

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

WRIT PETITION NO. 3446 OF 2022

ALONG WITH

WRIT PETITION NO. 1901 OF 2022

ALONG WITH

WRIT PETITION NO. 1996 OF 2022

Jetair Pvt. Ltd.	]	
Jet Air House,	]	
13, Anti Centre, Yusuf Sarai,	]	
New Delhi-110049	]	... Petitioner

Versus

1. Deputy Commissioner of Income-tax,	]	
Central Circle-5(2), Mumbai,	]	
Room No.1908, 19 ^h Floor,	]	
Air India Building, Nariman Point,	]	
Mumbai – 400 02	]	

2. Principal Commissioner of Income-tax,	]	
Central – 3, Mumbai,	]	
Room No.1901, 19 th Floor,	]	
Air India Building, Nariman Point,	]	
Mumbai 400 021	]	

3. Union of India,	]	
Through the Joint Secretary & Legal Adviser,	]	
Branch Secretariat,	]	
Department of Legal Affairs,	]	
Ministry of Law and Justice,	]	
2 nd Floor, Aayakar Bhavan, M. K. Marg,	]	
New Marine Lines, Mumbai – 400 020	]	... Respondents

ALONG WITH
WRIT PETITION NO. 2393 OF 2022
ALONG WITH
WRIT PETITION NO. 2828 OF 2022

Jetair Pvt. Ltd.	]	
having address at Jetair House,	]	
13 Anti Centre, Yusuf Sarai,	]	
New Delhi-110049	]	... Petitioner
Versus		
1. Deputy Commissioner of Income-tax,	]	
Central Circle-5(2), Mumbai,	]	
Room No.1908, 19h Floor,	]	
Air India Building, Nariman Point,	]	
Mumbai – 400 02	]	
2. Additional Commissioner of	]	
Income-tax, Central Range – 5,	]	
Mumbai,	]	
Room No.1910, 19 th Floor,	]	
Air India Building, Nariman Point,	]	
Mumbai 400 021	]	
3. Union of India,	]	
through the Secretary, Department	]	
of Revenue, Ministry of Finance,	]	
Government of India,	]	
North Block, New Delhi – 110 001.	]	... Respondents

...

Mr. P. J. Pardiwalla, Senior Advocate a/w. Mr. Madhur Agrawal i/by Mr. Atul K. Jasani for the petitioner in WP/1901/2022, WP/1996/2022 and WP/3446/2022.

Ms. Aasifa Khan for the petitioner in WP/2393/2022 and WP/2828/2022

Mr. Suresh Kumar for the respondents.

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CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.

RESERVED ON : 24TH JANUARY 2023.

PRONOUNCED ON : 8TH MARCH 2023.

J U D G M E N T

[PER KAMAL R. KHATA, J.]

1. The present petition challenges, the notice dated 11th March 2021 issued under Section 148 of the Income Tax Act, 1961 (the Act) by respondent no.1 seeking to reopen the assessment for the Assessment Year (A.Y.) 2013-14 on the basis that he has '*reasons to believe*' that income chargeable to tax has escaped assessment within the meaning of section 147 of the Act; and the order dated 25th January 2022 passed by

the respondent no.1 rejecting the objections inter alia on the grounds that they are *ex facie* illegal and contrary to the provisions of the Act.

2. Whilst the present petition pertains to Assessment Year (AY) 2013-14, writ petitions (W.P) No 1996 of 2022 pertain to AY 2014-15, W.P No. 1901 of 2022 pertains to AY 2015-16, W.P No. 2828 of 2022 pertains to AY 2016-17 and W.P No. 2393 of 2022 pertains to AY 2017-18. Since the issue in these writ petitions as also the facts are identical save and except the year of assessment, we are disposing them by a common order. For brevity we advert to the facts in the W.P 1996 of 2022.

FACTS.

3. The petitioner was the sole General Sales Agent (GSA) for Jet Airways India Limited (Jet Airways) as also sales agent for various other airline companies for which the petitioner receives commission on domestic and international ticket sales for passengers and cargo transport.

