

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (T) No. 346 of 2017**

Maruti Clean Coal & Power Ltd. Ward No.42, Building No.14, Civil Lines, Near Income Tax Colony, Raipur-492001, Chhattisgarh.

---- **Petitioner**

Versus

Assistant Commissioner of Income Tax, Circle 1(1), Civil Lines, Raipur, Chhattisgarh.

---- **Respondent**

For Petitioner	:	Shri Salil Kapoor, Ms. Soumya Singh and Shri Amrito Das, Advocates.
For respondent	:	Smt. Naushina Afrin Ali, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy

Judgment

Reserved on 12/12/2017

Delivered on 03/01/2018

1. With the consent of the parties the matter was heard at motion stage.
2. The present petition under Article 226 of the Constitution of India has been filed assailing the notice dated 28.03.2017 issued under Section 148 of the Income Tax Act, 1961 (in short, the Act) and also the order dated 25.09.2017 whereby the objections preferred by the petitioner questioning the issuance of notice dated 28.03.2017 was rejected.
3. Brief facts relevant for adjudication of the present dispute is that, for the assessment year 2010-11 the petitioner had filed its return on 14.10.2010. Subsequently a notice under Section 143 (2) of the Act was issued to the petitioner by the income tax department on

12.09.2011 and finally the Assessing Officer after completing the assessment passed an assessment order under Section 143 (3) of the Act on 21.03.2013. However, after 4 years time, the income tax department had issued a notice under Section 148 of the Act for re-opening of the assessment proceeding for the year 2010-11. The petitioner filed reply to the said notice and also requested for supply of copy of reasons to believe recorded for issuance of the notice under Section 148 of the Act. On 03.08.2017 the petitioner was served upon a notice under Section 142 (1) of the Act giving reasons to believe for re-opening assessment along with sanction for re-opening obtained under Section 151 of the Act. That, on 30.08.2017 the petitioner filed an objection against issuance of notice under Section 148 of the Act and the reasons recorded. This objection was finally rejected vide impugned order dated 25.09.2017 leading to filing of present petition.

4. The contention of the petitioner is that, firstly the issuance of notice under Section 148 was per se illegal as the same was issued beyond the prescribed period of limitation under the Act i.e. of four years. Secondly, the order rejecting the objections dealt with certain issues which were not the reasons assigned in the order dated 03.08.2017 whereby the reasons to believe for re-opening assessment has been disclosed. Thirdly, the reasons assigned are entirely baseless and that there was absolutely no tangible material available with the department for re-opening the assessment. According to the petitioner, under no circumstances could the authorities have issued

a notice under Section 148 of the Act beyond the period of four years as the requirement under the law is that notice under Section 148 of the Act can be issued only within four years time from the end of the relevant assessment year.

5. It was further the contention of the petitioner by referring document dated 03.08.2017 which was a document whereby the reasons has been recorded and the reason to believe that there was an escaped assessment, submitted that the findings or the reasons given are baseless and incorrect. He further submitted that it is not a case where it was not disclosed to the department while return of the previous years were being submitted and that there was absolutely no new material which came to the notice of the department with which they could have issued notice under Section 148 of the Act. Further, there does not seem to have been any specific or strong case made out by the department for re-opening the assessment.
6. According to the petitioner, the reason to believe disclosed by the Assessing Authority was in respect of income of Rs.2,14,79,440/- under the head of income from other sources for the year 2010-11 which according to the department, the petitioner had not disclosed while filing the return, and therefore, the same was treated as escaped assessment.
7. The petitioner tried to bring to the notice of the court that the department has totally failed to consider the previous years return which would reveal that there was no change in the share capital of the company for the year 2009-10 and also 2010-11 and the

petitioner had subsequently given this information of nil rise in the capital during the year while submitting its return. All these facts have not been scrutinized by the department and in a superficial manner has issued a notice under Section 148 of the Act and also in a similar manner has rejected the objections which the petitioner had raised. He further states that there was no tangible material available with the department which they have collected in the course of survey which was conducted on 26.09.2016.

8. Counsel for the Department opposing the petition submits that the petition is premature at this stage and is not maintainable for the reason that the petitioner has an alternative efficacious remedy of preferring an appeal against the impugned order. It is the contention of the counsel for the Department that the petition on merits also is not worth entertaining for the reason that the impugned order under challenge i.e. the rejection of the objection filed by the petitioner and the issuance of notice under Section 148 of the Income Tax Act are proper, legal and justified. That perusal of the order rejecting the objection would clearly show that it is a reasoned order objectively dealing with all the issues which were raised by the petitioner and since it has been done in accordance with the provisions of law, there is no scope for any judicial interference at this stage and the petitioner may prefer an appeal as is envisaged under the provisions of the Income Tax Act.
9. So far as the issue of limitation is concerned, counsel for the Department referring to Section 151 of Income Tax Act submits that

