

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION NOS.40706 AND 40708 OF 2017

W.P.NO.40706 OF 2017:

Anne Venkata Vishnu Vara Prasad ... Petitioner

Vs.

The Assistant Commissioner of Income-Tax,
Circle-2(1), Visakhapatnam ... Respondent

W.P.NO.40708 OF 2017:

Yelamanchili Venkata Ramana ... Petitioner

Vs.

The Assistant Commissioner of Income-Tax,
Circle-2(1), Visakhapatnam ... Respondent

DATE OF JUDGMENT PRONOUNCEMENT: 23rd MARCH, 2018

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO**

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|--|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the judgment? | Yes/No |
| 2. Whether copies of the judgment may be marked to Law Reporters/Journals | Yes/No |
| 3. Whether His Lordship wishes to see the fair copy of the judgment? | Yes/No |

SANJAY KUMAR, J

P.KESHA RAO, J

***THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO
+ WRIT PETITION NOS.40706 AND 40708 OF 2017**

% DATED 23rd MARCH, 2018

W.P.NO.40706 OF 2017:

# Anne Venkata Vishnu Vara Prasad	... Petitioner
Vs.	
\$ The Assistant Commissioner of Income-Tax, Circle-2(1), Visakhapatnam	... Respondent

W.P.NO.40708 OF 2017:

# Yelamanchili Venkata Ramana	... Petitioner
Vs.	
\$ The Assistant Commissioner of Income-Tax, Circle-2(1), Visakhapatnam	... Respondent

<Gist:

>Head Note:

! Counsel for petitioner	: Sri K.V.Simhadri
^Counsel for respondent	: Sri K.Raji Reddy

? CASES REFERRED:

1. (2012) 250 CTR 0119 : (2012) 70 DTR 0204
2. (2012) 246 CTR 0292 : (2012) 65 DTR 0249
3. (2004) 190 CTR (Bom) 166 : (2004) 268 ITR 332 (Bom)
4. (2015) 377 ITR 0001 (Bom) : (2015) 235 Taxman 0025 (Bombay)
5. Civil Misc. Writ Petition (Tax) No.1492 of 2007 dated 26.09.2014 on the file of Allahabad High Court.
6. 363 ITR 300
7. Special Civil Application No.3955 of 2014 dated 31.03.2014 on the file of Gujarat High Court.

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAHA RAO
WRIT PETITION NOS.40706 AND 40708 OF 2017**

COMMON ORDER
(*Per Sri Justice Sanjay Kumar*)

Notices issued to two assesseees under Section 148 of the Income-tax Act, 1961 (*for brevity*, 'the Act of 1961'), proposing to reopen their assessments for the assessment year 2010-11 are subjected to challenge by them in these writ petitions.

By interim orders dated 04.12.2017 passed in both cases, this Court restrained the Income-tax authorities from proceeding further with the reassessment of the petitioners for the said assessment year.

A rather long-winded history precedes the issuance of the impugned notices. Both the writ petitioners are employees of M/s.Vijay Nirman Company Limited, Visakhapatnam. The petitioner in W.P.No.40706 of 2017, Anne Venkata Vishnu Vara Prasad (*hereinafter*, 'Prasad'), filed his return of income for the assessment year 2010-11 declaring a total income of Rs.49,69,760/-, while the petitioner in W.P.No.40708 of 2017, Yelamanchili Venkata Ramana (*hereinafter*, 'Ramana'), declared a total income of Rs.54,30,170/-. Both of them declared long term capital gains arising out of transfer of their shares in M/s.Vijay Nirman Company Private Limited, as it then was, treating the date of transfer of these unlisted shares as 24.11.2009, the day on which they filed declarations in Form No.7B with the purchaser company. The sale consideration declared by Prasad for these shares was Rs.1,99,98,613/-, while Ramana declared a sale consideration of Rs.99,99,305/-. Both of them invested part of the sale proceeds in National Highway Authority of India Bonds. Prasad invested Rs.50,00,000/- in these bonds on

04.05.2010, while Ramana invested Rs.15,00,000/- on 29.03.2010. Prasad also purchased a house property through a registered sale deed on 31.10.2011 for Rs.1,50,00,000/-. Prasad claimed deductions/exemptions in respect of the above investments of Rs.50,00,000/- in bonds, under Section 54EC of the Act of 1961, and Rs.1,50,00,000/- in house property, under Section 54F of the Act of 1961, in his return of income. Ramana claimed a deduction/exemption on the investment of Rs.15,00,000/- in bonds, under Section 54EC of the Act of 1961, in his return of income.

