

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA

SPECIAL JURISDICTION (INCOME TAX)

ORIGINAL SIDE

RESERVED ON: 26.08.2022

DELIVERED ON: 13.09.2022

CORAM:

THE HON'BLE MR. JUSTICE T.S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA

ITAT/143/2021

(IA NO: GA/02/2021)

COMMISSIONER OF INCOME TAX (EXEMPTION), KOLKATA

VERSUS

B.P. PODDAR FOUNDATION FOR EDUCATION

Appearance:-

Mr. Vipul Kundalia, Senior Advocate.

Mr. Anurag Roy, Advocate.

.....For the Appellant.

Mr. Saurabh Bagaria, Advocate.

Mr. Saumya Kejriwal, Advocate.

Mr. G.S. Gupta, Advocate.

.....For the Respondent.

JUDGMENT***(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)***

1. This appeal filed by the revenue under Section 260A of the Income Tax Act, 1961 (the Act) is directed against the order dated 13th November, 2019 passed by the Income Tax Appellate Tribunal, B Bench, Kolkata (Tribunal) in ITA No. 1863/Kol/2019 for the Assessment Year 2009-10. The revenue has raised the following substantial questions of law for consideration:

- (i) *Whether on the facts and circumstances as well as in law the Income Tax Appellate Tribunal was correct in law in holding that the other additions made in the order under Section 147/ 143(3) of the Income Tax act, 1961, which were not part of the reasons recorded for reopening the assessment were not sustainable in the eyes of law even after insertion of Explanation 3 to Section 147 of the Act by Finance Act, 2009 when addition was made by the Assessing Officer on the ground of reopening?*
- (ii) *Whether on the facts and circumstances of the case the Learned Income Tax Appellate Tribunal correctly interpret the decision reported in the case of Jet Airways (1) Limited reported 331 ITR 236 (Bom) and Ranbaxy Laboratories Ltd. reported in 336 ITR 136 (Del) on facts in the instant case?*

2. We have heard Mr. Vipul Kundalia, learned Senior Standing Counsel assisted by Mr. Anurag Roy, learned Advocate for the appellants and Mr. Sourabh Bagaria assisted by Mr. Saumya Kegriwal and Mr. G.S. Gupta, learned Advocates for the respondents.
3. The respondent assessee filed the return of income for the assessment year under consideration, AY 2009-10, declaring a total income of Rs. NIL. The return was processed under Section 143 (1) of the Act. A survey under Section 133A of the Act was conducted from which it was found that the

assessee has deposited money with *M/s. Nissan Developers and Properties Pvt. Ltd.* to the tune of Rs/ 59,42,709/-. It was further seen that the said company is a specified person of the assessee. According to the Assessing Officer, the assessee is hit by Section 13(1)(c)(ii) and Section 13(1)(d) of the Act., for such reason the assessment was reopened under Section 147 of the Act by issuance of notice under Section 148 dated 13.03.2016. Subsequently, notices under Section 143(2) and Section 142(1) were issued. Pursuant to such notices the assessee through their authorized representative appeared before the Assessing Officer and produced details and documents and made their submissions. The Assessing Officer observed that from the impugned documents it was seen that the assessee had deposited Rs. 59,42,709/- and Rs. 3,65,97,000/- with *M/s. Nissan Developers and Properties Pvt. Ltd.* and *Poddar Projects Ltd.* respectively and both these companies are specified persons of the assessee. Therefore, the Assessing Officer held that these amounts are to be taxed separately at Maximum Marginal Rate in terms of the proviso to Section 164(2) of the Act. Further, the Assessing Officer pointed out that two of the trustees are also directors of the said companies with substantial interest and the companies have e-mail ID as that of the trust and they all function from the same address. In that view of the matter the total amount of Rs. 4,24,39,709/- was treated as income by invoking Section 13(1)(b) read with Section 11(5) of the Act. The next aspect which was enquired into/ discussed was with regard to the genuineness of the activities of the assessee as to whether it was in accordance with the objects of the trust. After taking into consideration, the statements recorded from various persons who are said to

