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

WRIT PETITION NO. 2513 OF 2001

Dena Bank ...Petitioner
vs.
Union of India & Anr. ....Respondents

Ms.A. Vissanji with Mr.S.J. Mehta for Petitioner.
Mr.Suresh Kumar with Ms.Samiksha Kanani for Respondents.

CORAM: M. S. SANKLECHA &
S.C. GUPTE, JJ.

DATE : 14 OCTOBER 2016

P.C. :

This petition under Article 226 of the Constitution of India challenges the notice dated 28 May 2001 issued under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notice dated 28 May 2001 seeks to reopen assessment for Assessment Year 1994-95.

2. This petition was admitted on 24 January 2002. At the time of admission, interim stay was granted restraining the Respondents from acting further in pursuance of the impugned notice dated 28 May 2001.

3. On 30 November 1994, the Petitioner filed its return of income for the Assessment Year 1993-94 declaring a loss of Rs.33.07 crores. On 24 February 1997, the Assessing Officer passed an order under Section 143(3) of the Act determining the Petitioner's total income at Rs.71.11 lakhs.

4. Thereafter, on 28 May 2001, the impugned notice seeking to reopen assessment for Assessment Year 1994-95 was issued to the Petitioner. The Petitioner challenged the impugned notice dated 28 May 2001 by filing this petition. Pending admission of this petition, the reasons recorded in support of the impugned notice dated 28 May 2001 were filed by the Respondent-Revenue as annexure to the affidavit in reply dated 7 December 2001 of Mr.Jagdish Jangid, Assistant Commissioner of Income Tax. The reasons recorded reads as under :

> "1. Assessee has filed its return of income on 30/11/1994 declaring total loss of Rs.33,07,06,363/-. Assessment was completed u/s.143(3) of I.T. Act on 24/02/1997 at income of Rs.71,11,040/-.
>
> 2. In the assessment completed it was noticed that on following issues income has escaped assessment :-
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> > (i) Export credit interest amounting to Rs.1,12,49,121/- remained to be taxed.
> >
> > (ii) Unrealised gain from investment of Rs.1,49,89,619/- being accrued income but remained to be taxed.
> >
> > (iii) DRDA subsidy recoverable at Rs.54,11,984/- remained to be taxed.
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> Apart from the above, provision for contingency frauds Rs.8,16,43,000/- were allowed without obtaining the details relating to loss on account of fraud and legal action taken against the concerned employees.
>
> 3. Assessee was asked to clarify as to how the above income was not considered taxable in the return of income submitted by it. Assessee submitted that the issues pointed out are not mistake apparent from record and hence cannot be rectified and assessee also submitted that the amounts would have already been considered as income but no efforts were made to clarify the same from records. In view of this, the income has escaped

> assessment on account of nonsubmission of information / nondisclosure of material fact by the assessee. I have reason to believe that substantial income has escaped assessment. As per section 147 of I.T. Act for reopening the assessment, assessing officer should have reason to believe that any income chargeable to tax has escaped assessment. In view of the details mentioned in earlier paras, I have reasons to believe that substantial income chargeable to tax has escaped assessment. As per explanation 2 to Section 147 if income chargeable to tax has been made the subject of excessive allowance, the same will be deemed to be the case where income chargeable to tax has escaped assessment. This is as per explanation 2(c)(i)&(iv) to Section 147. The income escaped is Rs.11.33 Crores which is much more than the limits mentioned in Section 149. The reopening of assessment will be within 10 years from the end of assessment year. Another requirement for reopening of assessment after 4 years is that the escapement of income should be by reason of the failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Assessee has not disclosed the correct income taxable under I.T. Act.
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> In view of the above discussion, the statutory requirements for reopening of assessment have been fully met and the reopening for assessment is essential and legally permissible.
>
> 4. Considering the above, the assessment in the aforesaid assessee's case for A.Y. 1994-95 need to be reopened since substantial income (more than Rs.11.33 Crores) have escaped assessment."

5. Consequent to the above, the Petitioner amended its petition and *inter alia* challenged the impugned notice being without jurisdiction. This essentially on the ground that all facts necessary for the assessment were disclosed truly and fully during the assessment proceedings leading to the order of assessment dated 24 February 1997.

6. This amended challenge was admitted by the court on 24 January 2002 and impugned notice was stayed by this court.

7. When this petition reached hearing, Mr.Suresh Kumar, learned Counsel appearing for the Respondent-Revenue raised a preliminary objection, to the court considering the petition on merits. It is submitted that in view of the decision of the Apex Court in **GKN Driveshafts (India) Ltd. vs. Income-tax Officer**[1], the Petitioner could now file its objections to the reasons recorded in support of the impugned notice (as now communicated). The Assessing Officer would consider the objections and pass an order thereon accepting or rejecting the objections. It is submitted that in view of the declaration of the law by the Apex Court, there is an alternative remedy available and, therefore, this court should not exercise its extra-ordinary jurisdiction and grant relief to the Petitioner.

