

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on: 12/02/2020****Judgment Delivered on : 19/02/2020****Writ Appeal No. 103 of 2020***{Arising out of Order dated 05.12.2019 in Writ Petition (T) No. 135 of 2019 by the learned Single Judge}*

Suresh Kumar Agarwal S/o Late Shri Shankar Lal Agrawal Aged
About 56 Years Civil Contractor, Jindal Fuels, Main Road, Post
Lormi, District - Mungeli, Chhattisgarh 495115

---- Appellant**Versus**

1. Dy. / Assistant Commissioner of Income Tax Circle -2(1), Bilaspur
2. The Pr. Commissioner Of Income Tax Bilaspur
3. The Chairman, Central Board Of Direct Taxes, North Block, Central Secretariat, New Delhi 110 001

---- Respondents

For Appellant/Assessee	:	Shri S.Vasudevan, Shri Romir S. Goyal and Shri Shashank Sharma, Advocates.
For Respondents/Revenue	:	Ms. Naushina Afrin Ali and Shri Amit Chaudhari, Advocates.

Hon'ble Shri P.R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C.A.V. Judgment**Per P.R. Ramachandra Menon, Chief Justice**

1. Challenge raised against the re-assessment notice issued in terms of Section 148(2) of the Income Tax Act, 1961 (*for short, 'the Act'*) and the manner of disposal of the specific objection raised against the same with reference to Section 147 of the Act came to be repelled by the learned Single Judge, leading to dismissal of the writ petition, which is put to challenge in this appeal.

2. The Appellant/Petitioner is engaged in the business of civil construction and operation of petrol pumps who submitted his return of income for the assessment year 2012-2013 on 30.09.2012 declaring an income of Rs. 70,95,420/-. The same was taken up for scrutiny assessment

and it was finalised in terms of Section 143(3) of the Act making some additions/deletions, in respect of which there was no grievance. The proceedings were however sought to be re-opened by issuing notice under Section 148(2) read with Section 147 of the Act and later, an order was passed on 22.12.2018 treating the unsecured loan of Rs. 3.73 crores from M/s. Dreamland Impex Pvt. Ltd. as unexplained cash credit under Section 68 in the hands of the Petitioner. This was subjected to challenge by filing a statutory appeal and it is stated that the same is pending before the appellate authority.

3. While so, a fresh notice for re-assessment was issued on 29.03.2019 pointing out that the Assessing Officer (*for short 'the AO'*) had reason to believe that some portion of the income had still escaped the assessment. The Petitioner sought for the reasons which is stated as supplied on 16.04.2019. On getting the reasons, objections were filed by the Petitioner on 25.07.2019 which came to be considered and rejected as per the order passed by the AO on 09.08.2019. This made the Petitioner to challenge the notice dated 29.03.2019 and the order passed on 09.08.2019 (repelling the objections) by filing a writ petition before this Court. The relief sought for were opposed from the part of the Respondents/Revenue. After hearing both the sides, the learned Single Judge, referring to the relevant provisions of law and also the various rulings rendered by the Apex Court held that the requirements in the statutory provision had been satisfied with regard to issuance of the re-assessment notice and it was not liable to be interdicted. Accordingly, the writ petition was dismissed, however, observing in paragraph 28 that no opinion was being expressed with regard to the merits of the case, which was still pending, to be adjudicated before the AO and that the right to challenge the finding was still open to the Petitioner. Correctness of the said finding and reasoning is sought to be challenged in this appeal.

4. We heard Shri S. Vasudevan, the learned counsel appearing for the Appellant/Assessee and Ms. Naushina Afrin Ali, the learned Standing Counsel representing the Respondent/Revenue, at length.