have given donations for securing admission to professional colleges, the Assessing Officer held that the assessee is not carrying out its activities as per the objects of the trust. Accordingly, the amount said to have received as donation was added back to the income of the assessee under Section 69A of the Act. Aggrieved by such order the assessee preferred appeal before the Commissioner of Income Tax (Appeals), 25, Kolkata (CIT(A)) contending that the entire proceedings initiated under Section 147 of the Act after service of notice under Section 148, is illegal, ab-initio, void and bad in law. It was contended that there was no failure on the part of the assessee to disclose material facts necessary for completing the assessment and initiating proceedings under Section 147 was illegal and unjustified. It was further contended that the notice under Section 148 was issued after a lapse of 5 years. Further that the assessee had filed detail objections to the reasons for reopening which was never disposed of by the Assessing Officer, the law laid down by the Hon'ble Supreme Court in **GKN Driveshafts (India) Ltd. Versus ITO and Ors.**¹ was violated. Further, it was contended that in the assessment order the Assessing Officer has raised several other issues which were not forming part of the reasons for reopening as was communicated to the assessee. Further, it was submitted that in the original assessment under Section 143(3) which was completed on 01.03.2011, the Assessing Officer issued notice to the assessee called for document and details which were furnished and the Assessing Officer has recorded his satisfaction in the assessment order dated 01.03.2011. Therefore, it was contended that on the very same facts, reopening could not have been done.

¹ (2003) 259 ITR 19 (SC)

The assessee placed reliance on the decision of the Hon'ble Supreme Court in ***CIT Versus Kelvinator India Ltd.***² to support the contention that the reassessment proceeding was a case of change of opinion. Several other grounds were raised touching upon the merits of the matter.

4. The CIT(A) by order dated 30th July, 2019 substantially affirmed the view taken by the Assessing Officer except for granting partial relief such as with regard to the claim for carry forward of the depreciation etc. Aggrieved by such order the assessee preferred an appeal before the learned Tribunal. It was contended before the Tribunal that the CIT(A) failed to take note of the material irregularity committed by the Assessing Officer while initiating proceedings under Section 148 of the Act for reopening assessment under Section 147 without noting the vital fact that the basis of issuing notice under Section 148 was on a wrong assumption of fact that the assessee had invested money with its specified persons. Further, it was contended that the solitary reason recorded by the Assessing Officer for reopening of the assessment was deleted by the CIT(A) and in such circumstances, the assessment under the other heads done by the Assessment Officer which were not shown as reasons for reopening ought to have been held to be illegal. Various other grounds were raised touching upon the merits of the matter. The learned Tribunal after taking note of the factual position, more particularly, that the addition of Rs. 59,42,709/- which was made in the reassessment proceedings having been deleted by the CIT(A) vide order dated 30.07.2019, the reassessment on the heads which were not part of the reasons recorded for the reopening the assessment is not sustainable. The

² (2010) 320 ITR 561 (SC)

learned Tribunal placed reliance on the decision of the High Court of Bombay in **Commissioner of Income Tax Versus Jet Airways (I) Ltd.**³ and the decision of the High Court of Delhi in **Ranbaxy Laboratories Ltd. Versus CIT** ⁴ . On the above grounds the appeal filed by the assessee was allowed. Challenging the said order, the revenue is before us by way of this appeal.

5. Mr. Kundalia, learned Senior Standing Counsel placed reliance on the decision of the High Court of Karnataka in **Sri. N. Govindaraju Versus ITA Ward 8(2), Bangalore 82 and Anr.**⁵ to support his contention that after the insertion of Explanation 3 to Section 147 of the Act even if the issue was not one of the reasons recorded while reopening the assessment, the Assessing Officer has power to assess the escaped income on such other issues which comes to his notice subsequently, in the course of the proceedings under Section 147 of the Act. By referring to various paragraphs of the said decision, it was submitted that in the latter part of Section 147, it has been provided that “any other income” chargeable to tax which has escaped assessment and which has come to the notice of the Assessing Officer in the course of the proceedings, can also be taxed and that there are two parts to the Section and they which had been joined by the words “and also”, cannot be treated as conjunctive but has to be disjunctive. It is submitted that the judgment in the case of **Majinder Singh Kang Versus CIT and Ors.**⁶ , **CIT Versus Atlas Cycle Industries** ⁷ and

³ (2011) 331 ITR 236 (Bom)

⁴ (2011) 336 ITR 136

⁵ 2015 SCC Online Kar 7386

⁶ (2012) 344 ITR 358 (P&H)

⁷ (1989) 180 ITR 319 (P&H)

CIT Versus Shri Ram Singh ⁸ were taken note of and the said decision clearly applies to the facts of the case on hand.

