In the absence of any such specific information, which ought to have been reflected in the reasons recorded, it can be said that the

jurisdictional requirements have not been fulfilled in the present case.

12 While it may be true that as against the alleged payment of Rs.153 crores paid to Mr. Vasudev Thacker, he admitted to have received only amount of Rs.130 crores, which led to a disclosure by the Petitioner to the extent of Rs.23 crores, yet the same cannot be made a basis for reopening. It needs to be pointed out that it is not the case of the Respondent-revenue that the entire amount, which had been received by Mr. Vasudev Thacker as also Mr. Nishant Thacker was never used for purchase of parcels of land for establishing the project, for which Special Purpose Vehicle companies were created. If that is so, one fails to understand as to why only four entries recorded in the reasons recorded, were picked up by the assessing officer.

13 For the aforementioned reasons, we allow the Petition. The impugned notice under Section 148 of the Act dated 1 July 2014 and the Order dated 24 November 2015, rejecting the objections are set aside.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)

RAJESH
VASANT
CHITTEWAN

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