proper sanction from the higher Authorities has been taken by the Department as is required and since the sanction as is required under Section 151 of the Income Tax Act has been obtained from the Principal Commissioner, Income Tax, the issue of limitation of 4 years as is required for issuance of notice under Section 148 of the Act would not come into play. Counsel for the department contended that it is only a notice under Section 148 of the Act which has been issued by the authorities, the petitioner as such can still enter appearance before the authorities and can make all necessary submissions. According to the Department, it is a case where the ground which necessitated the issuance of notice under Section 148 was a survey which was conducted under Section 133A in the premises of the petitioner in March, 2016 where it was found that there was a huge amount of income which had escaped assessment as it was not disclosed by the petitioner while submitting his return for the assessment year 2010-11. Since it was an escaped assessment, the Department with the sanction of the Principal Commissioner had all the power and authority for issuance of the notice under Section 148 of the Act for reopening the assessment. According to the Department, it is a case where the petitioner himself had deliberately not disclosed the secured loan that it had received from other sources during the said period. According to the Department, it was a case where new materials were found in the course of the survey conducted under Section 133A. Since it was a case of new materials, it cannot be presumed that the reopening of assessment was on a change of opinion and for this reason also, the petition deserves to

be rejected.

10. So far as the merits of the case is concerned, that has to be dealt with by the statutory authority prescribed under the Act which in the instant case would be the appellate authority. It was contended by the Income Tax Department that what is required under Section 151 is only a reason to believe that is to say that the Commissioner only needs to be satisfied on the reasons recorded by the assessing officer and it does not require concrete proof to be produced before the Commissioner while granting sanction.
11. So far as the judgments which have been relied upon by the petitioner is concerned, it was contended by the counsel for the Department that the said judgments are all distinguishable on their facts itself and that the facts of the instant case cannot be equated and compared with those cases. In the instant case, there were certain substantial materials detected during the course of survey whereby it was found that there was a huge amount income undisclosed by the petitioner. Thus, it had escaped assessment. Such is not the facts of the cases referred to by the counsel for the petitioner and therefore those judgments are distinguishable on their facts. Counsel for the Department, in turn, relied upon the two decisions of the Bombay High Courts. In addition the Department also relied upon the decision of the Supreme Court in the case of ***“GKN DRIVESHAFTS (INDIA) LTD. VS. INCOME TAX OFFICER AND OTHERS”*** reported in ***(2003) 1 SCC 72*** and in the case of ***“COMMISSIONER OF INCOME TAX AND OTHERS VS. CHHABIL***

DASS AGARWAL” reported in **(2014) 1 SCC 603**. Thus, prayed for dismissal of the petition at this stage.

12. Having heard the discussions made by either of the parties we proceed to delve with the issue of the limitation first, it is noteworthy to mention at this juncture the provision of Section 149, which debars from issuance of notice under Section 148 after 4 years have lapsed from the end of the relevant assessment year. Likewise, it is also pertinent to take note of Section 151 which envisages that no notice under Section 148 can be issued, unless the Commissioner is satisfied on the reasons recorded by the Assessing officer. At the same time, the proviso to Section 151 also stipulates that if for any reason the notice under Section 148 is being issued after the expiry of 4 years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or the Commissioner is satisfied on the reasons recorded by the Assessing officer, that it is a fit case for the issuance of such a notice. Thus the proviso to Section 151 clearly envisages the requirement of reasons to be specifically assigned showing the circumstances and grounds which compels or which led to the Assessing officer for the issuance of the notice under Section 148 beyond the period of 4 years.
13. The fact that it has been inserted by a proviso so far as the requirement of special reasons to be recorded by the Assessing officer for the issuance of a notice under Section 148 beyond the period of 4 years, means, it is in addition to what is envisaged and required under the substantive provision of Section 151. With this

statutory provision, if we look into the notice under Section 148 which has been issued as Annexure P/5 with the writ petition. For ready reference, the contents of notice under Section 148 is reproduced herein as under:-

“Whereas I have reasons to believe that your Income chargeable to Tax for the Assessment Year 2010-11 has escaped Assessment within the meaning of section 147 of the Income Tax Act, 1961.

I, therefore, propose to assess/re-assess the income/loss for the said Assessment Year and I hereby require you to deliver to me within 30 days from the service of this notice, a return in the prescribed form for the said Assessment Year.

This notice is being issued after obtaining the necessary satisfaction of the additional Commissioner/ Commissioner of Income Tax/ Chief Commissioner of Income Tax.”

14. Further, in reference to the demand made by the petitioner for providing the reasons to believe for issuance of notice under Section 148, the Income Tax Authorities vide their response dated 03.08.2017 intimated the petitioner the reasons to belief and vide the said document it had been specifically intimated by the department that the Income Tax assessment for the assessment year 2010-11 was completed on 21.03.2013. It was submitted that a survey was conducted under Section 133A on 26.09.2016 and where it was found that there was some fresh unsecured loans of Rs.11,20,07,504/- from different body corporate during the relevant year and so far as the reasons to believe is concerned, the relevant endorsement by the Assessing officer is reproduced herein as under:-

“Keeping-in-view the above facts and materials available on record and also in order to lift the corporate veil, I

have formed an honest belief that the income of Rs.2,14,79,440/- on account of bogus credit should have been chargeable to tax under the head "Income from Other Sources" for the relevant A.Y. 2010-11 in the hands of the assessee namely, Maruti Clean Coal & Power Ltd. But has, in fact, escaped assessment. Thus, the assessee has failed to disclose entirely all material facts necessary for assessment. In order to rope into the escaped income and to assess such income, recourse to the provisions of section 148 to 153 is to be taken subject to approval from Hon'ble Pr. CIT-1, Raipur."