Their claims were accepted and Assessment Orders dated 16.01.2013 (*re* Prasad) and 28.03.2013 (*re* Ramana) were passed, duly accepting their returns. These Assessment Orders were passed under Section 143(3) of the Act of 1961.

However, the Commissioner of Income-tax at Visakhapatnam *suo motu* exercised power under Section 263 of the Act of 1961 and issued show-cause notices to both the petitioners on 19.06.2014. Revisionary power was sought to be exercised in relation to the deductions/exemptions claimed by the petitioners in the context of their capital gains arising out of the sale of shares. In the case of Prasad, the Commissioner observed that under Section 54EC of the Act of 1961, the investment had to be made within six months, while under Section 54F thereof, the investment had to be made in house property within two years, from the date of transfer of the asset so as to entitle an assessee to claim deductions/exemptions. Opining that the investments made by Prasad in bonds and house property were beyond this stipulated time, the Commissioner called upon him to show cause as to how he was entitled to claim deductions under these provisions. In the case of Ramana, the Commissioner raised the

same objection as was raised in the case of Prasad in relation to the investment in bonds and the deduction claimed under Section 54EC of the Act of 1961. The Commissioner opined that the date of receipt of monies by these assesseees towards sale consideration for their shares was the conclusive factor which should be taken into account to determine the time limits for the investments and taken from such date, these assesseees were not entitled to the deductions/exemptions claimed by them. The Commissioner therefore concluded that both the Assessment Orders were erroneous and prejudicial to the interest of the Revenue. By order dated 20.03.2015 in the case of Prasad and by order dated 25.03.2015 in the case of Ramana, the Commissioner set aside their Assessment Orders and directed the Assessing Officer (AO) to redo their assessments, disallowing their claims as to deductions/exemptions in relation to capital gains.

Aggrieved by these orders passed by the Commissioner of Income-tax-1, Visakhapatnam, under Section 263 of the Act of 1961, the petitioners preferred appeals before the Income-tax Appellate Tribunal, Visakhapatnam (*for brevity*, 'the Appellate Tribunal'). ITA No.177/Vizag/2015 was filed by Ramana while ITA No.178/Vizag/2015 was filed by Prasad. During the pendency of these appeals, the Income-tax authorities filed additional evidence before the Appellate Tribunal, including Investment Agreement dated 12.08.2009. By common order dated 09.12.2016, the Appellate Tribunal allowed the appeals and set aside the orders of the Commissioner dated 20.03.2015 and 25.03.2015 passed in exercise of revisionary power under Section 263 of the Act of 1961. The Appellate Tribunal opined that the actual transfer of the shares took place on 24.11.2009 when the petitioners filed valid share transfer

forms in Form No.7B before the purchaser company. The date of receipt of the monies therefor, i.e., 10.09.2009, was held to be irrelevant for this purpose. Taken from the date of transfer, *viz.*, 24.11.2009, the investments made by both the petitioners, on the strength of which they had claimed deductions, were found to be well within the time stipulations in Sections 54EC and 54F of the Act of 1961. The Commissioner was held to be incorrect in assuming jurisdiction under Section 263 of the Act of 1961 as no prejudice was caused to the Revenue by allowing the assessee such deductions/exemptions. The Appellate Tribunal accordingly restored the original Assessment Orders passed in both the cases.

