

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.13064 OF 2017

J.B.Amin & Brothers (HUF),
“Nimisha”, Near MSEB Office,
Opp. Pendkar Hospital,
Jubilee Park,
Aurangabad.

Petitioner

Versus

Union of India,
through Assistant Commissioner
of Income Tax, Circle II,
Aurangabad

Respondent

Mr.P.M.Shah, Senior Counsel i/by Mr.S.P.Shah, advocate for the petitioner.
Mr.Alok Sharma, Standing Counsel for the Respondent.

CORAM : R.M.BORDE &

SMT. VIBHA KANKANWADI, JJ.

Reserved on : 06th December, 2017

Pronounced on : 22nd December, 2017.

JUDGMENT (Per R.M.Borde, J.):

1 Heard. Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2 The petitioner assessee is praying for issuance of writ of certiorari or any other appropriate writ, order or direction in the nature of writ of certiorari to quash and set aside order dated 04.08.2017, passed by the Assistant Commissioner of Income Tax-II, Aurangabad, whereby objection tendered by the assessee for issuance of notice under Section 148 of the Income Tax Act, 1961,

is rejected. The petitioner is also praying to uphold the objection raised by him vide communication dated 11.11.2016 and to drop the proceedings initiated vide notice dated 14.09.2016, under Section 148 of the Income Tax Act.

3 According to the petitioner, land CTS No.4619, admeasuring 3994.06 square meters was purchased by late Shri Balubhai Amin at Rs.1,80,000/-. The land is situate at Aurangpura, Aurangabad. After demise of Balubhai Amin in 1968, the property is inherited and belong to the petitioner i.e. J.B.Amin and Brothers (HUF). The value of the property has been shown in the Books of Accounts maintained by the petitioner as Rs.1,80,000/-. The petitioner alienated the land along with superstructure standing thereon for consideration of Rs.18 crores on 27.04.2009. The consideration, in respect of the land, is stated to be Rs.16 crores. The petitioner filed return of Income for the year 2009-2010 (Assessment year 2010-2011) wherein this transaction was duly disclosed.

4 According to the petitioner, it is permissible under Section 55(2)(b)(ii) of the Income Tax Act to compute market value of the property, which was assessed at Rs.2,00,63,643/- as on 01.04.1981, to be cost of acquisition. The computation of long term gain and indexation was made considering the aforesaid market value as on 01.04.1981. The Respondent Income Tax Department proposed to re-assess income of the petitioner and as such, notice came to be issued on 14.09.2016, under Section 148 of the Act, requiring the petitioner to file return of income.

5 Section 149 of the Income Tax Act provides limitation of six years from the end of assessment year for issuing notice under Section 148 of the Act. In response to the notice, petitioner – assessee presented return of income on 03.11.2016. The petitioner thereafter requested Respondent – Income Tax Department to provide reasons recorded by them, as required under Section 148(2) of the Act believing that income of the present petitioner has escaped assessment. On 03.11.2016, the Respondent – department informed reasons for believing that the income of present petitioner has escaped assessment. The petitioner tendered an objection to the proposed action since, according to the petitioner, the reason informed by the Respondent for taking proposed action, was not sustainable in law.

6 According to the petitioner, Section 55(2)(b)(ii) of the Act provides that it is the option of the assessee to take into account market value as on 01.04.1981 for computing long term gain or the actual price paid for purchase of the property. The Respondent, however, was pleased to reject the objection raised by petitioner – assessee by an order dated 04.08.2017 on the ground that the market value estimated by the present petitioner as on 01.04.1981 is incorrect and that only cost of acquisition can be computed for capital gain. Since the Respondent department proposed to proceed further with the action on new and distinct ground than the reason originally recorded by the Respondent-department, the petitioner has approached this Court with a prayer to quash and set aside the order passed by the Respondent rejecting the objection as well as for setting aside the notice issued under Section 148 of the Act.

7 The notice issued by the Assistant Commissioner of Income Tax, Circle-II, Aurangabad, on 03.11.2016, records that the assessee is a Hindu United Family (HUF) and has presented return of income for the year 2010-2011 on 31.07.2010 declaring total income amounting to Rs.3,48,67,770/-. On perusal of the return of income, it is noticed that the assessee offered long term capital gain to the tune of Rs.3,31,97,795/- on the land sold for consideration of Rs.16 crores on 27.04.2009. It is noted that on perusal of the books of accounts/balance sheet as on 31.03.2010, it is seen that the opening WDV of the land as on 01.04.2009 is shown at Rs.1,80,000/- in the statement of fixed assets. The Assessee, while filing return of income, shown cost of the land as Rs.2,00,63,640/- as on 01.04.1981 instead of Rs.1,80,000/- (book value). According to the Respondent – department, in view of Section 49(1)(iii)(a) of the Income Tax Act, cost of acquisition of the said land shall be deemed to be the cost for which previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be. It is also recorded in the notice that the assessee has wrongly taken cost of acquisition of the said land at Rs.2,00,63,640/-, being the market value based on valuation report prepared by M/s S.B.Shuttari, Chartered Engineer and Government Registered Valuer and after indexation, the effective cost reduced from sale consideration was Rs.12,68,02,205/-. According to the department, the assessee has wrongly taken market value as on 01.04.1981 instead of considering cost of acquisition reflected from its books of accounts. The department believed that the income to the extent of