5. The learned counsel for the Appellant submits that there is a finding rendered by the learned Single Judge to the effect that the re-assessment notice issued by the AO is valid, adding that the learned Single Judge has not correctly and completely assessed the ingredients to have satisfied before issuance of notice, particularly in terms of Section 147 of the Act. It is pointed out that this is the second re-assessment, after suffering the scrutiny assessment under Section 143(3) and the re-assessment effected thereafter on 22.12.2018. The present re-assessment sought to be pursued as per notice dated 29.03.2019. The only ground mentioned by the AO is that he has 'reason to believe' that a sum of Rs. 1.53 Crores (stated as shown by the Petitioner in the return and also disclosed in the books of accounts) has escaped the assessment. It is pointed out that the said amount was not deposited in the Bank as a one time entry, but it is a deposit involving several transactions over a period of time. The amounts deposited on various dates are sought to be substantiated with reference to the materials produced, adding that such deposits were made by the Petitioner in the regular course of business and corresponding withdrawals also may be there and hence, it cannot be considered as income escaped from any assessment.

6. The learned counsel further points out that the provision *i.e.* Section 147 of the Act envisages re-assessment in respect of three different stages. The first one is upto a period of four years where there is a free hand for the Respondent. But once it is beyond four years and within six years, the alleged escape of income should be due to non-disclosure and such other instances as mentioned therein. Once it goes beyond six years, it becomes an extraordinary circumstance with reference to the foreign assets etc. The

picture becomes more clear from the first proviso to the aforesaid section, from which it is revealed that there has to be failure on the part of the Petitioner/Assessee with regard to the full disclosure of the facts. This aspect as to the failure on the part of the Assessee is also referred to by the learned Single Judge. Even though, the learned Single Judge has referred to the 'reason to believe' for re-opening the assessment as given under Section 147 of the Act, the scope of the 'proviso' has been ignored and hence the finding does not reconcile with the observations made earlier. It is also stated by the learned counsel that the entire deposits made over a period of time were cash deposits in the bank account of the Petitioner in the course of business and the same have been duly accounted in the books of accounts. The question has been correctly framed by the learned Single Judge in paragraph 16 of the judgment, to the effect whether the transaction of cash in the savings bank account of the Petitioner was a new information or was a tangible material which could be brought within the ambit of income which has escaped assessment so as to attract provisions of Section 147 of the Act. Specific reference is made to the observations made by the learned Single Judge in paragraphs 17, 18 and 19 to contend that though the question/contention raised by the Petitioner has been correctly noted and mentioned in paragraph 16, this particular aspect i.e. whether the deposit of Rs. 1.53 Crores over a period of time in the Savings Bank Account was a new information or a tangible material to be considered as a reason to believe for effecting re-assessment in terms of Section 147 of the Act is omitted to be dealt with.

7. It is pointed out that the learned Single Judge has observed in paragraph 17 of the judgment that, nowhere Section 147 of the Act (either in the main section or under the proviso) or under the 'Explanation' given, is there any bar for the Department to initiate re-assessment, if the documents/records have already been subjected to scrutiny at the time of

assessment. According to the learned counsel, bar is created under the first proviso to Section 147 of the Act clearly mentioning the circumstances under which it is possible to be re-opened and hence the question whether those circumstances are satisfied, have not been separately considered, analyzed or appreciated. The learned Single Judge has simply proceeded under the impression that the only requirement to effect the re-assessment in terms of Section 147 of the Act is that the AO should have 'reasons to believe' that the income concerned has escaped the assessment. This has to be read and analysed with reference to the time when such a step is sought to be pursued i.e. when it is beyond four years and within six years, as involved in the instant case. If it is coming within the said slot, the specific requirements with reference to the non-disclosure of full details has to be established insofar as the particulars with regard to deposit of Rs. 1.53 Crores in the bank account over a period of time has already been disclosed. Since it is supported by the books of accounts, it is never a new material to have acted upon by the AO for causing any re-assessment under Section 147 of the Act. When the learned Single Judge proceeded to consider the challenge after framing the questions in paragraph 16, unfortunately, the suppression part has been given a 'go bye', though there is an observation in paragraph 21 to the effect that all that this Court can see, verify or scrutinize is as to whether the reasons assigned are not vague, indefinite or without any basis etc.

8. It is pointed out with reference to the materials produced that deposits in the bank came over a period of time and all those particulars were furnished before the AO, which never amounts to any new material and hence, it was never a fit case for the second re-assessment. What is being done by the AO is only a roving enquiry, which is forbidden under the statute. The learned counsel submits that, according to the learned Single Judge, sufficiency of reason need not be looked into; but it has to be considered whether it was vague, indefinite or without any basis and whether there was

any failure on the part of the Petitioner; without which the proviso will not be attracted. If the proviso is not attracted, no proceeding can be there under Section 147 of the Act.

