

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.47 OF 2022

Shrikant Vasudev Naik,
S/o Vasudev Naik, 70 years of age,
Retired, Indian National,
Resident of H.No.956/A,
Vasudeo Smruti Tarachi Bhat,
Siolim, Bardez 403 517

... Petitioner

Versus

1. The Assistant Commissioner of Income Tax
Circle 1(1), Panaji Goa.
Having his office at Aayakar Bhavan,
1st Floor, 5 EDC Complex, Patto Plaza,
Panaji Goa.

2. Principal Commissioner of Income Tax
Having his office at Aayakar Bhavan,
1st Floor, 5 EDC Complex, Patto Plaza,
Panaji Goa.

...Respondents

WITH

WRIT PETITION NO.48 OF 2022

Indirabai Shrikant Naik,
W/o Shrikant Naik, 70 years of age,
Housewife, Indian National,
Resident of H.No.956/A,
Vasudeo Smruti Tarachi Bhat,
Siolim, Bardez 403 517

...Petitioner

Versus

1. The Assistant Commissioner of Income Tax
Circle (1), Panaji Goa.
Having his office at Aayakar Bhavan,
1st Floor, 5 EDC Complex, Patto Plaza,
Panaji Goa.

2. Principal Commissioner of Income Tax
Having his office at Aayakar Bhavan,
1st Floor, 5 EDC Complex, Patto Plaza,
Panaji Goa.

...Respondents

Mr Shivan Desai, Advocate for the Petitioners.
Ms Susan Linhares, Standing Counsel for the Respondents.

**CORAM: M. S. SONAK &
BHARAT P. DESHPANDE,JJ**

DATED: 26th SEPTEMBER 2022

ORAL JUDGMENT (Per M. S. Sonak, J)

1. Heard the learned counsel for the parties.
2. The learned counsel agree that a common judgment and order can dispose of both these petitions because the issues of law and fact are almost identical. The Petitioner in Writ Petition No.48 of 2022 is the wife of the Petitioner in Writ Petition No.47 of 2022. Given Section 5A of the Income Tax Act, 1961, separate returns were filed by the wife and the husband for the Assessment Year 2016-2017. Therefore, the issues of law and facts raised in both these petitions are identical. Accordingly, writ Petition No.47 of 2022 is taken the lead petition.
3. The Petitioners filed their income tax returns under Section 139(1) for the Assessment Year 2016-2017. This was followed by a revised return of income on 18.01.2017, declaring a total income of

₹1,17,69,130/-. On 11.08.2017, their cases were considered for limited scrutiny, and a notice under Section 143(2) was issued to them.

4. Notice dated 11.08.2017 stated that the following issues have been identified for examination:

"i. Whether value of consideration for computation of capital gains has been correctly shown in the return of income.

ii. Whether deduction from capital gains has been claimed correctly.

iii. Whether investment and income relating to properties are duly disclosed."

5. The Petitioners claim to have responded to the above notice dated 11.08.2017 by submitting all documents about the income for Assessment Year 2016-2017. In particular, the Petitioners claim that they furnished the documents relating to the sale transaction of the property, including the MOU dated 30.08.2007, the sale deed dated 14.07.2015, and the MOU dated 30.03.2016.

6. The Assessing Officer vide his order dated 19.12.2018 accepted the Petitioners returned income and consequentially the explanation furnished by the Petitioners that were backed with the relevant documents as aforesaid. In particular, the computation sheet appended to the Assessment Order dated 19.12.2018 shows that the deductions

to the extent of ₹1,64,45,000/- claimed by the Petitioners under Section 48 of the I.T. Act, were allowed by the Assessing Officer.

7. On 27.03.2021, the Petitioners were served with impugned notices under Section 148 of the I.T. Act seeking to reopen the assessment for the Assessment Year 2016-2017. By communication dated 01.04.2021, the Petitioners sought reasons for reopening of assessment after enclosing a copy of the return of income for Assessment Year 2016-2017.

8. On 23.12.2021, the Petitioners received the impugned notices under Section 143(2) read with Section 147 of the I.T. Act. The reasons for reopening of the assessment accompanied the impugned notices, and the same read as follows:-

"Reasons for reopening of the assessment in case of Shrikant Vasudev Naik

A.Y. 2016-17 u/s. 147 of the Income Tax Act, 1961.

