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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.1066 OF 2019

John Sebastian Zezito Lobo ..Petitioner
Versus
Assistant Commissioner of Income Tax, Circle-2(1), Panaji And 2 Ors. ..Respondents

Mr. Kapil D. Kerkar, with Mr. T. Sequeira, Advocate *for the Petitioner.*

Ms. Amira A. Razaq, Standing Counsel *for the Respondents.*

CORAM: DIPANKAR DATTA, CJ &
M. S. SONAK, J.

DATED: 17th August 2021

P. C.

1. A notice dated 26.03.2019 issued under Section 148 of the Income Tax Act, 1961 (hereafter "the Act", for short) is under challenge in this writ petition on the ground that the jurisdictional fact for issuance of such notice is absent.

2. We have noted that after receipt of the impugned notice the petitioner sought for the reasons for issuance thereof by his letter dated 04.06.2019; in pursuance thereof, the Assistant Commissioner of Income Tax by a communication dated

11.06.2019 furnished to the petitioner the reasons for reopening of assessment proceedings for the Assessment Year 2016-2017. Paragraphs 6 to 8 of the communication dated 11.06.2019 read as follows:

> *'6. <u>Basis of forming reason to believe and details of escapement of income</u>:*
>
> *As per the submission, the assessee sold a property vide sale deed on 24.07.2015 for sale consideration of Rs.9,75,00,000 and offered only Rs.4,38,33,261 to tax as capital gain and hence there is Low capital gain with respect to sale consideration and Large deduction of Rs.84,30,421/- claimed is u/s 54F, high expenses of Rs.2,30,00,000 are claimed as cost of settlement of tenants. All of which needs to be verified. As verified from AST and ITS data, the assessee did not register the sale deed and thus escaped scrutiny for AY 2016-17 despite of high capital gains. Therefore, I am of opinion that the income has escaped assessment during the FY 2015-16 relevant to AY 2016-17.*
>
> *7. <u>Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India</u>:*
>
> *8. <u>Applicability of the provisions of Section 147/151 to the facts of the case</u>:*
>
> *In this case, return of income has been filed by the assessee but the case was not selected for scrutiny for AY*

2016-17. Accordingly, no assessment was made. In view of the facts mentioned in para-6 above, I have reason to believe that income to the extent of Rs.5,36,66,784/-, has escaped assessment within the meaning of provisions of Section 147 of the I.T. Act in the hands of the above assessee for the asst. year 2016-17.'

3. Having received the aforesaid communication, the petitioner lodged an objection by his representation dated 04.12.2019 before the Assistant Commissioner of Income Tax urging several grounds. On the very same day, i.e., 04.12.2019, the petitioner presented this writ petition before this Court whereupon an interim order was passed on 17.12.2019 in terms of prayer clause (D). As a result thereof, no steps could be taken by the respondents pursuant to the impugned notice.

4. The writ petition has been listed today after exchange of pleadings.

5. We have heard Mr. Kapil Kerkar, learned advocate for the petitioner and Ms. Amira Razaq, learned Standing Counsel for the respondents at some length.

6. We do not appreciate the attempt of the petitioner to have the notice under Section 148 of the Act interdicted by presenting this writ petition on the same day of lodging of objection to the notice by submitting a detailed reply. Obviously, the objection was intended to persuade the Assistant Commissioner to revoke the impugned notice. On the contrary, if indeed the petitioner perceived that there was no justification for the Assistant Commissioner to issue the impugned notice since the jurisdictional fact was absent, the petitioner could have raised the said point at the first instance before this Court prior to submitting to the jurisdiction of the Assistant Commissioner. An error of jurisdictional fact is a point on which an action for judicial review could be maintained without relegating the noticee to the notice issuing authority. In such event, the Court could have examined the point raised by the petitioner. However, the petitioner appears to have pursued the writ remedy as a parallel remedy, which is impermissible in law. Now, with the pleadings on record, it does appear to us, at least, *prima facie*, that the contention of the petitioner of an error of jurisdictional fact having vitiated the proceedings initiated by the Assistant Commissioner is not tenable.

7. Mr. Kapil Kerkar contended that the finding of income assessable to tax having escaped the notice is baseless, since the Assistant Commissioner has proceeded on assumptions and presumptions.

8. In course of hearing, we have been referred to the decisions of the Hon'ble Supreme Court in ***GKN Driveshafts (India) Ltd. v/s. Income Tax Officer***[1] and the decision in ***Assistant Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers (P.) Ltd.***[2] by Ms. Razaq. In ***GKN Driveshafts (India) Ltd.*** (supra), the Supreme Court upheld the order of the Delhi High Court dismissing a writ petition in which a similar notice under Section 148 of the Act was under challenge by observing that the noticee ought to lodge objection to issuance of notice, after receiving the reasons for reopening of assessment, and that the Assessing Officer would be bound to dispose of the same by passing a speaking order before proceeding with the assessment. In ***Rajesh Jhaveri Stock Brokers (P.) Ltd*** (supra), the Supreme Court analysed the provisions of Section 147 of the Act and observed that if the condition precedent for invocation of powers under Section 147 read with Section 148 to 152 of the Act is present, i.e., there is *prima facie* finding that income assessable to tax has escaped notice, it would be open to the assessing officer to proceed for reopening of the assessment proceedings. We also find from such decision that if the assessing officer has cause or justification to know or suppose that income has escaped assessment, it can be said that he has reason to believe that an

1(2002) 125 Taxman 963 (SC)
2 (2007) 161 Taxman 316 (SC)

income has escaped assessment. In such a case, the High Court would not be clothed with the jurisdiction to examine the reasons which weighed in the mind of the assessing officer to issue the notice. As has correctly been contended by Ms. Razaq, this is not the appropriate stage for the purpose of examining the reasons assigned by the Assistant Commissioner.

9. In such view of the matter, we decline interference and relegate the petitioner to the forum before the Assistant Commissioner. The impugned notice shall be taken to its logical conclusion in accordance with law. If any adverse finding is rendered against the petitioner, obviously the same must have the support of reasons. Thereafter, the petitioner shall be at liberty to explore his remedy in accordance with law.

10. The writ petition is disposed of on the aforesaid terms, without costs. Interim order, if any, stands vacated.

11. All contentions on the notice as well as the proceedings are left open. We make it clear that the observations made by us are only for the purpose of deciding this writ petition.

M. S. SONAK, J. **CHIEF JUSTICE**