IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **20.02.2024**

CORAM

THE HONOURABLE **MR.JUSTICE SENTHILKUMAR RAMAMOORTHY**

W.P.No.7690 of 2022
and W.M.P.Nos.7691, 7693 & 7696 of 2022

M/s.Anand Cine Services Pvt. Ltd.
Represented by its Director,
Mr.A.Anand Prasad,
(Earlier a partnership firm, Anand Cine Service)
No.3, Sarangapani Street, T.Nagar
Tamil Nadu 600 017. ... Petitioner

-vs-

1.Assistant Commissioner of Income Tax
Non-Corporate Circle 20(1)
No.121, M.G.Road, Nungambakkam,
Chennai 600 034.

2.Assistant Commissioner of Income Tax
Non-Corporate Circle 10(1)
No.121, M.G.Road, Nungambakkam,
Chennai 600 034.

3.Additional Commissioner of Income Tax
Non-Corporate Range 10,
No.121, M.G.Road, Nungambakkam,
Chennai 600 034. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, pleased to issue a Writ of Certiorarified Mandamus, calling for the records of the first respondent contained in its notice under Section 148 of the Income Tax Act, 1961, bearing Notice No. ITBA/AST/S/148/2017-18/1009512165(1), dated 28.03.2018, for PAN: AAAFA4996K, assessment year 2013-14 and all proceedings in furtherance thereof, including but not limited to the order passed by the second respondent, bearing DIN and Letter No. ITBA/AST/F/17/2021-22/1035180294(1), dated 30.08.2021 and the direction issued by the third respondent under Section 144A of the Income Tax Act, 1961, bearing F.No.43/NCR-10/144A Dir./21-22, dated 11.03.2022, for PAN: AAAFA4996K, assessment year 2013-14, and to quash the same as arbitrary, unjust and illegal, and to consequently forbear the respondents from in any manner reassessing the petitioner's income under Section 147 of the Income Tax Act, 1961, for the Assessment Year 2013-14.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondents : Mr.R.S.Balaji, Sr. SC,
Mrs.S.Premalatha, Jr. SC

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ORDER

A notice under Section 148 of the Income Tax Act, 1961 (the Income Tax Act) dated 28.03.2018 and all proceedings consequential thereto are challenged. The dispute relates to the assessment year (AY) 2013-14. The petitioner was a partnership firm at the relevant time under the name and style of Anand Cine Service. The return of income for the above mentioned assessment year was filed by the firm. Upon scrutiny, an assessment order came to be issued on 28.03.2016. Shortly thereafter, a request for rectification was made on 07.04.2016. The respondents did not respond to the request for rectification, but made a tax demand for AY 2013-14. Thereafter, the respondent issued a notice on 28.03.2018 under Section 148 of the Income Tax Act seeking to reopen the assessment. The said notice did not set out the reasons for believing that there was escaped assessment. Pursuant to a request from the petitioner for such reasons, the respondents provided the reasons by letter dated 09.05.2018. The respondents cited the transaction relating to the deletion of the fixed assets value of lands from the books of account, where were converted as partnership assets when M/s.Positive Housing Private Limited and JDA Consultancies Private Limited were admitted to partnership, and thereafter removed after the execution of deeds of cancellation by the parties.

2. Upon receipt of notice calling for particulars of the above transaction, the petitioner provided an explanation on 15.10.2018 and also raised objections to reassessment on the grounds that the relevant documents were already available with the respondents and that the assessment cannot be reopened on a change of opinion and without tangible material. The notice was challenged at that point of time by relying on *GKN Driveshafts Ltd. v. Income-tax Officer(GKN Driveshafts), 259 ITR 19(SC)*, and, by order dated 16.04.2021, this

Court directed that a speaking order be issued setting out reasons for reopening assessment. Such order was issued on 30.08.2021 and is also assailed herein. Upon a reference by the respondents, directions were issued by the 3rd respondent on 11.03.2022 under Section 144A of the Income-tax Act. The petitioner approached this Court soon thereafter and an interim stay of further proceedings was granted on 30.03.2022. The assessment order dated 31.03.2022 came to be issued in these facts and circumstances with additions for an aggregate sum of Rs. Rs.1,49,93,830/- under various heads. Significantly, no addition was made regarding the transaction that triggered the reopening of assessment.