6. Mr. Bagaria placed reliance on the decisions in **Commissioner of Income Tax Versus Jet Airways (I) Limited** ⁹, **Ranbaxy Laboratories Ltd. Versus CIT** ¹⁰, **Principal Commissioner of Income Tax Versus Lark Chemicals (P) Limited** ¹¹, **Yashoda Shivappa Nagangoudar Versus Income Tax Officer** ¹², **CIT Versus Mohmed Juned Dadani** ¹³, **Asstt. CIT Versus Major Deepak Mehta** ¹⁴, **Commissioner of Income Tax Versus Shri Ram Singh** ¹⁵, **M/s. Tractors and Farm Equipment Limited Versus The Assistant Commissioner of Income Tax** ¹⁶, **Martech Peripherals P. Ltd. Versus Deputy Commissioner of Income Tax & Anr.**¹⁷, **Commissioner of Income-Tax (Exemption) Versus Monarch Educational Society** ¹⁸, **GKN Driveshafts (India) Ltd. Versus Income-Tax Officer and Ors.**¹⁹, **Principal Commissioner of Income Tax Versus Anil Nagpal** ²⁰.

7. It is submitted that the decision in **Jet Airways** have been consistently followed by the various High Courts and the decision in **Majinder Singh Kang** referred by the revenue was taken note of in **Mohmed Juned Dadani** and it was held that the explanatory memorandum to Explanation 3 to Section 147 of the Act was not brought to the notice of the High Court in the

⁸ (2008) 306 ITR 343 (Raj)

⁹ (2011) 331 ITR 236 (Bom)

¹⁰ (2011) 336 ITR 136

¹¹ (2018) 99 taxmann.com 312 (SC)

¹² (2022) 138 taxmann.com 296 (Bombay)

¹³ (2013) 355 ITR 172 (Guj.)

¹⁴ (2012) 344 ITR 641 (Chattisgarh)

¹⁵ (2008) 306 ITR 343 (Raj)

¹⁶ T.C. (A) No. 1548 of 2008

¹⁷ (2017) 394 ITR 733 (Mad)

¹⁸ (2016) 387 ITR 416 (Del)

¹⁹ (2003) 259 ITR 19 (SC)

²⁰ (2017) 291 CTR 272 (P&H)

said decision. It is further submitted by Mr. Bagaria that in the reasons for reopening there was no allegation made against the assessee that they failed to fully and truly disclose all material particulars for the purpose of completion of the assessment and therefore, the reopening itself is a clear case of change of opinion. In any event, it is submitted that the reason recorded for reopening having been set aside/ dropped, the Assessing Officer is precluded from assessing the income of the assessee on other heads which were not forming part of the reasons for reopening.

8. After we have elaborately heard the learned Advocates on either side, we note that the case of the revenue rests upon the decision in **Sri. N. Govindaraju** in which the Court had taken note of and followed the decisions in **Majinder Singh Kang, Atlas Cycle Industries** and **CIT Versus Mehak Finvest Pvt. Ltd.**²¹

9. In **Sri. N. Govindaraju** it was held that “reason to believe” that any income chargeable to tax had escaped assessment is one aspect of the matter; if reason exists, the Assessing Officer can undoubtedly assess or reassess such income, for which there is such reason to believe that income chargeable to tax has escaped assessment. Further, it was held that the second part of the Section relates to “any other income” and the question would be as to whether it is to be read in conjunction to the first part or not. It was held that if it is to be read in conjunction, then without there being any addition made with regard to such income for which reason had been given in the notice for reopening assessment, the second part cannot be invoked, but if it is not to be read in conjunction, the second part can be

²¹ (2014) 367 ITR 769 (P&H)

invoked independently even without the reason for the first part to survive. The Court held that the two parts of the Section which had been joined with the words “and also”, cannot be read as conjunctive but has to be read as disjunctive.