1. The assessee is a Individual. It has filed return of income for the assessment year 2016-17 on 18-01-2017 declaring income of Rs. 1,17,69,130/-. The case is selected for scrutiny assessment which is completed on 19.12.2018 declaring assessed income of Rs. 1,17,69,130/-.

2. It is brought to the notice of the assessing officer that assessee had received a total sales consideration of Rs. 9,93,60,000/- from the sale of ancestral property. He paid an amount of Rs. 1,64,45,000/- being damages & compensation and same has been reduced from the full value of consideration. Out of this, the assessee share is Rs. 82,22,500/-. After claiming

expenses like brokerage, indexation compensation and deductions u/s 54F & 54EC, the assessee declared net capital gain of Rs.93,40,387/-.

3. It is observed from the records that the assessee has claimed expenditure of Rs.1,64,45,000/- by way of compensation and reduced from total consideration received. The assessee had received an advance towards creation of right/actionable claims in the immovable property from two companies viz. Resicom Homes pvt. Ltd and M/s. DSouza.. The purchases were supposed to complete the contract of sale within a reasonable time and pay balance consideration. However, the buyer could not make remaining payments which prompted the assessee to search of alternate buyers. Finally the assessee identified an alternative buyer viz Kiran Thakur who offered a better price for the said property and the assessee canceled the sale deed agreement of earlier buyers viz Resicom Homes pvt Ltd and D Souza estate Holdings Pvt Ltd by paying compensation for breach of agreement. Accordingly, the assessee had paid Rs. 91,95,000/- and Rs.72,50,000/- to the earlier buyer, as compensation. The compensation amount cannot be linked with the sale of the impugned property. Further, the asset is capital asset and taxed under the head capital Gains but not business income while computing the capital gain the assessee has reduced the same from full value of sales consideration by treating it as expenditure.

4. However, the compensation should not be treated as expenditure for the purpose of acquiring the property and same cannot be allowed as deduction. Under the head capital gains only direct expenses relatable to transfer of property are allowed as deduction. Therefore, Cancellation/compensation expenses should not be held to be incurred either for acquiring the property or for transfer of property. Moreover the damages/compensation cancellation charges paid by assessee is only by way of penalty for breach of terms and conditions of the agreement. The penalty in nature and penalty cannot be allowed as deduction. Hence the assessee is not entitled to get

deduction of Rs. 1,64,45,000/- from the full value of consideration. In assessee' case only 50 % of compensation (Rs.82,22,500/-) paid has to be disallowed and brought to tax under the head capital Gain. Remaining 50% of expenditure (Rs.82,22,500/-) claimed has to be disallowed and tax in the assessee's spouse name i.e. Smt. Indira Bai Shrikant.

5. In view of the above facts, the Assessing Officer is of the belief that income chargeable to tax amounting to Rs 82,22,500/-has escaped the assessment, within meaning of provision of section 147 of tax act, 1961. Accordingly, a proposal for the sanction/ approval to issue notice u/s 148 of the I. T. Act, 1961 from the Hon'ble Addl. Commissioner of Income Tax, Panaji is hereby solicited as per the provisions of sec.151 of the I.T. Act, 1961.

Yours faithfully,
AAKANKSHA KULSHRESTHA
CIRCLE 1(1), PANAJI"

9. The Petitioners filed detailed objections/representation to the impugned notices dated 23.12.2021 in terms of procedure in ***GKN Driveshafts (India) Ltd. Vs Income Tax Officer and others***¹. The Respondents vide communication dated 07.03.2022 disposed of the Petitioners objections maintaining that the impugned notices were correctly issued. Hence, the present petitions.

10. Mr Desai, learned counsel for the Petitioners, submits that there was no tangible material for reopening the assessment under Section 147 of the I.T. Act. He presents that this is a mere "*change of opinion*" because the Petitioners disclosed all material facts. Upon

¹ 2002 Supp(4) SCR 359

considering the same, the Assessing Officer made the Assessment Order *inter alia* permitting the deductions as claimed. He submits that the Respondents were bound by the reasons they stated when issuing impugned notices. Such reasons could not be supplemented, or no fresh reasons could be introduced while rejecting the Petitioners' objections or by filing an affidavit. He submits that the impugned notices have been issued in excess of jurisdiction vested in the Respondents, and therefore, the same ought to be quashed and set aside.