3. Mr. Suhrith Parthasarathy, learned counsel for the petitioner, advanced multiple contentions in respect of the invalidity of the impugned notice, such as that reasons to believe that there is escaped assessment should be based on tangible material; that it cannot be based on change of opinion; and that all relevant documents that

pertained to the transaction forming the basis for reopening were submitted earlier and that assessment was concluded after scrutiny. Learned counsel, thereafter, focused attention on the invalidity of the notice under Section 148 and the consequential assessment order because no addition was made in respect of the transaction forming the reason to reopen assessment. By referring to Section 147 of the Income Tax Act, as it stood then, learned counsel contended that Explanation 3 thereto is applicable only if reassessment is made both on the ground on which it was decided to initiate reassessment and on other grounds which came to the notice of the Income Tax authorities in course of reassessment proceedings. In support of the contention that Section 147 is applicable only in the circumstances outlined above, learned counsel referred to and relied upon the following judgments:

i) Commissioner of Income-Tax v. Jet Airways (I) Ltd. (Jet Airways), 2010 SCC OnLine Bom 2065, particularly paragraphs 20 and 21 thereof, where the Division Bench of the Bombay High Court held that a fresh notice under Section 148 is required if there was no escaped assessment on the ground on which reassessment proceedings were initiated.

ii*) Tractors and Farm Equipment Limited v. Assistant Commissioner of Income-tax(TAFE), 2018 SCC OnLine Mad 13767*, particularly paragraph 16 thereof, where the Division Bench of this Court followed the ratio of *Jet Airways*.

iii*) Martech Peripherals Pvt. Ltd. v. Deputy Commissioner of Income-tax Company Circle IV and another, 2017 SCC OnLine Mad 18889*, particularly paragraphs 42 to 49 thereof.

iv*) Commissioner of Income Tax (Exemption), Kolkata v. B.P.Poddar Foundation For Education, ITAT/143/2021, judgment dated 13.09.2022,* particularly paragraph 14 thereof.

v*) The Principal Commissioner of Income Tax-1, Mumbai v. Lark Chemicals P. Ltd., Income Tax Appeal No.1083 of 2015, judgment dated 28.02.2018.*

vi) Principal Commissioner of Income Tax 1 v. Lark Chemicals P. Ltd., Special Leave Petition (Civil) Diary No(s). 34183 of 2018(SC).

4. Learned counsel also submitted that the writ petition was filed in March 2022 assailing the notice under Section 148, and that this Court granted an interim stay of the impugned order on 30.03.2022. In spite of the order of interim stay, he submitted that the respondents proceeded to issue the assessment order on 31.03.2022. Even solely on the ground of the assessment order being issued in contravention of the order of this Court, learned counsel submits that the assessment order is liable to be interfered with.

5. Mr.R.S.Balaji, learned senior standing counsel, made submissions in response and to the contrary. At the outset, he submitted that the petitioner has a statutory remedy against the assessment order and that the exercise of discretionary jurisdiction is, therefore, not warranted. He also submitted that revenue interest

would be gravely prejudiced if the Section 148 notice and proceedings pursuant thereto are interfered with by pointing out that the assessing officer concluded that income aggregating to Rs.1,49,93,830/- is liable to be added as escaped assessment to the income disclosed in the return of income of the petitioner.

6. After refuting the other contentions regarding the invalidity of the notice under Section 148, he contended that the interpretation of Section 147 by the Bombay High Court in *Jet Airways* is incorrect and that the correct interpretation was placed on such provision in judgments of the Punjab and Haryana High Court in *Manjinder Singh Kang v. CIT* and the Karnataka High Court in *N. Govindaraju v. Income-tax Officer, Ward-8(2), Bangalore.* In fact, he submitted that the judgment of the Division Bench of the Karnataka High Court was not taken into consideration by the Division Bench of this Court in *TAFE* while following *Jet Airways*. He relied on the following judgments:

i*) Manjinder Singh Kang v. CIT (Manjinder Singh Kang), [2012] 25 taxmann.com 124(P&H),* particularly paragraphs 11 and 12 thereof, where the Division Bench of the Punjab & Haryana High Court held that Explanation 3 to Section 147 does not postulate that additions can be made on other grounds only if made on the ground on which reassessment proceedings were initiated. He also referred to the order dated 19.08.2011 of the Supreme Court dismissing the SLP against the judgment of the High Court.