8. As against this, Ms.Vissanji, learned Counsel for the Petitioner points out that this petition challenges a notice of the year 2001 seeking to reopen an assessment for the Assessment Year 1994-95. Therefore, in the present facts, it would be most unfair to relegate the Petitioner to the procedure of filing an objection to the reasons recorded in support of the impugned notice and the Assessing Officer thereafter passing an order thereon. This more particularly in view of the fact the impugned notice is *ex facie* without jurisdiction as is evident from the reasons recorded in support thereof. It was submitted by her that an identical submission was a subject of consideration by this court in **Ajanta Pharma Ltd. vs. Assistant Commissioner of Income-Tax**[2] and the same was rejected. Therefore, this Court need not relegate the Petitioner to the Assessing Officer in this case as the impugned notice being beyond a period of four years from the end of the relevant assessment year and is on demurrer without jurisdiction.

1 **(2003) 259 ITR 19 (SC)**

2 **(2007) 295 ITR 218**

9 A writ court has plenary jurisdiction to issue prerogative writs to do justice between parties. The courts, as a matter of a self imposed limitation, do not entertain a writ petition where an alternative remedy is available. However in an appropriate case where the impugned notice is itself without jurisdiction and does not require investigation into facts, a writ would issue. In such a case, the party would not be relegated to taking recourse to the alternative remedy available.

10. In fact, as correctly pointed out by Ms.Vissanji, this court in **Ajanta Pharma Ltd.** (supra) had occasion to consider an identical objection, as raised before us by Mr.Suresh Kumar for the Respondent, to consider the petition on merits in view of the decision of the Apex Court in **GKN Driveshafts (India) Ltd.** (supra). In fact, the court held that a party is not barred from approaching this court under Article 226 of the Constitution of India when the notice issued under Section 148 is *ex facie* without jurisdiction. The court, in particular, observed as under :

> " The decision in GKN's case [2003] 259 ITR 19 (SC) certainly reminds the assessee that when a notice under section 148 is issued, the proper course of action is to file a reply with his objections including those in relation to the absence of jurisdiction. <u>However, it does not lay down the law to the effect that when such an objection is in relation to absence of jurisdiction and the same is revealed ex facie or apparent on the face of a notice or reasons in support thereof, the assessee has compulsorily to invite an order from the Assessing Officer in relation to the absence of jurisdiction</u>. It is another case that when certain facts are to be ascertained or various other materials are to be gone through to arrive at a finding about the absence of jurisdiction, in which case, certainly, the assessee will have to approach the Assessing Officer. It is so because, the

> jurisdiction under article 226 of the Constitution of India being an extraordinary jurisdiction cannot be allowed to be availed of as a matter of course. In order to decide an issue of jurisdiction, findings of the authority on the factual aspect may be necessary. In that case, certainly primarily the assessee will have to approach the Assessing Officer. That does not mean that the assessee is invariably bound to approach the Assessing Officer in each and every case. There can be the cases, like the one in hand, where he may be entitled to approach the Court directly under article 226 of the Constitution of India." (emphasis applied)

11. Therefore, we would first examine the submission of the Petitioner that the reasons recorded in support of the impugned notice *ex facie* reveal it to be without jurisdiction. In case our examination of the reasons reveals that it is not as submitted by the Petitioner and decision on jurisdiction requires investigation into some facts, then we would most certainly not exercise our jurisdiction and relegate the Petitioner to filing its objections.

12. It is an undisputed position that the impugned notice is issued beyond the period of four years from the end of the relevant Assessment Year i.e. 1994-95. The impugned notice seeks to reopen an assessment with regard to which an order under Section 143(3) had been passed. Therefore, the first proviso to Section 147 of the Act would apply. The above proviso bars the Revenue from issuing a notice for reopening an assessment where the assessee has truly and fully disclosed all material facts necessary for assessment. The reasons in support must indicate failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment during the regular assessment proceedings under Section 143(3) of the Act. We have closely perused the reasons reproduced hereinabove. We find that the reasons, as reproduced hereinabove, indicate that the basis

for issuing a notice was not any material outside the record but proceedings available with the Assessing Officer on the basis of which the assessment under Section 143(3) of the Act was completed. No doubt, the reasons recorded in support do use the words 'that income has escaped assessment on account of non-submission of any information / non-disclosure of material facts'. However, merely using the above phrase as a 'mantra' would not satisfy the requirement of the Assessing Officer having reason to believe that income chargeable to tax has escaped assessment on account of the assessee not having fully and truly disclosed all material facts necessary for assessment. The minimum the reasons should have indicated was which material fact / information the Petitioner had failed to disclose. Further how this material fact has come to his knowledge subsequent to the finalising of assessment which led to the Assessing Officer to have reason to believe that the income chargeable to tax escaped assessment. No material in support of the above is indicated in the reasons in support of the impugned notice. This clearly makes the impugned notice without jurisdiction.

13. The *sine qua non* for issuing a notice beyond a period of four years from the end of the relevant assessment year in cases where assessments have been completed under Section 143(3) of the Act is a failure on the part of the Assessee to fully and truly disclose material facts necessary for assessment. The reasons in support of the impugned notice do not indicate even remotely that there was any failure on the part of the Respondent Assessee to fully and truly disclose all material facts necessary for assessment. Therefore, the impugned notice is without jurisdiction and is, therefore, set aside.

14. In the above view, no occasion to direct the Petitioner to file

objections to the impugned notice can arise.

15. Accordingly, Rule is made absolute in terms of prayer clause (a). No order as to costs.

(S.C. GUPTE, J.) **(M. S. SANKLECHA, J.)**