15. Now, when we look at the endorsement made by the Commissioner granting sanction under Section 151, the endorsement made by the Commissioner while granting sanction reads as under:-

"Yes, I am satisfied that this is a fit case for reopening under expl. 2(c) of Section 147 of the Act. Accordingly, sanction is given u/s. 151(1) of the Act for issue of notice u/s. 148 of the Act."

16. It would clearly reveal that there does not seem to have been any reference while the Assessment officer was recording the reasons, so far as reopening of the assessment being after 4 years neither does it anywhere reflect that specific sanction as is required under the proviso to Section 151(1) has been obtained for issuance of notice under Section 148. Admittedly, when the assessment was complete on 21.03.2013 and the notice under Section 148 being issued on 28.03.2017, it apparently is beyond 4 years period as is required under Section 149.
17. So far as the two Bombay High Court's judgments cited by the department, both these judgments were cases where notice under Section 148 was issued within the prescribed period of 4 years and it was this which was taken note of by the Bombay High Court while deciding the judgment in favour of the department.

18. The Bombay High Court in the case of ***“Hindustan Liver of India vs. R.B. Wadkar” (2004) 268 ITR 332***, in paragraph 29 while deciding the case in favour of assessee has held as under:-

“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. xxxxxxxxxxxxxxxx. 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.”

19. Likewise, the Delhi High Court in the case of ***“Principal Commissioner Income-tax-6 vs. Meenakshi Overseas (P.) Ltd.” (2017) 82 taxmann.com 300 (Delhi)*** in paragraph No.24 has held as under:-

“The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons.”

20. A similar view has again been taken by the Delhi High Court in the case of ***“Sabh Infrastructure Ltd. vs. Assistant Commissioner Income Tax” WPC No. 1357/2016, decided on 25.09.2017, 398 ITR 198 Delhi H.C.***
21. When we refer to Section 151(1) the proviso therein, specifically deals with the Chief Commissioner or the Commissioner to be satisfied on the reasons recorded by the Assessing officer for

issuance of a notice after the expiry of 4 years from the end of the relevant assessment year. It is this what is missing in the instant case. There can be no dispute as regards the requirement of Act to be strictly complied with. In the absence of the non-compliance of the statutory requirement as is required for issuance of a notice under Section 148, particularly when it is being issued beyond the period of 4 years, then the notice and the proceedings initiated stands vitiated for want of specific sanction as is required under the proviso to Section 151(1).

22. Since from the facts, it is evidently clear that the condition precedent necessary under Section 151(1) for issuance of a notice under Section 148 is not available or is reflected that from the proceedings, it is then that the principles laid down by the Constitutional Bench of Hon'ble Supreme Court in the case of "***Calcutta Discount Company Ltd. vs. Income Tax Officer***" ***AIR 1961 S.C. 372*** other similar judgments come into play envisaging the writ Courts having the power to exercise the power of issuance of writ, prohibiting the Income Tax officer from the proceedings with reassessment when patently it appears that the proceedings are in contravention to the provisions of the Income Tax Act
23. So far as the writ Court having jurisdiction in questioning the reassessment proceedings initiated under Section 148 is concerned, the said issue has already been dealt with elaborately by this Court in ***(2017) 397 ITR 197 (Chhattisgarh)*** in the case of "***Kamla Ojha vs. Income Tax Officer (One)***". The said decision again was based upon

the recent decision of the Hon'ble Supreme Court in the case of ***“Jeans Knit (P) Ltd. Bangalore vs. Deputy Commissioner, Income Tax, Bangalore” MANU/SC/1691/2016***, wherein the Hon'ble Supreme Court taking note of the decision of the Hon'ble Supreme Court in the case of ***Chhabil Das Agrawal's*** case has held that the writ petitions are maintainable questioning the issuance of notice under Section 148, if prima facie it is established that initiation is contrary to the provisions of the Income Tax Act. Thus, these two authoritative decisions of the Hon'ble Supreme Court in the case of “Calcutta Discount” (supra) as also in the case of “Jeans Knit” (supra) clearly negates the preliminary objections raised by the Income Tax Department.

24. Since this Court finds that issuance of notice under Section 148 at the first instance itself was without a proper sanction as is required under the proviso to Section 151(1) of the Income Tax Act. We need not go into the veracity and merits of the case any further at this stage. Leaving open the issue on merits, the present notice under Section 148 stands set-aside/quashed only on account of non-fulfillment of the condition precedent as is envisaged under the of the proviso to section 151(1) of the Income Tax Act. The writ petition stands allowed only on this ground alone.
25. As a result, the impugned notice under Section 148 stands set-aside /quashed consequence to follow.

Sd/-
(P. Sam Koshy)
Judge