10. The earliest of the decisions on the point is in the case of **Jet Airways**. The Hon’ble Division Bench took note of the decision in **Shri Ram Singh, Altas Cycle Industries** held that after the Amendment of 2009, the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year; upon the formation of that belief and before he proceeds to make an assessment, reassessment or re-computation, the Assessing Officer has to serve on the assessee a notice under Sub-Section (1) of Section 148; the Assessing Officer may assess or reassess such income which he has reason to believe, has escaped assessment and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently, in the course of the proceedings under Section 147 and though the notice under Section 148 (2) does not include a particular issue with respect to which income has escaped assessment, he may nonetheless assess or reassess the income in respect of any issue which has escaped assessment which has come to his notice subsequently, in the course of the proceedings under the Section. The Hon’ble Division Bench held that even after the Amendment, the Parliament has not taken away the basis of the decision in **CIT Versus Shri Ram Singh**²² . Following paragraphs of the judgment would be of great relevance:

²² (2008) 306 ITR 343 (Raj)

Parliament, when, it enacted Explanation 3 to Section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to Section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under Section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd. [2008] 305 ITR 170 and of the Punjab and Haryana High Court in Vipin Khanna [2002] 255 ITR 220 would, therefore, no longer hold the field. However, in so far as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh [2008] 306 ITR 343, Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab and Haryana High Court in CIT v. Atlas Cycle Industries [1989] 180 ITR 319. The decision in Atlas Cycle Industries [1989] 180 ITR 319 held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under Section 148 were incorrect or nonexistent. The decisions of the Punjab and Haryana High Court in Atlas Cycle Industries [1989] 180 ITR 319 and of the Rajasthan High Court in Shri Ram Singh [2008] 306 ITR 343 would not be affected by the amendment brought in by the insertion of Explanation 3 to Section 147.

Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment of reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the

reasons, for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No. 2) Act of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of Section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under Section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under Section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in Section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that Section 147 as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language

used by Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to Section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words “and also” by the Rajasthan High Court in Shri Ram Singh [2008] 306 ITR 3443. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of Section 147 as they stood after the amendment of April 1, 1989, continue to hold the field.

11. The decision in **Jet Airways** was followed in **Ranbaxy Laboratories** wherein it was held as follows:

As per Explanation 3 if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under Section 147 regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to taken into accounts, he would be required to issue a fresh notice under Section 148.

12. The decision in Jet Airways was followed in **Lark Chemicals (P) Limited**, which decision was affirmed by the Hon’ble Supreme Court as SLP stood dismissed, reported in **(2018) 99 Taxman.com 312 (SC)**. Yet again, the decision in **Jet Airways** was followed in **Yashoda Shivappa Nagangoudar**. In **Mohmed Juned Dadani**, the Hon’ble Division Bench had

taken note of the decision in **Majinder Singh Kang**, referred to the decision of the Hon'ble Supreme Court in **S. Sundaram Pillai Versus V.R. Pattabiraman** ²³ to explain the object of an explanation to a statutory provision, the Court also took note of the decision in **Jet Airways, Atlas Cycles Industries** and **Travancore Cements Limited** and held that if the assessing officer were to drop the ground on which the reassessment proceedings was initiated cannot be permitted to chase other grounds not mentioned in the reasons for reopening and if permitted it would result in an incongruent situation. The decision in **Majinder Singh Kang** was distinguished. The relevant portion of the judgment is as follows:-

- *We may also approach the question from a slightly different angle. It is not in dispute that once an assessment is reopened by a valid exercise of jurisdiction under section 147 of the Act, it is open for the Assessing Officer to assess or reassess any income which had escaped assessment which comes to his light during the course of his assessment proceedings which was not mentioned in the reason for issuing notice under Section 148 of the Act. In a notice for reassessment which has been issued beyond a period of four years from the end of relevant assessment year, the condition that income chargeable to tax has escaped assessment for the reason of the failure on the part of the assessee to disclose truly and fully all material facts for the purpose of assessment must also be established unless of course some ground, viz. non-filing of the return at all, etc. is available to the Assessing Officer. If such non-disclosure of material facts is established with respect to the reason recorded for issuing notice for reopening the assessment, it would be open for the Assessing Officer to thereafter even assess other income which might have escaped assessment but which may not necessarily satisfy the requirement of non-disclosure of true and full material facts. If in such a situation, the*