4. The petitioner filed its return of income for AY 2013-14 on 28th September 2013, declaring total income at ₹ 6,29,93,470/-. The commission charged by the petitioner from Jet Airways was duly

reported as a related party transaction in its audited statement. The commission earned from Jet Airways was ₹ 14,42,13,012/- being 76.85% of the total commission earned in respect of passenger turnover. On 1st September 2014, the petitioner received a notice u/s 143(2) of the Act for scrutiny assessment. During the course of assessment proceedings, on 21st April 2015 detailed questionnaires were issued by the AO. Those were responded through various letters starting from 29th April 2015 to 28th December 2015. After due consideration the AO passed order dated 28th January 2016 u/s 143 (3) of the Act and computed the total income at ₹ 7,25,65,530/-. The AO made a disallowance with respect to interest expense on the ground that the petitioner had given interest free loan and advances to subsidiaries and other companies.

5. Aggrieved by the order dated 28th January 2016, an appeal was filed before the Commissioner of Income-tax (Appeals) (CIT(A)) which deleted the disallowance whilst allowing the appeal by its order dated 12th September 2016.

6. On 11th March 2021 the respondent no. 1 issued the impugned notice u/s 148 of the Act on the ground that he had reason to believe that income chargeable to tax for AY 2013-14 had escaped assessment.

The notice stated that it had been issued after obtaining necessary satisfaction of respondent no.2. Thereafter the petitioner on 28th May 2021 filed the return in response to the impugned notice. On 16th December 2021 the respondent no.1 issued the following reasons:

“2.Brief details of information, Analysis of information collected/ received, Enquiries made, findings of AO, Basis of forming reason to believe and details of escapement of income.–

2(i) A survey u/s. 133A was conducted in the case of M/s. Jet Airways (India) Pvt. Ltd. on 19.09.2018, by the investigation Wing Mumbai and following issues were found.

2(ii) CASE OF JETAIR AS A SOLE GSA FOR JET AIRWAYS.

Jetair private Limited is private ltd co. Incorporated on 19 July 1974. The company has been in business from 1974 as General Sales Agent for International Airlines and domestic Airlines. As a General sales agent, company represents foreign/domestic Airlines to agent community, works with agent to increase Airline sale and provides city ticketing offices wherever required. It also carries out function of sales accounting and collection follow up.

Jetair is the sole GSA for domestic ticket sales passenger and Cargo for Jet Airways India Limited. Thus, Jetair Pvt. Limited works as a GSA and earns commission which ranges from 0.60% to 5% on passenger and 2.5% on cargo sales.

The GSA receives a commission on all tickets and airways bill flown from the region that it represents. All

cost related to GSA's business are the responsibility of GSA including rent, staff cost, office expenses etc. Airline also use GSA since GSA has historical ties with travel and cargo agents which will be time consuming for the Airline to build.

The company Jetair Pvt. Limited has agreement with various other airlines companies other than Jet Airways India Limited. The list of all the companies with whom ORC (Online Registration Commission) agreement is executed along with the commission rate is given as follows AY 2012-13 to 2017-18.

2(iii) JETAIR AND ITS ONLINE RESERVATION COMMISSION (ORC)

The rates at which ORC was received by Jetair from several airlines for FY 2012-13 has been tabulated as under:

<i>Airline</i>	<i>Pax/cgo</i>	<i>F.Y. 12-13</i>
<i>Jet Airways/Jetlite</i>	<i>Cargo</i>	<i>2.37</i>
<i>Jet Airways</i>	<i>PAX</i>	<i>0.20</i>
<i>Kenya Airways</i>	<i>Cargo</i>	<i>3.00</i>
	<i>PAX</i>	<i>3.00</i>
<i>Royal Jordanian</i>	<i>Cargo</i>	<i>2.50</i>
	<i>PAX</i>	<i>4.76</i>
<i>All Nippon</i>	<i>PAX</i>	<i>2.35</i>
<i>Cyrus Air</i>	<i>PAX</i>	<i>3.00</i>
<i>Air Austral</i>	<i>Cargo</i>	<i>2.50</i>
	<i>PAX</i>	<i>368.87</i>