11. Mr Desai relies on *NYK Line (India) Ltd. Vs Deputy Commissioner of Income Tax*², *Zuari Foods and Farms Pvt. Ltd., Vs Asst. Commissioner of Income Tax*³, *Jainam Investment Vs Asst. Commissioner of Income Tax*⁴, *Idea Cellular Ltd. Vs Deputy Commissioner of Income Tax & Ors.*⁵, *GKN Sinter Metals Ltd., Vs Ramapriya Raghavan & Ors.*⁶, *Commissioner of Income Tax Vs Kelvinator of India Ltd. (now known as Whirlpool of India Ltd.)*⁷, *Oracle Systems Corporation Vs Asst. Director of Income Tax*⁸ in support of his contentions.

2 2012 SCC OnLine Bom 195

3 MANU/MH/0902/2018

4 MANU/MH/2533/2021

5 2008 SCC OnLine Bom 1445

6 MANU/MH/1482/2015

7 2002 SCC OnLine Del 1515

8 2015 SCC OnLine Del 13013

12. Ms Linhares, learned counsel for the Respondents, submits that there is no infirmity in the issue of impugned notices. She offers that the Petitioners never disclosed the sale deed and the MOU at the time of initial assessment under Section 143(3) by the Assessing Officer. She submits that these two documents constitute fresh or tangible material sufficient for reopening the assessment under Section 147 of the I.T. Act.

13. Ms Linhares submits that the clauses of the sale deed and the MOU make it clear that there was no liability on the property sold; therefore, the compensation of ₹1,64,45,000/- was not some expenditure incurred wholly and exclusively in connection with the sale or transfer. She submits that during the initial assessment, the Assessing Officer was unaware of the sale deed and the MOU and, in any case, had no occasion to apply his mind to these aspects. She, therefore, submits that there is no legal infirmity in the issue of impugned notices. She relies on *Gruh Finance Ltd. Vs Joint Commissioner of Income Tax (Assessment)*⁹ in support of her contentions.

14. The rival contentions now fall for our determination.

15. The record clearly bears out that the Petitioners had claimed a deduction of ₹1,64,45,000/- in Section 48 of the I.T. Act. After the Petitioners' cases were selected for limited scrutiny, it appears that the

⁹ (2000) 243 ITR 482

Petitioners filed necessary documents supporting their claim for deductions. As noted earlier, limited scrutiny was precisely to consider whether the deductions from capital gains had been claimed correctly by the Petitioners.

16. Upon consideration of disclosures made by the Petitioners and the documents produced by the Petitioners, the Assessing Officer, by a speaking order, accepted the returns filed by the Petitioners. This means that the Assessing Officer accepted the Petitioners' claim for deductions to the extent of ₹1,64,45,000/- from the capital gains. Section 48 of the I.T. Act *inter alia* provides that the income chargeable under the head "*capital gains*" shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the expenditure incurred wholly and exclusively in connection with such transfer.

17. The Petitioners' case was that they had agreed with Resicom Homes Pvt. Ltd. and D'Souza Estate Holdings Pvt. Ltd. to sell the property in question. However, the sale did not fructify, and therefore, by a memorandum of understanding, the agreement was cancelled after returning the amount received from the above two parties. In addition, the Petitioners paid to the said two parties by compensation a further amount of ₹1,64,45,000/-. This latter amount was claimed as a deduction under Section 48 of the I.T. Act. The Assessing Officer duly accepted this deduction after the Petitioners' case was taken up for limited scrutiny under Section 143(3) of the I.T. Act.

18. In the reasons accompanying the impugned notices, significantly, there was not even an allegation about suppressing or concealing the deed of sale or MOU. The reasons referred to record and based on the records suggested that the Assessing Officer may have erred in deducting ₹1,64,45,000/- because there was no reason to pay Resicom Homes Pvt Ltd. and D'Souza Estate Holidays Pvt. Ltd., any compensation. From the reasons furnished, it is apparent that this is a case of change of opinion and not a case of any concealment or suppression of material facts.