It appears that pursuant to the earlier orders passed by the Commissioner of Income-tax-1, Visakhapatnam, in exercise of powers under Section 263 of the Act of 1961, directing the AO to redo the assessments, orders were passed afresh by the said AO under Section 143(3) read with Section 263 of the Act of 1961. Assessment Order dated 17.12.2015 was passed in the case of Prasad, while Assessment Order dated 06.01.2016 pertained to Ramana. The AO, for the first time, opined that the date of the Investment Agreement entered into by the purchaser company with the petitioners, *viz.*, 12.08.2009, would be the date of transfer for the purpose of claiming deductions under the Act of 1961. Significantly, this was not what the Commissioner had stated in his revisionary orders. Aggrieved by these fresh Assessment Orders, both the petitioners had preferred appeals before the Commissioner of Income-tax (Appeals).

While so, the AO issued the impugned notices under Section 148 of the Act of 1961 to both the petitioners on 31.03.2017 calling upon them to submit returns of their income for the assessment year

2010-11 in the prescribed form, as she had reason to believe that income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act of 1961. Both the petitioners requested the AO to furnish reasons for reopening the assessment along with the approval obtained from the competent authority. The AO supplied reasons, as requested, under letter dated 22.09.2017 addressed to Prasad and letter dated 11.10.2017 addressed to Ramana. Therein, she stated that third party enquiries were conducted and it was found that the petitioners had sold their shares based on the Investment Agreement dated 12.08.2009. She further stated that the transfer of shares took place on the date of execution of this Investment Agreement within the meaning of Section 2(47) of the Act of 1961 and therefore, the investments made by the assesseees to claim exemptions were beyond the stipulated time in both cases. She concluded that in view of this new found evidence, she had reason to believe that income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act of 1961. Both the petitioners thereupon submitted detailed objections. However, the AO addressed letters dated 17.11.2017 to both of them rejecting their objections and directing them to co-operate in the reassessment proceedings. Therein, she again reiterated that new information in the form of the Investment Agreement dated 12.08.2009 had come to light, which was not available at any time during the original assessment proceedings or during the proceedings under Section 263 of the Act of 1961. She opined that the date of the said agreement would be the date of transfer, which was not considered earlier; that the date of the Investment Agreement, being the date of actual transfer, was not one of the questions for

adjudication brought before the Appellate Tribunal and the common order dated 09.12.2016 of the Appellate Tribunal was silent on the issue of considering the date of the Investment Agreement as the date of transfer, as it had only held that the date of receipt of monies was not the date of actual transfer.

At this stage, both the petitioners filed these writ petitions.

Sri K.V.Simhadri, learned counsel for the petitioners, would inform us that the common order dated 09.12.2016 passed by the Appellate Tribunal in ITA Nos.177 and 178 of 2015 was subjected to appeal by the Revenue, under Section 260A of the Act of 1961, before this Court. ITTA No.742 of 2017 pertained to ITA No.178 of 2015 relating to Prasad, while ITTA No.751 of 2017 arose out of ITA No.177 of 2015 relating to Ramana.

It may be noted that one of the substantial questions of law framed by the Revenue in the appeals reads as under:

i) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in law in holding that in the present case, the effective date of transfer of shares for the purpose of sec. 45 of the IT Act is 24.11.2009 ignoring and not appreciating that the 'transfer' as envisaged u/s 2(47) had taken place on the date of execution of the investment agreement i.e. on 12.08.2009 and this is the date material for reckoning the time available for making specified investments and deciding the admissibility of deduction u/s 54 EC and sec. 54F?'

By order dated 29.11.2017 passed in ITTA No.742 of 2017, a Division Bench of this Court dismissed the said appeal. The Division Bench opined that in the absence of any specific provision which determined the actual date of transfer, the view taken by the AO that the date on which declarations in Form No.7B were signed by both

parties and presented to the purchaser company is the date of effective transfer is a plausible view. The Bench therefore concluded that the Commissioner ought not to have exercised revisional jurisdiction under Section 263 of the Act of 1961. The contention of the Revenue that as the Investment Agreement was entered on 12.08.2009, the shares were deemed to have been sold on that day was also considered in Para 4 of the order of the Division Bench. Thereafter, when ITTA No.751 of 2017 came up for admission on 05.12.2017, the very same Division Bench was informed by Sri K.Raji Reddy, learned senior standing counsel for the Revenue, that ITTA No.742 of 2017 filed against the same common order had already been dismissed on 29.11.2017. The Division Bench accordingly dismissed ITTA No.751 of 2017 also.