Rs.12,56,63,427/- has escaped within the meaning of Section 147 of the Income Tax Act.

8 The petitioner tendered an objection to the notice containing reasons communicated by the respondent – department; and called upon the Income Tax Department to withdraw the notice. Respondent – Income Tax Department, however, under the order passed by the Assistant Commissioner of Income Tax, Circle-II, Aurangabad, rejected the objection and confirmed the notice.

9 While rejecting the objection, it is recorded by the Respondent – department that the valuation report submitted by the assessee, prepared by Registered Valuer S.B.Shuttari, is not correct and lawful. According to the Department, there are guidelines for valuation of immovable properties, issued in the year 2009 by the Directorate of Income Tax, New Delhi, which must be followed by the approved valuer and Income Tax Department. Even the basis for showing higher valuation, being the report of the approved valuer, is also not free from flaws and lacunae. Respondent – department, therefore, held that the assessee cannot take umbrage of Section 55(2)(b)(ii) of the Act. According to Respondent, fair market value shown by the petitioner – assessee, on the basis of report of the valuer, cannot be accepted and the valuation arrived at by the valuer is 100% higher than the actual market rate.

10 Relying upon Section 49 (1) of the Income Tax Act, it is contended by the petitioner that the cost of acquisition of the asset

shall be deemed to be the cost for which previous owner of the property has acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee, as the case may be.

11 Clause (ii) of sub section (2)(b) of Section 55 provides that:

Section 55 (2) (b) (ii): where the capital asset became property of the assessee by any of the modes specified in sub-section (1) of section 49, and the capital asset became the property of the previous owner before the 1st day of April 1981, means the cost of the capital asset to the previous owner or the fair market value of the asset on the 1st day of April, 1981, at the option of the assessee.

12 It is contended by learned Counsel appearing for the petitioner that it is the option of the assessee either to compute capital gain based upon market value of the asset as on 01.04.1981 and it may not be essential for the assessee to consider the capital cost incurred by the previous owner or fair market value of the asset.

13 The petitioner contends that recording of reasons is the basic thing and no notice can be entertained founded upon extraneous ground not communicated to the petitioner under the notice or in the disclosure made by the department after receiving notice by the assessee calling upon the department to supply reasons for arriving at the conclusion and before directing the petitioner to file return of income.

14 The petitioner, placing reliance on the judgment of Division Bench of this Court in the matter of **Hindustan Lever Ltd. Vs. R.B. Wadkar & others**, reported in 2004 (3) Mh.L.J. 517, contends that it is necessary for the Assessing Officer to form his opinion and put it on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. In paragraph 20 of the judgment, it is observed by the Division Bench of this Court, thus:

“20 The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the

Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

15 Similarly, in the matter of **Sabharwal Properties Industries Pvt. Ltd. & others Vs. Income Tax Officer**, reported in [2016] 382 ITR 547 Delhi, the Delhi High Court has quashed the notice and order passed by the Income Tax Officer on the ground that the notice issued under Section 148 does not disclose the grounds. It is recorded in the judgment that disclosure of reasons provide a live link to the formation of the belief that income had escaped assessment. Similar is the view taken in the matter of **Indivest Pte.Ltd. Vs. Additional Director of Income Tax, Mumbai**, reported in (2012) 250 CTR (Bom) 15.

16 In yet another decision rendered by the Division Bench of this Court in the matter of M/s Pransukhlal Brothers Vs.

Income Tax Officer – 16(3)(1) (**Writ Petition Lodging No.2124 of 2014, decided on 20th August, 2014**). It is observed that validity of reopening of an assessment can only be tested by the reasons recorded at the time of issuing the notice for reopening an assessment. These grounds for reopening of assessment can neither be substituted and/or supplemented. The reopening of assessment will either stand or fall only upon the reasons recorded before issuing the impugned notice.

17 It appears to be the contention of the department that since the petitioner has demonstrated book value of the property at Rs.1,80,000/- and has assessed income for several years by showing book value of the property, as specified above, the conduct of the petitioner, according to Respondent-department, amounts to estoppel and it would not be open for the petitioner to contend that he has a choice either to make computation on the basis of market value or on the basis of cost of the property to the previous owner. Reliance is placed on the judgment in the matter of **Chhaganlal Keshavlal Mehta Vs. Patel Narandas Haribhai**, reported in AIR 1982 SC 121.