19. However, after the Petitioners raised the objections, the objections were disposed of by order/communication dated 07.03.2022. In this order/communication, there was a reference made to the Petitioners concealing the fact of the sale deed. The order/communication claim that the Assessing Officer had not considered para 7, page 17 of the sale deed before allowing the deductions under Section 48 of the I.T. Act.

20. Ms Linhares contended that where material concealment resulted in a mistake, the Assessing Officer is always entitled to reopen the assessment by invoking Section 147/148 of the I.T. Act. She submitted that the original assessment order does not show any conscious application of mind by the Assessing Officer to the Petitioners' claim for deductions under Section 48 of the I.T. Act.

21. In *GKN Sinter Metals Ltd.* (supra), the Division Bench of this Court took note of the catena of decisions beginning with *Hindustan Lever Limited Vs R. B. Wadkar* (268 ITR 332) that the notice for reopening of assessment would stand or fall based on the reasons recorded at the time of issuing a notice for reopening of assessment. The reasons cannot be improved by substitution, addition, or deletion. The reasons cannot be supplemented by filing an affidavit or making an oral submission. Otherwise, the reasons lacking in the material particulars would get augmented by the time the matter reaches the Court on the strength of the affidavit or oral submissions. Thus, the validity of the notice for reopening is to be examined based on the reasons recorded at the time of issuing the notice for reopening an assessment. The impugned notice cannot be supported by any additional material which does not find a place in the reasons recorded at the time of issuing the impugned notice.

22. Applying the above well-settled principles to the facts of the present case, the Respondents will have to stand or fall based on the reasons recorded by the Assessing Officer at the time of issuing impugned notices for the reopening of the assessment. Those reasons nowhere referred to any concealment of documents by the Petitioners or concealment of sale deed by the Petitioners. The record fairly bears out that there was no concealment. After taking up the Petitioners' cases for limited scrutiny, the Assessing Officer considered the material on record and allowed the deductions under Section 48 of the I.T. Act. Therefore, the Respondents cannot now be permitted to add to the

reasons recorded by the Assessing Officer at the time of issuing notices for reopening the assessment.

23. Even otherwise, there appears to be no merit in the claim of the concealment of documents like the sale deed or MOU. After the Petitioners' cases were selected for limited scrutiny, particularly on the aspect of the claim for deductions on capital gains, the Petitioners have stated on oath that all documents, including the sale deed and the MOU, were produced before the Assessing Officer in response to his questionnaire. The record shows that the deductions were granted after considering the relevant documents. This is possibly why, at the time of issuing notice for reopening the assessment, the reasons do not refer to any alleged concealment of documents or suppression of documents.

24. In *NYK Line (India) Ltd.* (supra), the Division Bench speaking through D. Y. Chandrachud, J (as His Lordship then was) has explained that the power of the Assessing Officer to reopen an assessment within four years of the relevant assessment year is undoubtedly wider than where four years have elapsed. Once four years have elapsed, the proviso to Section 147 stipulates that there must be a failure on the assessee's part to disclose fully and truly all material facts necessary for assessment as a result of which income chargeable to tax has escaped assessment. But, that is not to say that within four years, the power of the Assessing Officer to reopen an assessment is untrammelled. Even within four years, it is now a settled

principle of law that an assessment cannot be reopened based on a mere change of opinion. The Supreme Court has emphasized that the Assessing Officer has no power to review, but his power is the power to reassessment. If a mere change of opinion cannot furnish a ground for reopening an assessment, then, under the garb of reopening an assessment, a review would not equally be permissible. Consequently, the test is that there should be tangible material to conclude that there is an escapement of income from assessment.

25. In *Commissioner of Income Tax Vs Kelvinator of India Ltd.*¹⁰, the Hon'ble Supreme Court has held that post 01.04.1989, the power to reopen is much broader. However, one needs to give a schematic interpretation to the words "*reason to believe*", failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments based on "*mere change of opinion*", which cannot be *per se* reason to reopen. There is a conceptual difference between the power to review and reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfilment of certain preconditions, and if the concept of "*change of opinion*" is removed, a 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. Hence, after 01.04.1989, the Assessing Officer has the power to reopen, provided there is "*tangible material*" to conclude that there is escapement of

10 (2010) 320 ITR 561 (SC)

income from assessment. The reasons must have a live link with the formation of the belief.