The present Assistant Commissioner of Income-tax, Circle-2(1), Visakhapatnam, filed counters in both these writ petitions. Therein, she claimed that the issue relating to date of transfer of the shares was not adjudicated by the Appellate Tribunal in the proper perspective in the light of CBDT Circular No.704 dated 28.04.1995. According to her, neither of the petitioners made full and true disclosure of the facts germane to the date of transfer of the shares. She alleged that while claiming deductions/exemptions, they suppressed the Investment Agreement dated 12.08.2009. She stated that this new information which was submitted as additional evidence before the Appellate Tribunal was not available earlier, either during the original assessment proceedings or during the revisionary proceedings under Section 263 of the Act of 1961, and therefore, the relevance of this Agreement was not adjudicated by the Appellate Tribunal in the context of the actual date of transfer. She

relied upon CBDT Circular No.704 dated 28.04.1995 which states to the effect that when transactions take place directly between the parties and not through stock exchanges, the date of the contract of sale as declared by the parties shall be treated as the date of transfer, provided it is followed by actual delivery of shares and the transfer deeds. She pointed out that though the Appellate Tribunal made a passing reference to this Circular, it did not discuss its applicability to the cases on hand. She asserted that the Investment Agreement constituted fresh tangible evidence which gave reason to believe that income chargeable to tax had escaped assessment within the meaning of Section 147 of the Act of 1961. She claimed that as the petitioners had willfully suppressed facts and there was failure on their part in disclosing all the material facts, the notices under Section 148 of the Act of 1961 were issued after obtaining prior sanction of the Principal Commissioner, Visakhapatnam-1.

Both the petitioners filed reply affidavits rebutting the aforestated counter averments. Therein, they reiterated that the common order dated 09.12.2016 passed by the Appellate Tribunal was confirmed by this Court in ITTA Nos.742 and 751 of 2017 and pointed out that the AO had not brought out this fact in her counter-affidavits, which amounted to suppression by her. They asserted that in terms of Section 147 of the Act of 1961, the reopening of their assessments was without jurisdiction as the subject had already been dealt with in appeal. They asserted that the reopening was sought to be done beyond six years from the date of the original assessment and was therefore barred by limitation. They contended that the issue which had attained finality by dismissal of the ITTAs could not be reopened. They asserted that the Investment Agreement

was part of the additional evidence produced before the Appellate Tribunal by the Revenue itself and, therefore, it could not be said that they had failed to disclose the same. They pointed out that CBDT Circular No.704 dated 28.04.1995 was also relied upon by the Revenue in the appeals under Section 260A of the Act of 1961 and therefore, it could not be raised once again.

It is surprising to note that having specifically referred to the Appellate Tribunal's common order dated 09.12.2016 in her counters filed on 19.01.2018, the AO said nothing whatsoever about dismissal of the appeals preferred by the Revenue, against the said common order, on 29.11.2017 and 05.12.2017 respectively. It is difficult to believe that the AO, being the Assistant Commissioner of Income-tax Circle-2(1), Visakhapatnam, would have been unaware of the filing of these appeals by the Principal Commissioner of Income-tax-1, Visakhapatnam, and of their dismissal, well before the filing of her counters. Further, the contentions of the AO therein that the Appellate Tribunal did not consider the issue in the proper perspective and that Circular No.704 dated 28.04.1995 was also not considered properly no longer survive for consideration as the Revenue emerged unsuccessful in its appeals against the said common order dated 09.12.2016. It is indeed surprising that the Revenue resorted to suppression of this material fact when one of the main issues raised in these writ petitions and addressed at length in the counters was the common order dated 09.12.2016 passed by the Appellate Tribunal in favour of the petitioners. The Revenue would be well advised not to resort to such dubious tactics in future.

