

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1065 OF 2022

HARISH GANGJI DEDHIYA)...PETITIONER

V/s.

UNION OF INDIA AND OTHERS)...RESPONDENTS

Mr.Percy Pardiwalla, Senior Advocate a/w. Mr.Madhur Agarwal and Mr.Sumit Raghani and Sajid Mohamad i/by. Agrud Partners, Advocate for the Petitioner.

Mr.Akhileshwar Sharma, Advocate for the Respondent.

**CORAM : K. R. SHRIRAM &
N. R. BORKAR, JJ.**

DATE : 29th MARCH 2022

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1 Petitioner is an individual who had filed on 23rd July 2014 his original Return of income (ROI) tax for A.Y. 2014-15 declaring total income of Rs.1,89,69,048/-. Subsequently, on 23rd July 2015, petitioner filed revised ROI at

Rs.2,54,08,853/-. The ROI was processed under Section 143(1) of the Income Tax Act, 1961 (the said Act).

2 Subsequently, petitioner received a notice dated 31st March 2021 under Section 148 of the Act stating that the respondent no.2 has reasons to believe that petitioner's income for A.Y.2014-15 chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. Petitioner was later provided a copy of the approval under Section 151 of the Act alongwith reasons recorded for such belief.

3 Petitioner filed its objections and the objections came to be rejected by an order dated 21st January 2022. The notice dated 31st March 2021 and the order dated 21st January 2022 are impugned in this petition.

4 Mr.Pardiwalla submitted that even though the notice under Section 148 of the Act has been issued more than four years after the expiry of the relevant assessment year, the assessment not

having been completed under Section 143(3), the proviso to Section 147 may not apply. That would still not absolve responsibility of respondents that the reasons for the formation of the belief must have a rationale connection with or relevant bearing on the formation of the belief. Mr.Pardiwalla submitted that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been an escapement of the income of the assessee from assessment in the particular year. Mr.Pardiwalla submitted that the reasons recorded not only fails to make out a demonstrable link between the tangible material and the formation of the belief but it also exposes total non-application of mind by the respondent no.2 and also by the authorities who have granted the approval under Section 151 of the Act.

5 Mr.Sharma submitted that the link between the tangible material and the formation of belief has been explained in the impugned order dated 21st January 2022 and if there was any

error in the reasons recorded, those are, as stated in the Affidavit-in-Reply, typographical errors.

6 We have considered the petition with the documents annexed thereto and the Affidavit-in-Reply with the assistance of Mr.Pardiwalla and Mr.Sharma.

7 In the reasons recorded, a copy whereof is at Exhibit B to the petition, the proposed re-opening is set out to be for A.Y.2014-15. The information based on which respondent no.2 has formed an opinion that there is reason to believe escapement of income, in the reasons it is stated, relates to A.Y.2015-16. In the conclusion given in the reasons recorded for re-opening, respondent no.2 states “.....*I have reason to believe that the amount exceeding Rs. One Lakh chargeable to tax has escaped assessment for the assessment year 2016-17 within the meaning of Section 147 of the I. T. Act, 1961.....*”. Therefore, respondent no.2 himself is not clear for which year or based on information for which year that he proposed to re-open, as he

had reasons to believe that income had escaped assessment. In the Affidavit-in-Reply respondent no.2 casually states that it was a typographical error. In our view, respondent no.2 owed an obligation to explain as to how a typographical error crept in, in more than one place and before affixing his signature did he read the reasons that he had recorded. Therefore, we are not satisfied with the casual excuse of typographical error.

8 Moreover, if only the Additional Commissioner, who has recommended the proposal of respondent no.2 to respondent no.3 or respondent no.3 himself, while expressing satisfaction that the case was fit for issue of notice under Section 148, had bothered to read the reasons recorded, certainly they would have found the errors and they would have directed respondent no.2 to correct the reasons or refused to grant approval on reasons fraught with errors. This also indicates non-application of mind by the recommending authority, who, Mr.Sharma says, must be an Additional Commissioner of Income Tax and respondent no.3. On this ground alone, the notice issued under Section 148 gets vitiated.

9 Paragraph 2 of the reasons recorded reads as under :

“2 The A.O. has information that the assessee has entered into certain financial transaction/activities during the financial year 2013-14 relevant to the A.Y.2015-16. On going through the information, it is noticed that the assessee has involved in the share trading activity during the year and it involved an amount of Rs.2,46,07,261/-. It came to noticed that during the year assessee has made of shares/derivatives amounting to Rs. 2,46,07,261/- and made huge profit from these transactions. However, it has not been accounted in books of account. Further, it is observed that the assessee had earned long term profit from trading on shares/derivative, which found to be fictitious and claimed as exempted profit as long term capital gain on share trading. Thus, it is crystal clear that the assessee has routed his unaccounted income as long term capital gain and accounted in books of account. Accordingly, given colour of genuine transaction. Thus, I am at the opinion that assessee has escaped assessment exceeding Rs. One Lakh.”

10 Reading this, nobody can make out or atleast we are unable to make out any demonstrable link between the information and the formation of belief. This paragraph does not even indicate what was the trading activity during the year that the petitioner was involved in or from what shares or derivatives the petitioner is alleged to have made huge profit. How can someone be expected to respond to such vague charges ?

11 In **Income Tax Office, I Ward, District VI Calcutta and Others vs. Lakhmani Mewal Das**¹, it is held as under :

“As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far- fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in Section 34 of the Act of 1922 at one time before its amendment in 1948 are not there in Section 147 of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.”

(emphasis supplied)

1 103 ITR 437

12 Therefore, there must be live link or close nexus between the material before the ITO in the case at hand and the belief which he was to form recording the escapement of income. It is also no doubt true that Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for re-opening assessment but at the same time, it is not any and every material, however vague and indefinite or distant, remote and far-fetched which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. It is also settled law that the reasons for re-opening assessment has to be tested / examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to re-open the assessment. These reasons cannot be improved upon and/or supplemented much less substituted by an Affidavit and/or oral submissions (**First Source Solutions Limited vs. The Assistant Commissioner of Income Tax - 12(2)(1) and Another²**).

² 438 ITR 139 (BOM)

Therefore, the submission of Mr.Sharma that respondent no.2 has explained in the order on objections what was the report and information and details on which he formed a reason to believe, will be of no assistance to respondents.

13 In the circumstances, we hereby allow the petition in terms of Prayer Clause (a) which reads as under :

“That this Hon’ble Court be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ under Article 226 of the Constitution of India, calling for records pertaining to the impugned reopening notice dated 31.03.2021 issued by the Respondent No.2 (being Exhibit ‘A’ hereto) and after going into the validity and legality thereof to quash and set aside the same.”

14 Petition disposed.

(N. R. BORKAR, J.)

(K. R. SHRIRAM, J.)

ARTI VILAS
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