

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 3640 OF 2019

Yashoda Shivappa Nagangoudar
an individual residing at
B-3, 4th Floor, Room No.408,
Sai Leela Building, Tardeo Road,
New Maharashtra Nagar,
Mumbai – 400 034.

....Petitioner

V/s.

1. Income Tax Officer – 19(3)(5)
Room No.201, 2nd Floor, Matru
Mandir, Tardeo Road,
Mumbai – 400 007.

2. The Principal Commissioner of
Income Tax – 19
Room No.228, 2nd Floor, Matru
Mandir, Tardeo Road,
Mumbai – 400 007.

3. The Union of India
Through the Secretary,
Ministry of Finance,
Government of India, North Block,
New Delhi – 110 001.

...Respondents

Mr. Devendra H. Jain i/b Mr. Nikhil C. Bhise for Petitioner.
Mr. Sham V. Walve for Respondents-Revenue.

**CORAM : K.R. SHRIRAM &
R.N. LADDHA, JJ.
DATED : 5th JANUARY, 2022**

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

1. Petitioner received a notice dated 16th March, 2019 under
Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2012-13.
According to respondents they had reasons to believe that petitioner's

income chargeable to tax for A.Y. 2012-13 has escaped assessment. The reasons for re-opening is annexed to the petition. The reasons indicate that respondents have information that petitioner has deposited Rs.13,40,000/- in cash during F.Y. 2011-12. Notwithstanding that petitioner has not filed return of income for A.Y. 2012-13. Therefore, the income chargeable to tax amounting to Rs.13,40,000/- has escaped assessment due to failure on the part of the petitioner to disclose fully and truly all material facts for his assessment.

2. Petitioner filed objections dated 10th October, 2019 to the re-opening of assessment. In that petitioner has explained as under :

“However, the bank, viz; Dena bank in which I hold an account, made a factual mistake in reporting the above transactions. I had deposited total cash of only Rs.18,000/- on two occasions during the relevant year which were out of gifts received by me/out of my past savings. Whereas, the figure of Rs.13,40,000/- reported by the bank as cash deposited, was in fact the exact amount of cash withdrawn by me, which was erroneously reported as Cash deposit in the AIR/CIB. In support of this, I have attached a copy of the bank statement for F.Y. 2011-12. Refer Annexure – 1.

I have already written to Dena bank pointing out their mistake and have asked them to rectify the same and issue a clarificatory letter to me. I attach a copy of the letter submitted to them. Refer Annexure – 2.

Thus, this proves that the re-opening of my case u/s 147 of the Income-tax act, 1961 was made on the basis of incorrect material facts and the same should hence be dropped.”

3. We have also considered bank statement which does not show any cash deposit of Rs.13,40,000/-. It only shows cash deposits of Rs.18,000/-. In the order dated 6th November, 2019 disposing the objections

respondents admit and accept that there were cash deposits of only Rs.18,000/- and not Rs.13,40,000/- as alleged in the reasons for re-opening. But according to respondents there were deposits/credits to petitioner account other than in the form of cash, i.e., total credits of Rs.18,81,092/- (cash and non cash) and therefore as no return of income was filed to show such credits it remained unexplained.

4. To confer jurisdiction under Section 147 of the Act, the Assessing Officer must have reasons to believe that income chargeable to tax has escaped assessment. In this case, the Assessing Officer felt that there were reasons to believe that income had escaped assessment on incorrect facts and that is even accepted in the order disposing the objections which is impugned in the petition. Therefore, the entire basis on which jurisdiction is assumed under Section 147 of the Act fails. On this ground alone, the notice dated 16th March, 2019 and consequential order on objections dated 6th November, 2019 has to be quashed and set aside.

5. Mr. Walve submitted that as per explanation 3 to Section 147 of the Act, the Assessing Officer may assess or re-assess the income in respect of any issue which has escaped assessment even if such issue comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under Sub Section 2 of the Section 148 of the Act.

6. Though, there cannot be any dispute on this statement of Mr. Walve, explanation 3 presupposes that the notice which has been issued was a valid notice. As per explanation 3 it empowers the Assessing Officer to assess or re-assess the income in respect of any issue that comes to his notice subsequently in the course of the proceedings under Section 147 of the Act but if the proceedings under Section 148 of the Act itself has been initiated wrongly, the question of any new issue that would come to his notice subsequently during the course of proceedings under Section 147 of the Act would not arise. The assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of which comes to his notice subsequently during the course of the any other income proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. We find support for this view in **Commissioner of Income Tax vs. Jet Airways (I) Ltd.**¹ where paragraph

1 (2011) 331 ITR 236 (Bombay)

nos.6, 14, 15 and 22 reads as under :

6. *The effect of Explanation 3 which was inserted by the Finance (No. 2) Act of 2009 is that even though the notice that has been issued under section 148 containing the reasons for reopening the assessment does not contain a reference to a particular issue with reference to which income has escaped assessment, the Assessing Officer may assess or reassess 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. The reasons for the insertion of Explanation 3 are to be found in the Memorandum Explaining the Provisions of the Finance (No. 2) Bill of 2009. The Memorandum treats the amendment to be clarificatory and contains the following explanation ([2009] 314 ITR (St.) 183, 206) :*

"Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.

With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148."

14. *The rival submissions which have been urged on behalf of the Revenue and the assessee can be dealt with both as a matter of first principle, interpreting the section as it stands and on the basis of precedent on the subject. Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has power to assess or reassess the income which he has reason to believe had escaped assessment, and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those*

words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and" as well as "also" have been used together and in conjunction.

15. The Shorter Oxford Dictionary defines the expression "also" to mean further, in addition besides, too. The word has been treated as being relative and conjunctive. Evidently therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess : (i) such income ; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words "such income" refer to the income chargeable to tax which has escaped assessment, and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of which comes to his notice subsequently during the course of the any other income proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from April 1, 1989 clearly stipulated that the Assessing Officer has to assess to reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceeding. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.

22. 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.

(emphasis supplied)

7. In the circumstances, petition is allowed in terms of prayer clause -

(a) which reads as under :

(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate Writ, Order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside the notice u/s 148 dated 16.03.2019 ("Exhibit A") and the subsequent Order dated 06.11.2019 ("Exhibit E") disposing of Petitioner's objections on the issue of impugned notice.

8. Petition disposed with no order as to costs.

(R.N. LADDHA, J.)

(K.R. SHRIRAM, J.)