The crux of the controversy lies in the deductions/exemptions claimed by the petitioners in relation to their capital gains from sale

of shares. Section 54EC of the Act of 1961 provides for a deduction/exemption when capital gains arising from the transfer of a long term capital asset are invested, in whole or in part, in certain bonds within a period of six months from the date of such transfer. Section 54F thereof provides for a deduction/exemption in relation to capital gains arising from the transfer of a long term capital asset, not being a residential house, when the whole or part thereof are invested in a residential house in India within two years from the date on which the transfer took place. It may be noted that Section 2(47) of the Act of 1961 defines 'transfer' in relation to a capital asset inclusively and not exhaustively. However, as deductions/exemptions under Section 54EC and 54F are to be claimed only if investments are made within the prescribed time periods from the date of transfer of the capital asset, the Income-tax authorities seem to be in a quandary as to when the transfer of shares by the petitioners actually took place.

In the first instance, the AO accepted their plea that such transfer took place on 24.11.2009, when they submitted their declarations in Form No.7B to the purchaser company. At that stage, the Commissioner, in exercise of revisionary power under Section 263 of the Act of 1961, opined that as the share transfer monies were received by the petitioners on 10.09.2009, the said date should be taken to be the date of actual transfer.

Before the Appellate Tribunal, the Investment Agreement dated 12.08.2009 was produced as additional evidence by the Revenue itself. Reference was made by the Departmental Representative (DR) to various clauses in this agreement, as reflected in Paras 7 and 11 of the common order dated 09.12.2016 passed by the Appellate Tribunal. Having referred to this agreement, the DR argued that the

date of payment of consideration should be taken to be the effective date for reckoning the date of actual transfer as filing of a form was only a statutory requirement. The Appellate Tribunal took note of the contents of the Investment Agreement dated 12.08.2009 entered into by Aquarius Capital (Mauritius) Limited, the purchaser company, and Vijay Nirman Company Private Limited and its shareholders, pursuant to which the petitioners transferred their shares, in the capacity of shareholders. Reference was also made by the Appellate Tribunal to CBDT Circular No.704 dated 28.04.1995 and the clause therein, relied upon presently by the Revenue. Despite the same, the Appellate Tribunal found no merit in the argument advanced by the DR and concluded that the transfer took place on 24.11.2009 and not on 10.09.2009, when the monies were received. It is not in dispute that if the date of transfer is taken to be 24.11.2009, the investments made by the petitioners would be within time, whereby they could rightfully claim deductions/exemptions, be it under Section 54EC and/or Section 54F of the Act of 1961.

Before this Court, in appeal under Section 260A of the Act of 1961, the Revenue specifically took the ground that the date of transfer should be taken to be the date of execution of the Investment Agreement, i.e., 12.08.2009. The appeals were however dismissed by this Court holding that the view taken by the AO that the date of transfer was 24.11.2009 was a plausible one.

This being the chronological narrative, the question that arises is whether the Revenue is entitled at this stage to reopen the petitioners' assessments under Section 147 of the Act of 1961.

Section 147 deals with 'Income escaping assessment'. It states to the effect that if the AO has reason to believe that any income

chargeable to tax escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income. The first *proviso* thereto stipulates that where an assessment under Section 143(3) or under Section 147 has been made for the relevant assessment year, no action shall be taken under Section 147 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 Section 142(1) or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. The third *proviso* to Section 147 states that the AO may assess or reassess such income, other than the income involving matters which are the subject matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. Section 148 of the Act of 1961 deals with issue of a notice where income has escaped assessment. It states to the effect that before making the assessment, reassessment or recomputation under Section 147, the AO shall serve on the assessee a notice requiring him to furnish within such period, as may be specified, a return of his income. Section 148(2) requires the AO to record his reasons before issuing any notice under Section 148(1). Section 149 of the Act of 1961 is relevant for the purposes of these cases and it stipulates the time limit for the notice under Section 148. Section 149(1)(a) states that no notice under Section 148 shall be issued for the relevant assessment year if four years have elapsed from the end of the relevant assessment year, unless the case falls under Clause (b) or Clause (c) thereof. Clause (b) covers a situation

where four years, but not more than six years, have elapsed from the end of the relevant assessment year, and the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year. Clause (c) thereof covers a situation where four years, but not more than sixteen years, have elapsed from the end of the relevant assessment year and the income in relation to any asset located outside India, but chargeable to tax, has escaped assessment. Section 151 stipulates that the notice under Section 148 cannot be issued after expiry of four years unless the Principal Chief Commissioner or Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the AO, that it is a fit case for the issue of such notice.