18 Relying upon the judgment in the matter of **The Commissioner of Income Tax, West Bengal II, Calcutta Vs. M/s Naga Hills Tea Co.Ltd.**, reported in (1973) 4 SCC 200, it is contended by the petitioner, that if a provision of a Taxing Statute can be reasonably interpreted in two ways, that interpretation which is favourable to the assessee has got to be accepted and is a well accepted view of law.

19 The petitioner, placing reliance upon the judgment in the matter of **Commissioner of Income Tax Delhi Vs. Kelvinator of India Limited**, reported in (2010) 2 SCC 723, contends that with a view to prevent abuse, the expression, “reason to believe” has been introduced and the word “opinion” has been deleted by Circular No.549 dated 31.10.1989. The Assessing Officer must have reason to believe that there is escape of income and the conclusion, so reached and the formation of opinion, must be recorded in the order proposing to reopen the assessment in view of Section 147 of the Income Tax Act.

20 The petitioner, pointing out judgment in the matter of **Godrej Industries Ltd. Vs. B.S.Singh, Deputy Commissioner of Income-Tax and others**, reported in (2015) 377 ITR 1, contends that the sustainability of the reopening notice would be tested only on the basis of reason recorded at the time of issuing the notice. The reasons cannot be added to, deleted from or supplemented. Besides, when a notice for reassessment is challenged, the burden is on the Revenue to establish that the jurisdictional requirement stands satisfied.

21 In the instant matter, according to the petitioner, a new ground has been excavated by the department for supporting notice under Section 148 and in fact no such disclosure was made by the Assessing Officer while reason for his belief was supplied by the Income Tax Department.

22 Learned Counsel appearing for Respondent-Department has invited our attention to communication dated

03.11.2016 where under reasons for reopening of assessment under Section 148 of the Income Tax Act were communicated to the petitioner. It is the contention of the Respondent – department that the objection to the valuation report prepared by S.B.Shuttari, Chartered Engineer and Government Valuer, for the said land @ Rs.2,00,63,640/- has been recorded in the communication setting out reasons for reopening of assessment under Section 148 of the Income Tax Act by the Assistant Commissioner of Income Tax. Since there is already a disclosure in respect of disagreement of the department to the valuation report prepared by S.B.Shuttari, Chartered Engineer & Government Valuer, it is the reason supporting issuance of notice under Section 147 of the Act and there is no question of any new reason being introduced. The reason is already recorded in the order disclosing the reasons and as such, objection of the petitioner to the notice, does not deserve to be considered.

23 Learned Counsel appearing for the Respondent-Department is justified in referring to the provisions of Section 55(2)(b)(ii) of the Act that, where the capital asset became the property of the assessee by any of the modes specified in sub-section (1) of Section 49, and the capital asset became the property of the previous owner before 01.04.1981, it would be at the option of the assessee to compute the cost of capital asset to previous owner or the fair market value of the asset as on 01.04.1981.

24 According to the petitioner, the option has been exercised by the assessee and the market value of the property has been taken as a basis for computing capital gain by applying

indexation formula. The view adopted by the Respondent, that the petitioner shall have to compute capital gain on consideration of book value of the property i.e. cost to the previous owner at Rs.1,80,000/-, is opposed to the provisions of law. The petitioner has objected to the reasons for reopening assessment under Section 148 of the Income Tax Act supplied by the Assistant Commissioner of Income Tax by pointing out the legal position, as referred to above.

25 While turning down the objection, the Assistant Commissioner of Income Tax has also declined to accept the valuation made by the assessee on the basis of report of the Government approved valuer. It is recorded in the order that even the basis for showing higher valuation, being the report of approved valuer, is also not free from flaws and lacunae. It is recorded in the order that there are guidelines issued by the Directorate of Income Tax, New Delhi, for valuation of immovable properties, which must be followed by the approved valuer and the Income Tax Department. It is further recorded that guidelines of the year 2009 have not been adhered to while arriving at the conclusion regarding valuation of the property as on 01.04.1981. Since the valuation made by the approved valuer is not acceptable to the Respondent, the capital gain assessed by the assessee, on the basis of valuation of the property in the year 1981, also becomes unacceptable.

