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

WRIT PETITION NO. 3620 OF 2019

Sanjeev Amritlal Chheda ….Petitioner

V/s.

The Income Tax Officer 30(3)(2)
& Anr. …Respondents

Mr. Nishit M. Gandhi a/w Ms. Akshita Bhandari for Petitioner.
Mr. Sham V. Walve for Respondents-Revenue.

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

P.C. :

1. Petitioner was served with a notice dated 28th March, 2019 under Section 148 of the Income Tax Act, 1961 (the Act) for the Assessment Year 2012-13 in which the Jurisdictional Assessing Officer (JAO) has stated *"Whereas I have reasons to believe that your income chargeable to tax for the Assessment Year 2012-13 has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961 ………. This notice is being issued after obtaining the necessary satisfaction of the Pr. CIT 30, Mumbai."*

2. We have seen the reasons for re-opening under Section 147 of the Act made available to petitioner which is dated 25th March, 2019. The reasons does not even indicate initially that income chargeable to tax has escaped assessment. The entire basis of the notice is that respondent had

information that petitioner had borrowed cash loan of Rs. 16,30,000/- in A.Y. 2012-13 from one Mahavir Engineer and therefore petitioner has violated provisions of Section 269SS of the Act. There is not even a whisper as to what was the amount of income of petitioner that has escaped assessment. Though in the reasons the JAO states that he has reasons to believe that petitioner has borrowed cash loan of Rs.16,30,000/- and has violated the provisions of Section 269SS of the Act, in the proforma for recording reasons for initiating proceedings under Section 148 of the Act and for obtaining the approval of the Commissioner of Income Tax/Pr. Commissioner of Income Tax, the JAO has incorrectly stated that the quantum of income which has escaped assessment is Rs.16,30,000/- and not borrowing or cash loan taken. Taking admittedly a loan cannot be any reason to be even considered as income. What we find is that the Joint Commissioner has expressed that from the reasons recorded it is a fit case for issuance of notice under Section 148 of the Act and the Principal Commissioner has also expressed he is satisfied about issuance of notice under Section 148 of the Act. If these two gentlemen had only read the reasons as recorded for re-opening, certainly they would have realised that there is no income which has escaped assessment because the problem according to the JAO was that petitioner has borrowed cash loan of Rs.16,30,000/-. In fact in paragraph no. 9 of the reasons recorded it reads as under :

> *9. In the light of the above discussion and in consequence of*

> *information in the possession of the undersigned, I have reason to believe that by accepting cash loan of Rs.16,30,000/-, the assessee has violated the provision of section 269SS of I.T. Act, 1961 in the Assessment Year 2012-13. Hence, there is escapement of assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary within the meaning of section 147 of Income Tax Act, 1961.*

He says 'there is escapement of assessment' by reason of the failure on the part of the assessee to disclose fully and truly all material facts but does not say that 'there is escapement of income chargeable to tax that has escaped assessment'.

3. Moreover, even in the Assessment Order dated 4th December, 2019 respondents accept the total income as per the return of income declared by petitioner of Rs.7,87,370/- and the whole basis in the assessment order is only to justify respondents' allegations that petitioner had contravened the provisions of Section 259SS of the Act. Since the notice under section 148 of the Act is issued only where there is income that has escaped assessment, notice as impugned in the petition could not have been issued. If respondents felt that they have information that petitioner had taken cash loan of Rs.16,30,000/- and there has been contravention of the provisions under Section 269SS of the Act and petitioner was liable to penalty under Section 271D of the Act for failure to comply, then respondents could have commenced action or proceedings towards imposition of penalty under Section 271D of the Act. Once respondent proceeds on the basis that petitioner had accepted cash loan of

Rs.16,30,000/- that loan could never be considered as income and therefore there cannot be any escapement of income of the loan amount of Rs.16,30,000/-.

4. In the circumstances, without making any observations as to whether respondents could take any action under Section 271D of the Act or whether respondents are right in the allegations against petitioner of borrowing cash loan in the sum of Rs.16,30,000/-, only on the jurisdictional issue under Section 148 of the Act, we are allowing the petition in terms of prayer clause – (a) which read as under :

> *(a) That this Hon'ble Court may be pleased to issue under Article 226 of the Constitution of India an appropriate direction, order or a writ, including a writ in the nature of 'Certiorari', calling for the records of the case and, after satisfying itself as to the legality thereof, quash and set aside the Notice u/s 148 dated 28.03.2019, Ex. "B" herein, the order disposing objections dated 05.11.2019, Ex. "H" herein and the ex-parte assessment order dated 04.12.2019 Ex. "J" herein passed by the Respondent;*

5. Mr. Walve states that respondent should be permitted to take action under Section 271D of the Act. It is open to respondent to take such action as adviced in accordance with law. We are not making any observations on the merits of the case.

6. Petition disposed.

(R.N. LADDHA, J.) **(K.R. SHRIRAM, J.)**

Purti Parab