9. In support of the above contentions, the learned counsel for the Appellant/Assessee seeks to place reliance on the Division Bench judgment of the Delhi High Court in **Revolution Forver Marketing (P.) Ltd. v. Income Tax Officer** {(2019) 104 Taxmann.com 61 (Delhi); paragraphs 3, 6 to 8} and **Commissioner of Income Tax-Central I v. Indo Arab Air Services** {(2015) 64 Taxmann.com 257 (Delhi); paragraphs 20 to 25} holding that the reason for re-assessment was vague and unjustified, in turn leading to quashing of the notice issued for re-assessment. It is also pointed out that the reliance sought to be placed by the learned Single Judge (in paragraph 26 of the judgment) on the verdict rendered by the Division Bench in Writ Appeal No. 336 of 2019 upholding the judgment passed by the learned Single Judge in WP(T) No. 234 of 2018 and connected cases, is not applicable to the case in hand.

10. Ms. Naushina Afrin Ali, the learned Standing Counsel for the Respondent/Revenue submits that the appeal itself is not maintainable. It is pointed out that pursuant to notices which are under challenge in the writ petition, the re-assessment proceedings were finalised by the AO and that the Appellant has already moved the appellate authority challenging the re-assessment order. Since the matter is pending in appeal, no interference is called for by this Court with reference to the notice issued prior to the re-assessment.

11. The learned Standing Counsel for the Revenue submits that applicability of the proviso to Section 147 of the Act has been explained by the Apex Court in **G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer & Others**; {2002 Supp(4) SCR 359}. It is pointed out that the scrutiny

assessment was finalised on the basis of the materials furnished by the assessee; but thereafter, it came to the notice of the AO that there were various transactions with shell companies resulting in the escapement of income from tax which led to the notice for re-assessment. The 'reason to believe' of the AO is sufficient and adequacy of the reason is not a matter which is to be considered by this Court. Reliance is sought to be placed on the verdict passed by the Apex Court in ***M/s. Phool Chand Bajrang Lal & Another v. Income Tax Officer & Another***; {(1993) 4 SCC 77, paragraphs 24, 25 and 26} where also similar plea was raised from the part of the Assessee. In paragraph 25, it has been specifically observed by the Apex Court that the AO can start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of these facts; under which circumstance it will not be a mere change of opinion or the drawing of a different inference from the same facts as were earlier available, but acting on fresh information. Reliance is also sought to be placed on the verdict passed by the Apex Court on ***Raymond Woolen Mills Ltd. v. Income Tax Officer, Centre Circle XI, Range Bombay & Others***; {(2008) 14 SCC 218, paragraph 3} clearly holding that sufficiency or correctness of the material is not a thing to be considered at the stage of issuance of notice for re-assessment under Section 147 of the Act. It is pointed out that sufficient opportunity was granted to the Appellant/Assessee to explain the transactions also by supplying a questionnaire, but the Appellant-Assessee could not explain the transactions to the satisfaction of the AO.

12. The learned Standing Counsel for the Revenue sought to place reliance on a Division Bench verdict of the Patna High Court in ***Alkem Laboratories Ltd. v. Principal Commissioner of Income Tax***; (2019) 410 ITR 205, where it was held that, in absence of any concluded facts being

made available, it would not be proper to interfere at the notice stage and accordingly, the writ application was dismissed with liberty to avail the statutory remedy, if so advised. This verdict is stated as affirmed by the Supreme Court while dismissing the Special Leave Petition bearing No. 24140 of 2018 as per order dated 16.11.2018. Decision rendered by the Bombay High Court in ***The Indian Hume Pipe Company Ltd. v. The Assistant Commissioner of Income Tax***; {(2012) 348 ITR 439} is also relied on from the part of the Respondents, with specific reference to the observations in paragraphs 9 to 11 as to the conditions precedent spelt out in the proviso to Section 147 of the Act and that the full and true disclosure, which the statute contemplates, must be judged in the context of 'Explanation (1)' to Section 147 of the Act. Similarly, reference is made to the decisions rendered by the Division Bench of the Gujarat High Court in ***Peass Industrial Engineers Pvt. Ltd. v. Deputy Commissioner of Income Tax***; {(2016) 289 CurTR 139}, ***Pushpak Bullion Pvt. Ltd. v. Deputy Commissioner of Income Tax***; {(2017) 250 Taxman 201} and ***Aradhna Estate Pvt. Ltd. v. Deputy Commissioner of Income Tax***; {(2018) 404 ITR 105}; all of which were in respect of challenge raised against the notice for re-assessment. Interference was declined in all the cases.