ii) Commissioner of Income Tax, Amritsar v. Mehak Finvest Pvt Ltd, judgment dated 17.07.2014 in ITA No.505 of 2009, particularly paragraphs 6 to 8 thereof. He also pointed out that this judgment was carried in appeal to the Supreme Court and that the Supreme Court dismissed the Special Leave Petition.

iii*) Ernst & Young US LLP v. ACIT (Intl. Tax), (2023)146 taxmann.com 64 (Delhi)*, wherein the Division Bench of the Delhi High Court concluded that the reassessment proceedings were justified. He also placed for consideration the order of the Supreme Court dated 14.10.2022 declining to entertain the Special Leave Petition against the judgment of the Delhi High Court.

iv) *Sunil Jain v. Assistant Commissioner of Income Tax Circle (Delhi) (Sunil Jain), W.P(C).6036 of 2022, judgment dated 22.07.2022,* particularly paragraphs 17 to 20 thereof.

v) *Sunil Jain v. Income Tax Department, (2023) 154 taxmann.com 14(SC)*, whereby the Special Leave Petition against the judgment of the Delhi High Court was rejected.

vi) *S.Sundaram Pillai v. V.R.Pattabiraman 1985(1) SCC 591*, regarding the interpretation of explanation clauses in statutes.

vii) *N.Govindaraju v. Income-tax Officer, Ward - 8(2), Bangalore (Govindaraju), (2015)60 taxmann.com 333 (Karnataka)*.

7. Upon considering the rival contentions, the first issue that falls for consideration is whether the petitioner has made out a case to exercise discretionary jurisdiction. Learned senior standing counsel for the respondents relied on the judgment of the Division

Bench of the Delhi High Court in *Sunil Jain* to contend that jurisdiction under Article 226 should not be exercised in matters relating to assessment/reassessment of tax in view of the existence of a scheme and machinery for adjudication of disputes in tax statutes. Since the power exercised under Article 226 flows from the Constitution and is plenary but discretionary, it goes without saying that, except self-imposed restraints, even the existence of an alternative remedy does not act as an embargo on the exercise of jurisdiction although it is a material factor to be taken into account while deciding whether to exercise jurisdiction. In this case, the petitioner approached this Court upon notice being issued under Section 148 of the Income Tax Act. Such notice was challenged on multiple grounds and this Court granted an interim stay at the time of admission. In spite of the order of stay, the respondents proceeded to issue the assessment order on the following day. In the overall facts and circumstances, I conclude that this is an appropriate case to exercise jurisdiction under Article 226.

8. The next question to be examined is whether the impugned notice and proceedings consequent thereto are liable to be interfered with. Section 147 of the Income Tax Act, which is central to this determination, as it stood then, in relevant part, is set out below:

> *"147. Income escaping assessment - If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year).*
>
> *Explanation 3 - For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the*

> *income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."*

9. The rival contentions pertain largely to the interpretation of Explanation 3. Section 147 and, in particular, Explanation 3 thereto was interpreted by the Division Bench of the Bombay High Court in *Jet Airways*. Paragraphs 20 and 21 of the said judgment are set out below:

> *"20. Parliament, when, it enacted Explanation 3 to section 147 by the Finance (No.2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an*

interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd., [2008] 305 ITR 170 and of the Punjab and Haryana High Court in Vipan Khanna, [2002] 255 ITR 220 would, therefore, no longer hold the field. However, in so far as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343, Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was *taken by the Rajasthan High Court was also taken in another judgment of the Punjab and Haryana High Court in CIT v. Atlas Cycle Industries, [1989] 180 ITR 319. The decision in Atlas Cycle Industries, [1989] 180 ITR 319 held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or nonexistent. The decisions of the Punjab and Haryana High Court in Atlas Cycle Industries, [1989] 180 ITR 319 and of the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343 would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.*

21. 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. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147 as it stands postulates that assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by*

Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh, [2008] 306 ITR 343. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147 as they stood after the amendment of April 1, 1989, continue to hold the field."