On facts, it is clear that the notices dated 31.03.2017 under Section 148 of the Act of 1961 were issued to the petitioners on the very last day of the six-year period prescribed under Section 149(1)(a) of the Act of 1961. The reason now put forth by the Revenue to justify this step is that the Investment Agreement dated 12.08.2009 is new found evidence which was suppressed by the petitioners and therefore, it is entitled to the extended limitation of six years from the end of the assessment year 2010-2011.

It is however to be noted that the Investment Agreement dated 12.08.2009 already fell for consideration before this Court in the appeals filed by the Revenue under Section 260A of the Act of 1961 against the common order dated 09.12.2016 of the Appellate Tribunal. Sri K.Raji Reddy, learned senior standing counsel, has no information as to whether any appeals have been preferred therefrom to the Supreme Court. That being so, the orders of dismissal of these appeals filed by the Revenue are binding and it is not open to it to

once again seek to re-agitate any issue that stands covered by the said adjudication. As already pointed out, relevance of the Investment Agreement dated 12.08.2009 was explicitly raised by the Revenue in the said appeals by framing a specific question of law. Despite the same, this Court was not persuaded to agree and confirmed the common order of the Appellate Tribunal holding that the date of transfer of the shares by the petitioners was 24.11.2009, the date on which they submitted declarations in Form No.7B to the purchaser company. Sri K.Raji Reddy, learned senior standing counsel, is unable to explain as to how the Revenue can reopen the subject assessments basing on the Investment Agreement dated 12.08.2009, when the Appellate Tribunal as well as this Court, having considered the same, did not accept the Revenue's plea that it constitutes the date of actual transfer.

Further, as rightly pointed out by Sri K.V.Simhadri, learned counsel, reopening of the assessments under Section 147 cannot be resorted to by the AO in relation to income arising out of a matter which was the subject matter of an appeal. When the very basis for reopening of the assessments in the present cases, being the Investment Agreement dated 12.08.2009, was the subject matter of the appeals before the Appellate Tribunal and, thereafter, before this Court, it is not open to the AO to treat the same as the foundation for forming an opinion that income chargeable to tax had escaped assessment in the context thereof.

Though Sri K.Raji Reddy, learned senior standing counsel, would argue that the Commissioner was justified in exercising revisionary power under Section 263 of the Act of 1961, this issue was also the subject matter of the appeals before the Appellate

Tribunal and, thereafter, before this Court. Therefore, it does not survive for independent consideration at this stage.

The endeavour of the Revenue, as is clear from the arguments of Sri K.Raji Reddy, learned senior standing counsel, is to cloud and confuse the issues which fell for consideration in those appeals with the reopening of the assessments presently by way of the notices under Section 148 of the Act of 1961. However, these issues are disparate and distinct. Once the Appellate Tribunal and, thereafter, this Court rendered findings on the issues that fell for consideration in the appeals, it is no longer open to the Revenue to try and rake up the same in these writ petitions.

It is also to be noted from the counters that the main ground on which the AO sought to reopen the assessments was that the petitioners had willfully suppressed material facts. However, the petitioners pointed out that there was no such suppression as the Investment Agreement dated 12.08.2009 was produced by the Revenue itself as additional evidence before the Appellate Tribunal and no attempt was made by the Revenue to clarify as to wherefrom they got the said Agreement, if it was not produced by the petitioners. The Appellate Tribunal's order also bears out that the original assessment was made after the AO perused the details furnished by the petitioners, upon being issued show-cause notices dated 13.12.2012 and 28.12.2012 calling for specific details about their share transfers, computation of capital gains and proof of investments to claim exemptions. The Appellate Tribunal also recorded that the petitioners had filed detailed replies along with supporting documents to justify the exemptions claimed and it was only then, that the AO completed the assessments and accepted the

returns. Therefore, in the absence of any clear evidence of actual suppression of the Investment Agreement by the petitioners, the question of the Revenue falling back on this clause in Section 147 does not arise. All the more so, when it seeks to invoke the extended limitation of six years.