13. According to the learned counsel for the Appellant/Petitioner, it was the Petitioner who had given the information with regard to the deposits in the Bank as all these transactions were duly accounted and shown in the return and hence, it was not a new material. How does this information as to deposit (accounted money) leads to 'escaped income' is not a matter discussed by the learned Single Judge, adding that the proceedings were being pursued only on the basis of suspicion which cannot take the place of 'reason to believe'. The AO has not stated anything as to what is not disclosed. The ruling rendered by the Delhi High Court, reported in ***Bharti Infratel Limited v. Deputy Commissioner of Income Tax & Others***; {(2019) 411 ITR 403

(Delhi)} is sought to be pressed in, contending that Explanation (1) to Section 147 of the Act is having only a limited operation.

14. The scope of the said Explanation is sought to be asserted by the learned counsel for the Revenue with reference to the specific observation made by the Division Bench of the Bombay High Court in paragraphs 9, 10 and 11 of ***The Indian Hume Pipe Company Ltd. (supra)***. The learned counsel submits that though, some materials were submitted by the Appellant-Assessee, it did not completely reveal the deposit of Rs. 1.53 Crores; despite the several opportunities granted. Different cash flow statements were being submitted on different occasions by the Appellant-Assessee and this aspect has been specifically discussed by the AO while passing the assessment order, which is already subject to challenge before the appellate forum.

15. After hearing both the sides and taking note of the consistent stand being taken by this Court that interference at the notice stage is possible only in exceptional cases, this Court is of the view that it is quite open for the Appellant-Assessee to raise all the challenges, both legal and factual, by availing the statutory remedy. As pointed out already, the notice/proceedings under challenge in the writ petition have culminated in re-assessment order passed by the AO; which admittedly has been challenged by filing statutory appeal and is pending consideration. This being the position, this Court is of the firm view that, it is not a fit case to call for interference at this stage.

16. However, there is a contention for the learned counsel for the Petitioner that though the actual grievance of the Petitioner has been correctly taken note of in paragraph 16 of the judgment passed by the learned Single Judge, there is some observation in the following paragraphs as to the scope of the proceedings and the mandate of statutory requirements. According to the learned counsel, some of such observations

are quite detrimental to the rights and interest of the Appellant, and though appeal has already been preferred against the assessment order, it may not be possible for the appellate authority to consider and give an independent finding with regard to the scope of the provisions in view of the observations already made by the learned Single Judge. This will make the appellate remedy illusive.

17. It has been made clear in 'paragraph 28' of the judgment passed by the learned Single Judge that no opinion was being expressed on merits. The apprehension expressed by the Appellant, though not correct or sustainable in view of the clear observation in view of paragraph 28 of the judgment, to rule out any possibility of a finding to the contrary, we make it clear that the observations made by the learned Single Judge in the judgment under challenge will stand only confined to consideration of the question whether interference was to be made by this Court at the notice stage or not. In other words, the observations made by the learned Single Judge as to the scope of the relevant provisions of law will not be a bar for the appellate authority to consider the merit of the appeal including the question of law and the question of fact. It is open for the Appellant/Assessee to agitate all such aspects, both factual and legal, before the appellate authority and if it is raised, it shall be considered untrammelled by the observations made by the learned Single Judge in the judgment under challenge.

18. With the above observations, we hold that the appeal is not liable to be entertained. It is dismissed accordingly, without prejudice to the right of the Appellant to pursue his statutory remedy before the appellate authority, in terms of the relevant provisions of law.

Sd/-
(P.R. Ramachandra Menon)
CHIEF JUSTICE

Sd/-
(Parth Prateem Sahu)
JUDGE