

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.7052 of 2022

Anil Raj Tuli

....

Petitioner

-versus-

**Income Tax Officer, National
Faceless Assessment Centre, Delhi
and others**

....

Opposite Parties

Advocates appeared in the cases:

For Petitioner

:

Mr. Sidhartha Ray, Advocate

For Opposite Parties

:

Mr. Sidharth Sankar Mohapatra,
Senior Standing Counsel for
Income Tax Department

CORAM:

THE CHIEF JUSTICE

JUSTICE M. S. RAMAN

JUDGMENT

03.11.2022

Dr. S. Muralidhar, CJ.

1. The challenge in the present petition is to a notice dated 30th March, 2021 issued by the Income Tax Officer (ITO), Bargarh Ward, Bargarh under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen the assessment for the Assessment Year (AY) 2014-15.

2. The main ground on which the notice is challenged is that it has been initiated after the expiry of four years from the end of the

relevant AY on a mere change of opinion without any tangible new material.

3. The background facts are that on 29th October 2014, the Petitioner filed his return of income for the AY 2014-15 showing a total income of Rs.10,81,300/-. The return was picked up for scrutiny and the statutory notices under Sections 143(2) and 142(1) of the Act were issued. The Petitioner with the return submitted his balance sheet as of 31st March 2014, and trading and profit & loss account accompanied by the audit report in Form-3CB.

4. During the course of regular assessment proceedings, the Assessing Officer (AO) called for an explanation as regards the low net profit. After examining the books of accounts and explanation offered by the Assessee, the ITO passed an Assessment Order under Section 143(3) of the Act by an order dated 29th July, 2016 raising a demand of Rs.21,070/-.

5. Four years after the expiry of the AY in question, the impugned notice dated 30th March, 2021 under Section 148 of the Act was issued seeking to reopen the assessment for AY 2014-15. On 30th June 2021, a notice under Section 143(2) read with Section 147 of the Act was issued setting out the reason recorded for reopening as “non-deduction of TDS from the hiring charges paid to the service provider.” The Assessee on 8th July, 2021 had filed its objection and requested for communication of the reasons. On

26th July 2021, the ITO communicated the reasons again saying that the Assessee had booked a sum of Rs.55,95,700/- as vehicle expenses and hire charges without deducting TDS on the hiring charges paid to the service provider.

6. However, the approval by the Principal Commissioner of Income Tax, Sambalpur-Opposite Party No.4 (PCIT) to the reopening appeared to be dated 26th March, 2021. Accordingly, it was contended that the PCIT (Opposite Party No.4) while approving initiation of the reassessment proceedings did not apply his mind that the reason had been recorded more than three months thereafter i.e. on 30th June, 2021. According to the Petitioner, it is only thereafter that he received the notice dated 30th March, 2021 under Section 148 of the Act.

7. Pursuant to the request for reasons made by the Assessee by the reply dated 9th July 2021, the National Faceless Assessment Centre (NFAC) by the letter dated 7th January, 2022 again provided to the Assessee the reasons for the reopening of the assessment. This time the reasons were slightly more elaborated and read as under:

“An information available on record reveal that during the F.Y. relevant to the A.Y. 2014-15, the assessee had booked a sum of Rs.55,95,700/- as vehicle expenses and hire charges in his Profit & Loss account drawn. The assessee has not deducted TDS from the hiring charges so paid to the service provider as mandated u/s. 194-1 of the I.T. Act, 1961. Further, this is also in contravention to the provisions mandated u/s. 40(a)(ia) of the I.T. Act, 1961.”

8. It is the contention of the Assessee that the matter regarding non-deduction of TDS while paying to the service provider was already the subject matter of the original assessment proceedings before the AO during the scrutiny assessment. This did not amount to new tangible material justifying the reopening of the assessment.

9. The objections of the Assessee were negated by the NFAC by the order dated 4th March, 2022. Thereafter, notice under Section 142(1) of the Act was issued on 8th March, 2022 fixing the date of compliance to 15th March, 2022. It was at that stage that the present petition was filed in which while issuing notice on 16th March 2022, this Court directed that further proceedings could continue but no final order would be passed.