2(iv) From the above table, with regard to the ORC (Online Reservation Commission) payment for the passenger (PAX) and the cargo (CGO) received by the Jet Air is observed that there is huge variation in

commission fee received by it from various airline mentioned in the table above vis-a-vis its related Party i.e., Jet Airways / JetLite for passenger and cargo ticket sales. The range in respect of ORC for passengers is 0.2% to 0.99% for related party Jet Airways/Jetlite averaging to about 0.6% while for another unrelated airline it averages to around 2.5%. Thus, there is huge variation between the average rates at which ORC has been fixed for related party (lower rates) and unrelated parties (higher rates). Therefore, there is a sound basis for consideration of 2.5% as the rate at which the commission for GSA services should be estimated in case of Jet Air Pvt. Ltd.

2(v) From the transaction in the nature of commission payment between the related entity i.e. Jet Airways (India) Limited and Jetair Pvt. Limited which appears to be an arranged one, it can be deducted that there has been deviation from the usual practise of commission payment, which in turn reduces the overall tax liability of the Jetair Pvt. Ltd. a group entity of Jet Airways (India) Ltd. this arrangement has reduced the tax burden of the assessee company, which is related party within the definition of 40A(2)(b) of Income Tax Act 1961.

2(vi) It is also important to highlight that the question in this regard was asked to Smt. Vidyagauri Samant, D/o Shri Vishwanath Samant working with M/s. Jetair Pvt. Ltd. as General Manager (Finance) during the course of survey action at Jet airways and its related entities on 19.09.2018, relevant portion of the same are reproduced as under:

“Q.15. From details furnished by you, it is seen that there is huge variation in commission fee received by M/s. JetairPvt. Ltd. from M/s. Jet Airways Ltd over various Fys. Please comment.

Ans. Most of the commission earned by M/s. Jetair Pvt. Passenger ticket booking. Further, with most of the non-related airlines, commission at passenger ticket booking is charged either @ 3% of basic ticket fare or cost plus 15%. From jet Airways, commission at passenger ticket booking is charged @ up to 1% of basic ticket fare. Further, during FY 2011-12 and 2012-13. M/s. Jetair Pvt. Ltd. agreed to limit commission earning from Jet Airways to assist the Jet Airways (annexure-3 (page 1 to 3) – letters). Therefore, there was further drop in commission earned from Jet Airways during FY 2011-12 and 2012-13.

Q.16. As per answer given by you above, M/s. Jetair Pvt. Ltd. commission from M/s. Jet Airways Ltd. at lower rate in comparison to rate at which it charges commission from non-related entities. This rate was further lowered during FY 2011-12 and 2012-13. This has reduced taxable profit of M/s. Jetair Ltd. Please comment. Also give rate at which commission was charged from top 5 airlines including Jet Airways during FY 2011-12 to 2016-17.

1) All airlines’ contracts are individually negotiated, and terms/remuneration vary per Airline.

2) You will notice that some of the airlines have fixed fee (cost plus agreements), if we work out % of fee to sales generated by us, it is less than 3%. Please note services offered in all airlines are similar, however few airlines instead of giving lesser commission, negotiate on

changed model of cost plus thereby in actually reducing our effective %.

2) I have attached letter received from ANA in January 2012 (similar period to that of Jetairway letter) asking reduction in fee which we had agreed.

Therefore, commission or cost plus i.e., our remuneration models are decided based on individual client and are negotiated on case-to-case basis commercials teams. We offer all our override commission net of expenses to tax."

2(vii) It is not dispute that both Jet Airways (India) Ltd. and Jet Air Pvt. Ltd. are related parties under the Income-Tax Act, 1961, and considering its size and financial standing. Jet Airways has considerable weight to influence the fixing of ORC rated to its own benefit and to the benefit of the whole group by lowering tax liability of the group as a whole. The rather low rates of 0.2% to 0.9% as ORC for Jet Airways (India) Ltd. are indicative of mechanism deliberately employed to lower the payment of commission to Jetair Pvt. Ltd. Coupled by the fact that Jet Airways is a loss making enterprises, its liability to pay tax may not get affected as much as the payment of ORC to Jetair at lower rates would affect the revenues, and consequently the tax liability of Jet Air which incidentally is a profit-making company.