More significantly, the AO did not even state either in the notices dated 31.03.2017 issued under Section 148 of the Act of 1961 or in the letters dated 22.09.2017 and 11.10.2017 furnishing reasons for issue of such notices, that the petitioners had failed to disclose fully and truly all material facts necessary for their assessment. Further, she did not also mention that she had reason to believe that the income chargeable to tax which had escaped assessment would amount to or was likely to be one lakh rupees or more. The crucial question that arises is whether these omissions on the part of the AO have any import and if so, to what extent.

In like circumstances, a Division Bench of the Bombay High Court in **SOUND CASTING PVT. LTD. V/s. DCIT**¹, opined that the jurisdictional condition for reopening an assessment beyond a period of four years was not fulfilled in that case as there was no allegation in the reasons disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment for that assessment year.

Similar was the view taken by another Division Bench of the Bombay High Court in **ICICI BANK LTD. V/s. DEPUTY COMMISSIONER OF INCOME TAX**², wherein assessment for the assessment year 2003-04 was sought to be reopened by issue of a notice under Section 148 of the Act of 1961 on 30.03.2010. The

¹ (2012) 250 CTR 0119 : (2012) 70 DTR 0204

² (2012) 246 CTR 0292 : (2012) 65 DTR 0249

Division Bench observed that by virtue of the first *proviso* to Section 147, the jurisdictional condition for exercise of power to reopen the assessment beyond four years is that there must be a failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment but it was found that there was no statement in the reasons disclosed by the AO that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The Division Bench also referred to an earlier judgment of the Bombay High Court in **HINDUSTAN LEVER LTD. V/s. R.B. WADKAR**³ and the observations made therein, which read as under:

“The reasons recorded by the AO 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 AO. 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 AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach 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 AO 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. The reasons are the manifestation of the mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the

³ (2004) 190 CTR (Bom) 166 : (2004) 268 ITR 332 (Bom)

link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, 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 the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment.”

A similar view was taken by another Division Bench of the Bombay High Court in **GODREJ INDUSTRIES LTD. V/s. B.S. SINGH, DEPUTY COMMISSIONER OF INCOME TAX**⁴, wherein it was held that the reasons recorded at the time of issuing the notice under Section 148 is the only evidence of the AO’s reason to believe that income chargeable to tax had escaped assessment and these reasons cannot be added to, deleted from or supplemented. The Bench further held that when a notice for reassessment is challenged, the burden is on the Revenue to establish that the jurisdictional requirement stands satisfied.

In **AMAR NATH AGRAWAL V/s. COMMISSIONER OF INCOME TAX**⁵, a Division Bench of the Allahabad High Court opined that two distinct conditions must be satisfied before the AO can assume jurisdiction to issue a notice under Section 148 of the Act of 1961: i) he must have reason to believe that the income of the assessee had escaped assessment, and ii) he must have reason to believe that such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment and if either of these

⁴ (2015) 377 ITR 0001 (Bom) : (2015) 235 Taxman 0025 (Bombay)

⁵ Civil Misc. Writ Petition (Tax) No.1492 of 2007 dated 26.09.2014

conditions are not fulfilled, the notice would be without jurisdiction. It was further observed that Section 149(1)(b) makes it imperative that the AO, in his reasons, should also state that the escaped income is likely to be rupees one lakh or more, which is an essential ingredient for seeking the approval that is to be accorded by the competent authority under Section 151 of the Act of 1961.

On the same lines, in **MAHESH KUMAR GUPTA V/s. COMMISSIONER OF INCOME TAX**⁶, another Division Bench of the Allahabad High Court held that it is imperative for the AO to record his reasons that the escaped income is likely to be rupees one lakh or more so that the Chief Commissioner or Commissioner may accord his satisfaction under Section 151 of the Act of 1961. It was further held that if the said reason is not recorded by the AO, initiation of the reassessment proceedings after more than four years would be barred by time.