26. In the present case, it is apparent that reassessment is based on a mere change of opinion. The reassessment based on a mere change of opinion is nothing but a review. Admittedly, no such powers of review have been conferred on the Assessing Officer when purporting to exercise powers under Sections 147 and 148 of the I.T. Act.

27. Ms Linhares's contention about there being no conscious application of mind by the Assessing Officer when the Petitioners' returns were scrutinized and accepted under Section 143(3) cannot be accepted in the facts of the present case. As noted earlier, the limited scrutiny was to determine whether the deductions from capital gains were correctly claimed or not. Upon scrutiny, the Assessing Officer concluded that the same were claimed correctly. This is sufficient to indicate the conscious application of mind on the deduction issue under Section 148(1) of the I.T. Act. That apart, even otherwise, such contention was considered and rejected by the Division Bench of our Court in *Idea Cellular Ltd.* (supra). A similar argument was also rejected in *NYK Line (India) Ltd.* (supra) after relying upon the observations in paragraph 10 of *Idea Cellular Ltd.* (supra).

28. The Full Bench of Delhi High Court in *Kelvinator of India Ltd.* (supra) also rejected an identical contention by observing thus in paragraph 42:-

"42..... When a regular order of assessment is passed in terms of the said sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of Section 114 of the Indian Evidence Act, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

29. The Full Bench of Delhi High Court also considered the nature of jurisdiction conferred by Section 147 in the claim of the I.T. Act. It held that the Assessing Officer has no jurisdiction to review his own order. Therefore, the powers under Section 147 cannot be used, like the powers of review to reopen the reassessment. The observations of the Full Bench of Delhi High Court were approved and accepted by at least two Benches of this Court in *Asteroids Trading & Investment P. Ltd. Vs Deputy Commissioner of Income Tax*¹¹ and *Asian Paints Ltd. Vs Deputy Commissioner of Income Tax*¹².

30. *Gruh Finance Ltd.* (supra), relied upon by Ms Linhares in the first place, refers to peculiar facts and special circumstances emerging from the record where depreciation was claimed in respect of non-existing assets. That apart, the broader proposition in *Gruh Finance Ltd.* (supra) is based on the previous ruling of the Division Bench of

11 (2009) 308 ITR 1 90

12 (2008) 308 ITR 195

the Gujarat High Court in *Praful Chunilal Patel Vs M. J. Makwana, Assistant Commissioner of Income Tax*¹³.

31. *Praful Chunilal Patel (supra)* was explicitly considered by the Full Bench of Delhi High Court in *Kelvinator of India Ltd. (supra)*. Still, the Full Bench did not agree with its reasoning. The observations from *Praful Chunilal Patel (supra)* have been quoted in paragraph 25. After that, paragraphs 26, 27, and 28 of the Full Bench of Delhi High Court read as follows:-

"26. We are, with respect, unable to subscribe to the aforementioned view. If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the Assessing Officer. The Assessing Officer who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to reopen the proceeding. Assessment proceedings may be furthermore reopened more than once. It is now trite that where two interpretations are possible, that which fulfills the purpose and object of the Act should be preferred.

27. It is a well settled principle of interpretation of statute that the entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistakes as contained in Section 154 of the Act. The power of rectification of mistake conferred upon the Income Tax Officer is circumscribed by the provisions of Section 154 of the Act. The said power can be exercised when the mistake is apparent. Even a mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the

13 (1999) 236 ITR 832

Income-tax Appellate Tribunal has limited jurisdiction under Section 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

28. It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income Tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue."

32. Thus, for all the above reasons, the impugned notices issued in excess of the jurisdiction conferred upon the Respondents are liable to be quashed and set aside. They are, accordingly, quashed and set aside.

33. The rule is made absolute in terms of the prayer clauses (a) and (b) in both the petitions.

34. There shall, however, be no order for costs in both the petitions.

BHARAT P. DESHPANDE, J

M. S. SONAK, J