2(viii) Thus, on the basis of information gathered during survey and post-survey proceedings, careful perusal and examination of agreements in respect of ORC with 'related' and unrelated ' parties, statements of important senior management executive in the know-of-things, study of comparative chart of ORC for various airlines, it can be reasonably concluded that keeping

such a variation in ORC rates between related and unrelated entities without any ostensible reasons tantamount to violation of arms' length principles in deciding the cost of services purchased by Jet Airways from is related entity Jetair. Due to this, Jet Airways regularly and consistently underpaid its sister concern Jet Air Pvt. Ltd. thereby resulting in its lesser revenues and consequently leading to its lower profits, finally resulting into lower tax liability. Having been done without any reasonable justification in violation of arms' length principles, this appears to a device for evasion of taxes which would have been due from Jet Airways (India) Ltd.

Sr. No.	Particulars	A.Y. 2013-14 (Rs.)
1.	Total Turnover (Cargo+PAX)	78,22,86,48,896
2.	Total Commission received by Jetair	30,40,38,007
3.	Jet Airways PAX Turnover	78,29,29,33,117
4.	% of Commission calculated by the	0.20%
5.	Amount as calculated by the assessee	14,45,85,866
6.	% of commission @ 2.50% of Jet Airways PAX Turnover as per Survey findings	1,80,73,23,327
7.	Difference (6-5)	1,66,27,37,461

2(ix) The estimates of amount which would have been paid by Jet Airways (India) Ltd to Jet Air Pvt. Ltd. during the FY 2012-13 had Jet Airways (India) Ltd paid ORC to Jet Air Ltd at the rate of 2.5% which is approximately the average at which ORC has been paid to other airlines

has been arrived as tabulated above at Rs.1,66,27,37,461/-

2(x) Therefore, this is a mechanism and a colourable device to reduce the profits and consequently the tax liability of Jet Air Pvt Ltd. The amount of commission which ought to have been received by Jet Air Pvt had such commission paid at a percentage on which they have been paid to third parties, the total amount of commission that would have been received by Jet Air Pvt. Ltd. comes to Rs.1,66,27,37,461/-. This amount represents the receipts which ought to have been received by Jet Air Pvt. Ltd. from Jet Airways India Ltd. in the decision of Mc Dowell & Co. Ltd. Vs. Commercial Tax Officer by Supreme Court [22 Taxman 11 (SC) (1985)] it was held that - "... colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. Courts are not concerning themselves not merely with the genuineness of a transaction, but with the intended effect of it for fiscal purposes. No one can now get away with a tax avoidance project with the mere statement that there is nothing illegal about it."

2(xi) The findings have concluded that the amount of commission which ought to have been received by Jet Air Pvt. Ltd. had such commission paid at a percentage on which they have been paid to third parties, the total amount of commission that would have been received by Jet Air Pvt. Ltd. comes to Rs. 1,66,27,37,461/-. I have gone through the findings as well as the records. These

facts were not disclosed by the assessee in its original Return of Income filed. Therefore, I hold that the assessee has not disclosed fully and truly all the material facts in the return of income filed.

2(xii) Though the assessment u/s.143(3) of the Act has been carried out in the instant case, however, the assessee has failed to disclose truly and fully all material facts necessary for its assessment, relating to the commission receipts transactions from Jet Airways (India) Ltd. In view of the above discussion and facts of the case, I have “reason to believe” that the income amounting to Rs. 1,66,27,37,461/- chargeable to tax has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

2(xiii) Applicability of provisions of Section 147/151 to the facts of the case.

In this case, the return of income was filed for the year under consideration and the scrutiny assessment u/s. 143(3) had also taken place but the assessee had failed to disclose truly and fully material facts necessary for its assessment. Explanation [1] to Section 147 of the Act provides that “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.