²³AIR 1985 SC 582

stand of the Revenue is accepted, a very incongruent situation would come about if ultimately the Assessing Officer were to drop the ground on which notice for reopening had been issued but to chase some other grounds not so mentioned for issuance of the notice. In such a situation, even if a case where notice for reopening has been issued beyond a period of four years, the assessment would continue even though on all the grounds on which the additions are being made, there was no failure on the part of the assessee to disclose true and full material facts. In such a situation an important requirement of failure on the part of the assessee to disclose truly and fully all material facts would be totally circumvented.

- As already noted, except for the Punjab and Haryana High Court in the case of *Majinder Singh Kang Versus CIT [2012] 344 ITR 358 (P & H)* all courts have uniformly taken a view that Explanation 3 to Section 147 of the Act does not change the situation in so far as the present controversy is concerned. The leading decision of the Bombay High Court in the case of *CIT Versus Jet Airways (I) Ltd.* Has been followed by different High Courts. In the case of *CIT Versus Jet Airways (I) Ltd.*, the High Court, in its elaborate decision considering the statutory provisions, different judicial pronouncements and the explanatory memorandum for introduction of Explanation 3 to Section 147 of the Act, rules in favour of the assessee.
- The Punjab and Haryana High Court in the case of *Majinder Singh Kang Versus CIT [2012] 344 ITR 358 (P & H)* of course has sounded a different note. We may, however, notice that the explanatory memorandum to Explanation 3 to Section 147 of the Act was not brought to the notice of the High Court in the said decision. The High Court gave considerable importance on such Explanation 3 to section 147 of the Act and the language used therein.

13. The decisions in ***Jet Airways*** and ***Ranbaxy Laboratories*** were also followed and the appeal in favour of the assessee was allowed in the case of ***M/s. Tractors and Farm Equipment Limited***. The decision in ***N.***

Govindaraju was considered in **Anil Nagpal** and it was held that if the notice issued under Section 148 is invalid the assessing officer cannot reopen the assessment. Further it was held that even if the reasons recorded do not refer to a particular issue, the assessing officer would be entitled to assess the income or reassess the computation of income with regard thereto, if the same comes to his notice during the course of the proceedings for reassessment, however this can be done provided there is a valid notice under Section 148 that the assessing officer the jurisdiction to adopt proceedings under Section 147 of the Act and if the notice is illegal, the reassessment proceedings are invalid.

14. While on this issue, we should bear in mind the decision in the case of **GKN Driveshafts (India) Limited** wherein it was held that the assessing officer is bound to furnish reasons within a reasonable time and the noticee is entitled to file their objection to such notice and the assessing officer is bound to dispose of the same by passing a speaking order. Though the Explanation 3 inserted by the amendment empowers the assessing officer to assess the income in respect of any issue which has escaped assessment when such issue comes to his notice subsequently in the course of the proceedings under Section 147 notwithstanding that the reasons for such issue have not been included in the reasons recorded under Sub-Section 2 of Section 148, the prerequisite is there should be a valid notice. Admittedly, in the case on hand, the notice was held to be not sustainable. If that be so, the assessing officer cannot be stated to be empowered to make a roving enquiry into other issues which according to him came to his notice during the reassessment proceedings. The foundation of a reassessment proceeding

is a valid notice and if this notice is held to be invalid the entire edifice sought to be raised on such foundation has to collapse.

15. Thus, for all the above reasons, we are of the considered view that the tribunal was right in granting relief to the assessee.

16. In the result, the appeal filed by the revenue is dismissed and the substantial questions of law are answered against the revenue. No Costs.

(T.S. SIVAGNANAM, J.)

I Agree.

(HIRANMAY BHATTACHARYYA, J.)

(P.A- PRAMITA/ SACHIN)