10. When the same issue came up for consideration before the Division Bench of this Court in *TAFE*, the Division Bench of this Court cited *Jet Airways* with approval and followed the ratio laid down therein. Paragraph 16 of the judgment of the Division Bench of this Court is as under:

16. The decision in the case of Jet Airways (cited supra) was referred to by the High Court of Delhi in the case of Ranbaxy Laboratories Limited *v. CIT (2011) 336 ITR 136 (Delhi), wherein it was held that the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or reassessment of escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. Further, it was held that for every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue a fresh notice under section 148 of the Act. Thus, it was held that the Assessing Officer had jurisdiction to reassess the income other than the income in respect of which the proceedings under section 147 were initiated, but, he was not justified in doing so when the reasons for the initiation of those proceedings ceased to survive. Therefore, the argument advanced by the Revenue* *placing reliance on Explanation 3 to section 147 i of little avail."*

11. In effect, both in *Jet Airways* and *TAFE*, the Court held that Section 147 enables the assessing officer to travel beyond the reasons for initiating reassessment proceedings provided such reassessment is also carried out on the grounds or reasons on which reassessment was initiated. On the other hand, if the ground on which reassessment was initiated was no longer available to the assessing officer, the Court held that reassessment cannot be continued on the basis of the original notice under Section 148, and that a fresh notice is necessary.

12. Learned senior standing counsel submitted that the interpretation placed on Section 147 in *Maninder Singh Kang* and *Govindaraju* should be adopted. In view of the binding decision of the Division Bench of this Court in *TAFE*, the course of action canvassed by learned senior standing counsel is not open and his contention cannot be countenanced.

13. Keeping the above legal position in mind, it becomes necessary to examine the assessment order to determine the basis of such order. In paragraph 15 of the assessment order, the assessing officer recorded findings with regard to the transaction that triggered reassessment proceedings. The findings recorded therein are as under:

> *"15. Consequent to the directions of the Range Head, the value of the properties that were brought into the books as per Reconstitution deed dated 03.08.2009 and Codicil to the Partnership deed dated 03.09.2009 were obtained from the Registration site of the Government of Tamilnadu for the period 1-8-2007 to 31-03-2012. From the guideline values obtained, it is seen that the total value of the properties as per 50C is less than the value admitted by the assessee in the books. Hence there is no addition considering the provisions of 50C as no STCG arises."*

14. Turning to the notice under Section 148, the said notice did not set out any reasons for initiating reassessment. However, the

subsequent communication dated 09.05.2018 sets out the reasons. The operative portion of the communication dated 09.05.2018 is set out below:

> "*Please refer to the above.*
>
> *The reasons for reopening of the assessment in your case for the AY 2013-14 are hereby communicated as under:*
>
> *'During the year, the assessee sold land 'Schedule 4' - 'Fixed Assets' to Balance Sheet as on 31/03/2013 shows deletion of Rs.86,93,77,010/- under the head "Land". But, no Capital Gains was offered for assessment.*"

15. From the above extract, it is abundantly clear that the reason cited for reopening the assessment for assessment year 2013-14 was the deletion of Rs.86,93,77,010/- under the head 'land' without offering capital gains for assessment. As discussed earlier, the assessment order clearly discloses that no additions were being made on this account since there was no capital gain. The conclusion that follows from the above discussion is that no additions were

made in the assessment order as regards the deletion of the relevant immovable asset although the said transaction formed the basis for reopening assessment. Consequently, upon application of the binding precedents cited above, the notice under Section 148 and, therefore, the assessment order issued on 31.03.2022 cannot be sustained. Since reassessment cannot be sustained on this ground, the other contentions regarding the invalidity of the notice under Section 148 are not being examined.

16. Hence, the impugned notice and the assessment order are quashed by leaving it open to the respondents to initiate fresh reassessment proceedings in accordance with law. In view of the aforesaid conclusion, the directions under Section 144 A become immaterial. If fresh proceedings are initiated, it is open to the petitioner to raise all contentions, including on the ground of limitation.

17. W.P.No.7690 of 2022 is allowed on the above terms. No costs. Consequently, W.M.P.Nos.7691, 7693 and 7696 of 2022 are closed.

20.02.2024

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Index : Yes / No

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Neutral Citation: Yes / No

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