2(xiv) In view of the above, the provisions of clause (c) of Explanation [2] to Section 147 are applicable to the facts of this case and the assessment year under consideration is deemed to be a case where income of Rs.1,66,27,37,461/- chargeable to tax has escaped assessment on account of failure on the part of the

assessee to disclose truly and fully material facts necessary for its assessment. Hence, it is a fit case for issue of notice u/s. 148 of the Act. Accordingly, the assessment for A.Y. 2013-14 is to be re-opened u/s. 147 of the I. Tax Act 1961 by way of issuance of notice u/s. 148 of the I. Tax Act, 1961."

7. On 4th January 2022 the petitioner filed its objections challenging the validity of the reassessment proceedings. Thereafter on 25th January 2022 the respondent no. 1 rejected the objections. Aggrieved, the petitioner filed the present petition.

8. Mr. Pardiwalla, learned senior counsel for the petitioner submitted that pre-requisite conditions of assuming jurisdiction u/s. 148 of the Act are not satisfied in as much as the following conditions for assuming jurisdiction u/s 147 of the Act are not fulfilled:

- a. The Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment;
- b. There must be failure on the part of the Petitioner to disclose fully and truly any material facts necessary for assessment;
- c. The reason to belief must not be on account of change of opinion;

- d. The reason to belief must be based on from new tangible material which was not available during the course of the original assessment proceedings; and
- e. There must be valid approval under section 151 of the Act.

9. He submitted that impugned reassessment proceedings are invalid on account of not being provided '*actual reasons*' recorded by the respondent for issuing the impugned notice and merely extracting the alleged reasons in a subsequent letter is not sufficient compliance of law. He submitted that the impugned notice is invalid as a copy of the approval purportedly obtained for issuing the impugned notice is also not given to the petitioner.

10. He submitted that the main reason for the reassessment is that, as per survey findings, the range of commission received by the petitioner in respect of passengers was 0.2% to 0.99% averaging to about 0.6%, while for other unrelated airlines it averages to around 2.5%. Consequently, a huge variation between the average rates for the related party and the unrelated party was discovered. He submitted that merely on the basis that the petitioner is charging less commission for

rendering services as sales agent from Jet Airways (related party) than from others cannot be a basis for a belief that income chargeable to tax has escaped assessment. He submitted that the rates of commission cannot be compared without considering the surrounding circumstances under which the rate has been agreed between the parties. He submitted that the passenger turnover of Jet Airways was **61.74 times** the combined passenger turnover of all other airlines with whom the petitioner had executed General Sales Agreement (GSA). He submitted that considering the turnover given by Jet Airways, the lower rate charged by the petitioner for providing service as the sole selling agent was justified and cannot be compared with the rate charged to the other airlines which gave a very small fractions to the work to the petitioner.

11. He submitted that only real income is chargeable to tax. The respondent had not alleged that the petitioner had disclosed lesser income than what was actually earned by the petitioner. The allegation is that the petitioner has earned less income than what the petitioner ought to have earned. It is submitted that even if it is suggested that the petitioner ought to have earned more income than what the petitioner has actually earned, no income can be said to have escaped assessment so as to justify the impugned notice as there are no provisions in the Act

for taxing such alleged income. He submitted that notional income can be assessed to tax only when the case of an assessee falls under the provision which provides for taxing deemed income in the hands of an assessee such as u/s 50C of the Act transfer pricing provision. It is submitted that transfer pricing provision prescribes for deeming income in the hands of an assessee when an assessee has entered into an international transaction, or a specified domestic transaction and such transactions are not at arm's length price which the present transaction does not attract. He submitted that there is no other provision which requires the petitioner to determine the income of the petitioner on the basis of arm's length price. He submitted that the agreement between the petitioner and Jet Airways has been approved by the Central Government u/s 297 (1) of the Companies Act, 1956 and consequently it is not open to the AO to allege that Jet Airways has paid a lesser commission than required as per law as it would amount to one department of Government taking a contrary stand to another department of the Government.