26 The petitioner contends that ground of erroneous valuation has been introduced for the first time in the order and there is no notice to the petitioner in that regard. It is basically the

contention of the petitioner that there is no reference to erroneous valuation by the approved valuer in the Statement of Reasons for reopening assessment, provided by the department. The contention does not appear to be correct. In the penultimate paragraph of the reasons for reopening of assessment supplied by the Respondent on 03.11.2016, it is recorded thus:

“In view of the above, the assessee has wrongly taken the cost of acquisition of the said land at Rs.2,00,63,640/-, being the market value based on valuation report prepared by the S.B.Shuttari, Chartered Engineer Govt. registered valuer and after indexation the effective cost reduced from sale consideration was Rs.12,68,02,205/- giving rise to LTCG of Rs.3,31,97,795/-.”

27 There is a clearcut mention in the reasons that the assessee has wrongly taken cost of the land, being the market value based on the valuation report of S.B.Shuttari, Chartered Engineer & Government approved valuer. It is, thus, not open for the petitioner to contend that the assessee/petitioner was taken by surprise and that the notice has been confirmed or that the order rejecting the objection, raised by the petitioner, records extraneous consideration. In fact, the reasons recorded in the order while rejecting the objection raised by the petitioner cannot be said to be extraneous since the reference in respect of the grounds does appear in the reasons for reopening assessment, communicated on 03.11.2016.

28 Learned Counsel appearing for the Respondent, placing reliance on the judgment in the matter of **Majinder Singh**

Kang Vs. Commissioner of Income-tax, reported in (2012) 344 ITR 358 (Punjab & Haryana), contends that a plain reading of *Explanation 3* to Section 147 clearly depicts that the Assessing Officer has power to make additions even on the ground on which reassessment notice might not have been issued during reassessment proceedings, but he arrives at a conclusion that such other income has escaped assessment which comes to his notice during course of proceedings for reassessment under section 148. The provision nowhere postulates or contemplates that it is only when there is some addition on the ground on which reassessment had been initiated, that the Assessing Officer can make additions on any other ground on the basis of which income may have escaped assessment.

29 In the instant matter, such contingency has not arisen and no such conclusion in respect of some other escaped income has been noticed by the Assessing Officer during the course of proceeding for re-assessment. The proposition laid down is besides the point. The judgment of the Hon'ble Supreme Court in the matter of **Assistant Commissioner of Income Tax Vs. Rajesh Zaveri Stock Brokers Pvt.Ltd.**, (Appeal (civil) No.2830 of 2007, decided on 23.05.2007, is relied upon. In paragraph no.16 of the judgment, it is recorded thus:

“16 Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income

had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. Vs. ITO* [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceedings is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. Pvt. Ltd.* [1996 (217) ITR 597 (SC)]; *Raymond Woollen Mills Ltd. v. ITO* [1999 (236) ITR 34 (SC)].”

30 Learned Counsel appearing for the Respondent also contends that it would not be permissible for the petitioner to raise challenge to the order passed by the Assessing Officer under Section 148 of the Act in exercise of jurisdiction under Article 226 of the Constitution when efficacious remedy is available to the assessee under the Act. In the matter of **Commissioner of Income Tax & others Vs. Chhabil Dass Agrawal** (Civil Appeal No.6704 of 2013, decided by the Hon'ble Supreme Court on

08.08.2013, it is observed in paragraphs 20 and 21 of the judgment, thus:

“20 In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Co. Vs. State of Haryana*, (1985) 3 SCC 267, this Court has noticed that if an appeal is from “Caesar to Caesar's wife” the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case.

21 In the light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon.”

31 Similar proposition has been laid down in the matter of
Income Tax Officer, Calcutta Vs. M/s Selected Darulband Coal

Co., reported in AIR 1995 SC 1934. Our attention is also invited to the judgment of the Hon'ble Supreme Court in the matter of **Raymond Woollen Mills Ltd. Vs. Income-Tax Officer and others**, reported in (1999) 236 CTR SC 34. In paragraph 3 of the judgment, it is recorded thus:

“3 In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-Tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.”

32 On the question of maintainability of the petition, the petitioner has relied upon the judgment in the matter of **Jeans Knit Pvt. Ltd., Bangalore Vs. The Deputy Commissioner of Income Tax, Bangalore & others**, reported in (2017) 390 ITR 10 (2016 SCC OnLine SC 1536) and **Ajanta Pharma Ltd., Mumbai Vs. Assistant Commissioner of Income Tax**, reported in [2003(5)

Mh.L.J. 352].

33 Even holding the challenge to be maintainable, since it is observed by us that the objection raised by the petitioner is devoid of substance and that there is very much reference to the objection in the communication indicating “reasons for belief”, issued by Respondent-Department and that no new material or ground has been introduced in the final order and that the petitioner has not been taken to surprise, we do not find any reason to cause interference in the instant matter.

34 Writ Petition is devoid of substance, hence stands dismissed.

Rule discharged. There shall be no order as to costs.

SMT.VIBHA KANKANWADI
JUDGE

R.M.BORDE
JUDGE

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