Relevant to note, in **SAHKARI KHAND UDYOG MANDAL LTD. V/s. ASSTT. COMMISSIONER OF INCOME TAX**⁷, a Division Bench of the Gujarat High Court issued certain directions in the context of reopening of assessments under Section 147 read with Section 148 of the Act of 1961. One such direction was that the AO, after serving a notice for reopening under Section 148 of the Act of 1961 and upon receipt of the return of income from the assessee, should straightaway supply the reasons recorded by him for issuing such notice within thirty days after filing of the return, without waiting for the assessee to ask for the same. The assessee, upon receiving such reasons, should raise his objections, if he so desires, within sixty days of receipt thereof. If such objections are raised, the AO should

⁶ 363 ITR 300

⁷ Special Civil Application No.3955 of 2014 dated 31.03.2014

dispose of the same, as far as possible, within four months. Despite such directions, it appears that the Revenue is unmindful of the same. The facts presently bear out that the notices under Section 148 of the Act of 1961 were issued on 31.03.2017 and the petitioners asked for reasons therefor in April, 2017. The reasons were furnished only in September/October, 2017 leading to objections being submitted by the petitioners in October, 2017. Their objections were thereafter rejected in November, 2017.

In the cases on hand, as already stated *supra*, neither in the notices dated 31.03.2017 nor in the reasons furnished in September/October, 2017, did the AO record the presence of the aforestated jurisdictional conditions for reopening the subject assessments. Even thereafter, when she rejected the petitioners' objections under her letters dated 17.11.2017, the AO did not do so. Thus, as matters stand, the AO never opined that issue of the subject notices was warranted on the ground that the petitioners did not disclose fully and truly all material facts necessary for their assessment or that the income that escaped assessment during that year amounted to or was likely to amount to one lakh rupees or more. The absence of these jurisdictional conditions in her reasons for seeking to reopen the assessments beyond four years is fatal to the very issuance of the impugned notices. Trite to state, the reasons communicated by the AO to the petitioners must be the same reasons furnished to the competent authority for seeking approval under Section 151 of the Act of 1961, as the AO cannot modify, add to or delete from such reasons to suit her own purposes at different points of time. Further, when the reasons recorded by the AO are the only material that can be looked into by the competent authority for granting approval

under Section 151 of the Act of 1961, the absence of such jurisdictional conditions therein would invariably vitiate the approval, if any, by the competent authority, as he could not have recorded the requisite satisfaction under Section 151 of the Act of 1961, when the fundamental jurisdictional conditions justifying the reopening of the assessments beyond the normal four-year period did not even find mention in the reasons recorded by the AO.

On the above analysis, this Court finds that reopening of the petitioners' assessments for the assessment year 2010-11 by way of the notices dated 31.03.2017 issued under Section 148 of the Act of 1961 and the rejection of their objections thereto by the letters dated 17.11.2017 cannot be sustained on grounds more than one. The attempt on the part of the Revenue to do so is an abuse of power as the facts demonstrate that the very basis for such reopening was the subject matter of the appeals before the Appellate Tribunal and, thereafter, before this Court. That apart, the jurisdictional conditions precedent that there must be failure on the part of the petitioners to disclose fully and truly all material facts necessary for their assessment for the assessment year 2010-11 and that the income which escaped assessment would amount to one lakh of rupees or more, did not even find mention in the notices or the reasons for reopening the assessments. In the absence thereof, reopening of such assessments beyond the period of four years cannot be countenanced.

The writ petitions are accordingly allowed. The notices dated 31.03.2017 issued under Section 148 of the Act of 1961 and the rejection of the petitioners' objections thereto *vide* letters dated 17.11.2017 are declared illegal. The original Assessment Orders of

the petitioners in relation to the assessment year 2010-2011, which have been upheld in appeal by the Appellate Tribunal and, thereafter, by this Court, shall be binding upon the Revenue.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

P.KESHAHA RAO,J

23rd MARCH, 2018

Note : L.R.Copy to be marked.

(B/O) PGS