12. He submitted that there was also no failure to disclose in as much as all material facts necessary for the assessment were disclosed during the course of original assessment proceedings. He submitted based on all documents the AO had passed assessment order u/s 143 (3) of the Act

after considering all the petitioner's submissions. He submitted that the statement of the employee of the petitioner cannot be said to be any tangible material to justify the reopening in as much as it does not contain any information which could be regarded as new material to justify reopening. It was lastly submitted that since no approval was provided to the petitioner, it must be presumed that no approval was obtained by respondent no. 1 from respondent no. 2 so as to justify reopening of petitioner's assessment. He submitted that the Petition be made absolute.

13. Per Contra, Mr. Kumar, learned counsel for the respondent submitted that Jet Airways (India) Limited and Jetair Private Limited are related party's under the Act. He submitted that considering the size and financial standing, Jet Airways has considerable weight for fixing ORC rate to its own benefit thereby lowering the tax liability and to the benefit of the whole group thereby lowering the tax liability of the entire group. The lower rates charged by the petitioner are indicative of a mechanism deliberately employed to lower the payment of commission to Jetair Private Limited coupled with the fact that Jet Airways is a loss-making enterprise and its liability to pay tax may not get affected as much as payment of ORC to Jetair at lower rate would affect the revenues, and consequently the tax liability of the petitioner

which is a profit-making company. He submitted that the transaction in the nature of commission payment between the related entities appear to be an arranged one and to conclude that there has been deviation from the usual practice of commission payment, which reduces the overall tax liability of the petitioner which is a group entity of Jetair Private Limited. He submitted that this arrangement of charging lower rates has reduced the tax burden of the petitioner which is related party. Learned counsel submitted that based on the information gathered during the survey and post survey and upon careful perusal and examination of the agreements with 'related' and 'unrelated' parties and after having considered the statements of various senior management executives and also study of the comparative chart of ORC have with various airlines, it was concluded that such variation in ORC rates between related and unrelated entities have ostensible reasons that would tantamount to violation of arms' length principles. He submitted that the petitioner was regularly and consistently being underpaid by its sister concern Jet Airways thereby resulting in lesser revenues and leading to its lower profits and thereby resulting into lower tax liability. It was accordingly concluded that there was no reasonable justification, and it appears to be a device for evasion of taxes in complete deviation of the arm's length principle. He submits that had Jet Airways India

Limited paid higher rate of commission to the petitioner, the total amount of commission that would have been received by the petitioner would be Rs.1,66,27,37,461/-. In support of his submission, he relied upon the decision in the case of ***Mc. Dowell & Co. Ltd. Vs. Commercial Tax Officer***¹ which held as under:-

“... colourable devices cannot be part of tax planning and it is wrong to encourage or entertain the belief that it is honourable to avoid the payment of tax by resorting to dubious methods. It is the obligation of every citizen to pay the taxes honestly without resorting to subterfuges. Courts are not concerning themselves not merely with the genuineness of a transaction, but with the intended effect of it for fiscal purposes. No one can now get away with a tax avoidance project with the mere statement that there is nothing illegal about it.”

14. The Learned counsel for the respondent submitted that under the garb of tax planning, related parties had managed and arranged to pay lesser rate of commission to suit finance/revenues of the group companies. This was a colourable device, with aim to evade tax. He submitted that this issue was not examined at the time of original assessment and therefore it would not amount to change of opinion and consequently refer the reopening bad in law. He thus submitted that the petition be dismissed.

¹[22 Taxmann 11 (SC)(1985)]

CONCLUSION.

15. We find merit in the contentions of learned senior counsel Mr. Pardiwalla.

16. In our view, the pre-requisite conditions of assuming jurisdiction u/s 148 of the Act are not satisfied in as much as the AO has failed to specify the material facts that were not truly and fully disclosed by the petitioner that was necessary for the assessment. Upon perusal of all the documents attached with the petition, it is clear that all documentary evidence including books of account as well as statements were submitted by the petitioner and therefore it is nothing but change of opinion which is not permissible under the Act.