10. Pursuant to the notice issued, the Department has filed its reply by the affidavit dated 8th August, 2022. It is pointed out that the reassessment proceedings for AY 2014-15 was initiated after expiry of four years but before expiry of six years and was duly approved by the Principal CIT, Sambalpur. It was submitted that the record containing the proposal for initiation of proceedings under Section 147 of the Act was submitted before the Principal, CIT, Sambalpur on 22nd October, 2020 and approval was obtained on 26th March, 2021. Thereafter, on 30th March 2021, notice under Section 148 of the Act was issued to the Petitioner. Thereafter, on

30th June 2021, notice under Section 143 (2) read with Section 147 of the Act was issued. Therefore, the date for recording of reasons was not 30th June, 2021 as projected by the Petitioner.

11. On merits, it was submitted by the Department that the perusal of the record revealed that the assessee had shown expenses of Rs.55,95,700/- under the head “vehicle expenses and hire charges”. His P&L Account revealed that the “assessee failed to deduct tax at source u/s. 194-1 of the I.T. Act, as certified by tax auditor in form No. 3 CD Clause No.34(a) containing the provision of deduction of Chapter-XVII-BB. Accordingly, the said amount is to be disallowed u/s. 40 a (ia) and to be considered as the income of the assessee.”

12. Reference was also made to the Explanation 1 under Section 147 of the Act, which reads thus:

“Production before the assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.”

13. It was submitted that since on the above issue no opinion was formed at the time of regular assessment, the question of change of opinion did not arise. Reliance was placed on the decision of the High Court of Mumbai in ***Export Credit Guarantee Corporation of India Ltd. v. Additional CIT (30 taxman.com***

211) (2013) and the decision of the Delhi High Court in ***Honda Siel Products Ltd. v. DCIT (197 taxman 415) (2011)***.

14. This Court heard the submissions of Mr. Sidhartha Ray, learned counsel for the Petitioner and Mr. Sidharth Sankar Mohapatra, learned Senior Standing Counsel for Income Tax Department.

15. In support of his submission that the reopening of the assessment was based merely on a change of opinion, Mr. Ray relied on the decisions of the Supreme Court of India in ***Calcutta Discount Company Limited v. Income Tax Officer, Companies District, I AIR 1961 SC 372, M/s. S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta v. Income Tax Officer (1981) 3 SCC 143*** and ***The Barium Chemicals Ltd. v. The Company Law Board AIR 1967 SC 295***. It was submitted that the expression “reason to believe” under Section 147 of the Act would require new and tangible material to emerge for the satisfaction of the ITO that there was an escapement of income. There must be rational and intelligible nexus between the reasons and the belief. Reference was also made to the recent decision dated 21st July, 2022 of this Court in W.P.(C) No.4440 of 2022 (***Kalinga Institute of Industrial Technology (KIIT), Bhubaneswar v. Asst. Commissioner of Income Tax, Exemption Circle, Bhubaneswar***)

16. Mr. Mohapatra, learned Senior Standing Counsel for the Department, on the other hand, referred to the decisions already adverted to the counter affidavit filed by the Department and

submitted that the mere production of books of accounts by the Assessee during the original assessment could not amount to a full and true disclosure of the material particulars. Consequently, it was submitted that the impugned notice did not call for interference.

17. The above submissions have been considered. As regards the submission that the PCIT had accorded sanction for reopening of the assessment without application of mind only because the date of approval is 26th March, 2021, while the date of communication of the reasons to the Petitioner is 30th June, 2021, the Court is inclined to accept the plea of the Department that the date of communication of reasons was later to the date on which reasons were recorded. The reasons were perhaps recorded earlier i.e. prior to the sanction for the reopening of the assessment by the PCIT on 26th March, 2021.

18. On merits, however, it is seen that the original assessment was a scrutiny assessment under Section 143 (3) of the Act. The assessee had produced the complete books of accounts, which were perused by the ITO. The order of assessment notes that “the books of accounts and other documents as called for are produced for examination” and the case was discussed with the authorized representative of the Assessee. It is further noted in the original assessment order as under:

“An explanation was called for low Net Profit or Loss shown from Large Gross Receipts. The A/R of the assessee filed an explanation. The same has been placed

in record and verified the same and no adverse was found.”

