

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

WRIT PETITION NO.3495 OF 2018

Saurabh Suryakant Mehta

.. Petitioner

v/s.

Income Tax Officer & Anr.

.. Respondents

Dr. K. Shivram, Senior Counsel a/w Mr. Rahul Hakani for the petitioner
Mr. A.R. Malhotra a/w Mr. N.A. Kazi for respondent nos. 1 and 2

**CORAM : AKIL KURESHI &
M.S. SANKLECHA, J.J.**

DATED : 17th JANUARY, 2019

P.C.

1. The petitioner has challenged the notice of reopening of assessment dated 30th March, 2018, as Annexure "L" to the petition.

Brief facts are as under :-

2. The petitioner is an individual and the dealer of iron and steel. For Assessment Year 2011-12 the petitioner had filed the return of income, which was taken in scrutiny by the Assessing Officer by issuing notice under Section 148 of the Act. He had recorded reasons for issuing the notice which suggested that he had received information from the Sales Tax Department that the assessee had indulged in

Havala entries and had not carried out actual trading activities with respect to certain sales. Pursuant to this notice, the Assessing Officer passed an order of assessment under Section 143(3) r/w Section 147 of the Act on 28th March, 2016 making certain additions to the assessee's declared income.

3. To reopen such assessment, the Assessing Officer issued the impugned notice. In order to do so, he had recorded following reasons:-

“The reason for issue of notice u/s 148 in your case for AY 2011-12 is as under :-

“In this return of income was filed on 16.09.2011 declaring income of Rs.8,05,347/-. Subsequently, order u/s 143(3) rws 147 was passed on 23.03.2016 assessing the income of the assessee at Rs.13,84,720/-.

On going through the assessment order it is seen that the addition of Rs.2,96,284/- was made @ 2.25% of the total bogus purchase of Rs.1,31,68,191/-.

It is observed from the case record that there was a specific information in respect of bogus hawala transaction, received from Sales Tax Department. In respect of this, during the course of assessment proceedings, notice u/s 133(6) were issued to the concerned parties. On verification of the same, it is seen that the said parties had issued bogus bill to the assessee and the assessee has failed to establish the genuineness of transactions. Since the transaction has not been established, whole of the amount i.e. Rs.13168191/- needs to be added to the total income. However, only 2.25% of the said amount was added, which is without any base.

Further, Hon'ble Supreme Court vide order dated 16.01.2017 in the case of M/s. N.K. Proteins Ltd. In SPL © CC Nos. 769 of 2017 : 2017-TIOL-23-SC-IT has clearly held as below;

“Once a finding of fact has been given that entire purchases shown on the basis of fictitious invoices and debited in the P & L A/c are established as bogus, restricting the addition to a certain percentage goes against the principles of sections 68 and 69C of the I.T. Act.”

In view of the above facts, I am of the opinion that the assessee's income to the extent of Rs.1,28,71,907/- (1,31,68,191 – 296284) has escaped assessment. Accordingly, the proceeding u/s 147 of the Income Tax Act, 1961 are duly attracted in order to frame proper assessment to bring to tax appropriate income on the issue of bogus entries of purchases and any other income which will be detected during the course of assessment proceedings. Therefore, this case is fit for issue of notice u/s 148 of the I.T. Act, 1961.”

4. Upon being supplied the reasons, the assessee raised objections to the notice of reopening under letter dated 28th November, 2018. Such objections were rejected by the Assessing Officer by order dated 30th November, 2018. Hence, this petition.

5. Having heard learned Counsel for the parties for final disposal of the petition, we notice that the impugned notice has been issued beyond the period of 4 years from the end of the relevant assessment year. The requirement that the income chargeable to tax has escaped

assessment due to failure on the part of the assessee to disclose truly and fully all material facts, would be applicable. Further, as per settled law, if a claim or an issue had been examined by the Assessing Officer during the previous assessment proceedings, in absence of any material available to the Assessing Officer later on to reassess such income would be based on mere change of opinion and, therefore, impermissible.

6. In the present case, the Assessing Officer had examined the material collected by the Sales Tax Department, *prima facie* suggesting that the assessee had indulged into bogus billing activities without actually carrying out the purchase and sale of the commodity. It is on this basis that the notice of reopening of assessment was issued earlier and addition of Rs.2,96,284/- was made. There are reasons recorded for issuing the impugned notice. We can gather that the Assessing Officer now believes that not mere 2.25% of the total bogus purchase of Rs.1.31 crores (rounded off) is to be added but the entire amount should have been added as the undisclosed income of the assessee. With respect to the validity of such a contention of the Assessing Officer, we have no comment to offer. However, what cannot be denied is that the Assessing Officer merely wishes to change the nature of the assessment

previously made. In other words, during the previous reassessment proceedings, the Assessing Officer examined the alleged bogus sales of the assessee, taxed 2.25% thereof as assessee's additional income and passed the order of assessment accordingly. The Assessing Officer now believes that taxing 2.25% of the sales, was an error and instead the entire amount should have been added to the assessee's income. This would be a mere change of opinion. The Act recognizes the revisional powers of the Commissioner to be exercised in case where the assessment order is erroneous and prejudicial to the interest of the Revenue. However, the reopening of assessment is an entirely independent and vastly different jurisdiction and cannot be confused with the revisional powers of the higher authority.

7. Under the circumstances, the impugned notice is quashed. Petition is disposed of accordingly.

(M.S. SANKLECHA, J.)

(AKIL KURESHI, J.)