17. In regard to what is *“true and full disclosure by the assessee”* the following passage from the decision in the case of ***Income-tax Officer vs. Lakhmani Mewal Das***² would be relevant:

“.... 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

²[1976] 103 ITR 473 (SC)

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.”

In our view, there was no failure to disclose any material fact necessary for the assessment by the petitioners.

18. With regard to “AO’s duty to mention” the following passage from the case of *Ananta Landmark (P.) Ltd. vs. Deputy Commissioner of Income-tax, Central Circle 5(3), Mumbai* ³ is relevant:

“... the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee.”

Therefore, based upon the reasons recorded, one needs to scrutinize whether there was any tangible material with the Assessing

³[2021] 131 taxmann.com 52 (Bombay)

Officer justifying reopening of the assessment or can it be said to be a case of ‘review’ and ‘change of opinion’ by the said officer. On the perusal of the papers and the reasons mentioned in the notice for reopening we find that AO has not mentioned what was the new tangible material to justify the reopening and what was the material fact which was not truly and fully disclosed.

19. In the present case the AO had passed an order u/s 143 (3) on 28th January 2016. Therefore, the passage in ***Kelvinator of India Limited*** (Supra), would be relevant. A Full Bench of the Delhi High Court held :

“We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. 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.”

20. The respondent has failed to show why the presumption should not be applied in the present case. Further, it can also be seen from the

reasons recorded that there was no new material which had come to the notice of the Assessing Officer and the entire reference in the reasons recorded is only to the material on record.

21. In *Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*, the Court, in the background of section 147 of the Act, observed :

“.....all that the Income-tax Officer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not

provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.

It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Section 147/148 of the Act."

22. Testing the facts of the present case on the touchstone of the judgments (Supra), it can be seen that there was no new material in the possession of the Assessing Officer. Nothing new had happened, neither was there any change in the applicable law, which would have warranted the reopening of the case. It clearly suggests that in the garb of reopening the assessment, the Assessing Officer was reviewing the earlier order of assessment. In the absence of any new tangible material available with the Assessing Officer, and in view of the fact that there is a general presumption that an order of assessment under section 143(3) has been passed after proper application of mind and considering the

fact that in the present case, the Assessing Officer had sought clarification with regard to the details of sister concerns⁴ and all transactions⁵, details whereof were submitted during the course of the proceedings, it certainly goes to show that the issue with regard to transactions with all parties including Jet Airways had been gone into by the said Assessing Officer.

23. In our view, the respondent no.1 wrongly rejected the aforestated objection of the petitioner by the impugned order dated 25th January 2022. The statement of an employee, during the course of survey of Jet Airways cannot in our view form the basis of assessment. It would clearly amount to a change of opinion. There is no failure on the part of the petitioner to disclose any material facts and consequently the reopening is invalid in view of the proviso of Section 147 of the IT Act.

23. We are of the view that the petitioner was right in charging lower commission rates to its sister concern / related party jet airways India Limited on account of it being a sole selling agent as well as client giving more than 98% of its total turnover.

⁴ Item no. 18 at page 270

⁵ Item no. 47 at page 272

24. In our view, it is business call / decision for a party and is certainly not colourable device / mechanism as contended by the respondents. In fact, if the sister concern / related party namely Jet Airways India Limited which is loss making company were to pay the same rates as paid by other clients of the assessee then such transaction in normal business parlance would have been colourable device or mechanism to increase the expenses of the sister concern, the fact that Jet India Private Limited is a loss making company is not a valid criteria to determine escapement of income.

25. Since this transaction is neither an international transaction nor a specified domestic transaction, the transfer provisions do not apply.

26. In the light of the above, we have no hesitation in holding that the reassessment proceedings were nothing but a case of 'change of opinion', which does not comply with the jurisdictional foundation u/s. 147 of the Act.

27. In view of the above we set aside the impugned notice dated 11th March 2021 and the impugned Order dated 25th January 2022 and stay all proceedings in furtherance thereto.

28. Petitions disposed of with no order as to costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)