19. After verifying the documents, the ITO noted as under:

“Thus, the total claims of expenses under these heads of expenses are Rs.5,20,799/- . In the course of assessment proceeding, the assessee has failed to produce all the relevant bills/vouchers in support of the expenses claimed though the relevant bills/vouchers were as called for.

Hence, in absence of supporting vouchers, I deem it fair and reasonable to disallow a sum of Rs.52,080/- i.e. 10% expenses claimed in different heads for Rs.5,20,799/- and the same is added to the total income.

20. It is seen, therefore, that the original assessment was on the basis of a complete and careful examination of the books of accounts produced by the Assessee. There was application of mind by the ITO to the materials produced by the Assessee.

21. As regards the reasons for reopening the assessment, it is stated to be based simply on “information available on record.” There is no indication that there was any failure by the Assessee to make a full and true disclosure of all the material particulars. The notice records mechanically that the ITO had reasons to believe that income chargeable to tax has escaped assessment. In other words, there is no reference to any new and tangible material forming the basis for the above belief about escapement of income from tax. In short, the same material already available

on record was re-examined by the ITO to come to the conclusion that there was an escapement of income.

22. In *Calcutta Discount Company Limited (supra)*, the Supreme Court held as under:

“9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — “I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents”. His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to “omission to disclose fully and truly all material facts necessary for his assessment”. Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.”

23. Notwithstanding the explanation to Section 147 of the Act that production of books of accounts by itself will not amount to a full disclosure, the reasons communicated should still have to indicate that there was a failure to make a full disclosure although the accounts were produced before the AO. In the instant case, there is no such statement anywhere on the record, which could have formed the basis for the belief of the ITO that income had escaped assessment.

24. In *Income Tax Officer-I, Ward District VI, Calcutta v. Lakhmani Mewal Das* (1976) 3 SCC 757, the Supreme Court explained the legal position on what was expected of the Assessee a regards full and true disclosure in the context of Section 147 (a) of the Act as it then stood, and which observations hold true even now. It was observed as under:

“7. It would appear from the perusal of the provisions reproduced above that two conditions have to be satisfied before an Income-tax Officer acquires jurisdiction to issue notice under section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year, viz., (1) the Income-tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return under section 139 for the assessment year to the Income-tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must co-exist in order to confer jurisdiction on the Income-tax Officer. It is also imperative for the Income-tax Officer to record his reasons before initiating proceedings as required by section 148(2). Another requirement is that

before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. *The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax Officer with regard to the inference which he should draw from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.*” (emphasis supplied)

25. Again in ***S. Ganga Saran and Sons (Pvt.) Ltd., Calcutta*** (*supra*), it was explained with reference to Section 147(a) of the Act as it then stood as under:

“6. It is well-settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under Section 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is 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. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction.

The important words under Section 147(a) are “has reason to believe” and these words are stronger than the words “is satisfied”. The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid.”

26. The Supreme Court has in ***Commissioner of Income Tax v. Kelvinator of India Ltd. (2010) 320 ITR 561(SC)***, after a review of the case law, held that the reopening of the assessment under Section 147 of the Act cannot be based merely on a change of opinion. The relevant observations read as under:

“.....post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review;

he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the grab of reopening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer.”

27. In *Oryx Fisheries v. Union of India* (2010) 13 SCC 427, the Supreme Court, while explaining what in administrative law the principles of natural justice generally require, and in that context of what a show cause notice must contain, observed as under:

“31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.”

28. This would apply in equal measure to a notice under Section 148 of the Act for a reopening of assessment followed by the reasons supplied. In the present case, it appears that the reopening of the assessment was based on the same material already available before the AO and without any noting, at the time of reopening of the assessment that there was a failure on the part of the assessee to make a full and true disclosure of all material particulars. On the same material already available, the ITO formed reason to believe that income had escaped assessment. This appears to be a textbook example of a reopening of assessment based on a mere change of opinion.

29. Consequently, this Court has no hesitation in quashing the impugned notice dated 30th March, 2021 and the order dated 4th March, 2022 of the NPAC rejecting the objection of the Petitioner to the reopening, and all proceedings consequent thereto.

30. The writ petition is allowed in the above terms, but in the circumstance, with no order as to costs.

(S. Muralidhar)
Chief Justice

(M. S. Raman)
Judge