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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision:26.09.2024*

\+ **W.P.(C) 12952/2019**

ALANKAR PROMOTERS LLP [EARLIER ALANKAR PROMOTERS PVT. LTD.] .....Petitioner

Through: Mr. Rohit Jain, Mr. Aniket D. Agarwal and Mr. Abhisek Singhvi, Advs.

versus

INCOME TAX OFFICER & ORS. .....Respondents

Through: Mr. Sanjay Kumar, Adv.

**CORAM:**
**HON'BLE MR. JUSTICE VIBHU BAKHRU**
**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA**

**VIBHU BAKHRU, J**.*(Oral)*

1. The petitioner (Alankar Promoters LLP) is a limited liability partnership. It was constituted with effect from 10.01.2019. The petitioner has filed the present petition impugning a notice dated 31.03.2019 (hereafter ***the impugned notice***) issued by respondent no.2 under Section 148 of the Income Tax Act, 1961 (hereafter ***the Act***). The petitioner had raised objections to the impugned notice, which were disposed of by respondent no.1 (hereafter ***the AO***) in terms of the order dated 02.12.2019 (hereafter ***the impugned order***).

2. The present petition was listed on 09.12.2019 and this Court had passed an *ad interim* order dated 09.12.2019 staying further proceedings

pursuant to the impugned notice. However, on 10.12.2019, the AO dispatched the assessment order dated 05.12.2019 (hereafter ***the impugned re-assessment order***), for the assessment year 2012-13, passed under Section 143(3)/147 of the Act. The impugned re-assessment order was received by the petitioner on 11.12.2019. Thereafter, the petitioner had filed an application (CM No.55629/2019) assailing the impugned re-assessment order for the assessment year 2012-13 and this court stayed the same.

**PREFATORY FACTS**

3. M/s Alankar Promoters Pvt. Ltd. (hereafter referred to as *APPL* and/or *the assessee*) was incorporated on 07.09.2011 under the Companies Act, 1956. During the financial year 2011-12, the assessee had availed interest free unsecured loan of ₹5,00,000/- from Sh. Ashok Kumar Jain, who was at the material time, a Director of the assessee.

4. The assessee claims that the aforesaid loan of a sum of ₹5,00,000/- was for business purposes and was received through proper banking channels. The loan was repaid to Sh Ashok Kumar Jain during the financial year 2012-13, through banking channels.

5. On 24.08.2012, the assessee filed its return of income under Section 139(1) of the Act for the assessment year 2012-13 declaring its income as Nil. The said return was processed under Section 143(1) of the Act.

6. On 10.01.2019, the assessee was reconstituted as a limited liability partnership – the petitioner in the present petition.

7. On 31.03.2019, respondent no.2 issued the impugned notice stating

that it had reasons to believe that the assessee's income for the assessment year 2012-13 had escaped assessment within the meaning of Section 147 of the Act. Respondent no.2 also proposed to re-assess the assessee's income/loss for the relevant assessment year.

8. Pursuant to the impugned notice, the petitioner submitted before respondent no.2, a copy of its return filed for the assessment year 2012-13, without prejudice to its rights and contentions. The petitioner declared Nil income, which was the same as furnished by the assessee in its return dated 16.04.2019. The petitioner also requested the AO to provide a copy of the reasons recorded and the material on which the re-assessment proceedings were initiated. It also informed AO that with effect from 10.01.2019, the assessee (Alankar Promoters Pvt. Ltd.) had ceased to exist. Thereafter, the petitioner sent reminders to the AO for furnishing the reasons for initiating the re-assessment proceedings as well as the copy of the approval under Section 151 of the Act.

9. On 11.11.2019, the AO furnished the reasons recorded for initiating the re-assessment proceedings. However, the petitioner claims that it was not provided copies of the materials on the basis of which the assessment was re-opened. The petitioner was also not provided a copy of the sanction under Section 151 of the Act and a copy of the format used for obtaining a copy of the sanction as demanded by it.

10. The petitioner raised objections to initiation of the assessment proceedings, which were dismissed by the impugned order.

11. The petitioner claims that it had received the impugned order on

04.12.2019. Immediately, thereafter on 06.12.2019, the petitioner filed the present petition.

12. The petition was listed before this Court for the first time on 09.12.2019 and this Court had passed the following order:

> "Issue notice. Learned counsel for the respondent accepts notice. Counter-affidavit be filed within eight weeks.
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> The respondent shall specifically point out in their counter-affidavit as to how the submissions made by the petitioner in his representation dated 27.11.2019 that the loan of Rs. 5 lakhs advanced by the Director of the Assessee Company to the assessee petitioner was repaid in the immediately following year i.e. Assessment Year 2013-14 through proper banking channels has been dealt with at the time of passing of the order – rejecting the representation on 02.12.2019. Rejoinder, if any, be filed before the next date. List on 20.07.2020.
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> In the meantime, the proceedings in pursuance of notice under Section 148, shall remain stayed."

13. It transpires that pursuant to the impugned notice, the AO had passed the impugned re-assessment order. However, this fact was not brought to the notice of this Court on 09.12.2019, even though the respondents were represented by the counsel on advance notice.

14. The impugned re-assessment order was dispatched on 10.12.2019 and was received by the petitioner on 11.12.2019.

15. As noted above, the petitioner filed an application (being CM No.55629/2019) seeking setting aside of the impugned re-assessment order. And, by an *ad interim* order dated 24.12.2019, this Court stayed the

operation of the impugned re-assessment order.

16. The respondent filed a counter affidavit after an inordinate delay of 281 days. However, this Court condoned the same by an order dated 18.11.2020.

17. By an order dated 09.11.2022, the interim order was made absolute till the disposal of the writ petition.

**REASONS AND CONCLUSION**

18. The principal question to be addressed is whether the assessment of the assessee's income chargeable to tax was re-opened in accordance with law.

19. In the present case, it is material to note that the assessment sought to be re-opened pertains to the assessment year 2012-13.

20. In terms of Section 147 of the Act, the AO can assess or re-assess the income chargeable to tax provided he has reason to believe that the assessee's income has escaped assessment. The operative part of Section 147 of the Act as applicable at the material time, 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):

**Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

**Provided further** that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

**Provided also** that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."

21. It would be material to consider the jurisprudence regarding the threshold conditions to be satisfied for re-opening of an assessment under Section 147/148 of the Act.

22. In ***Chhugamal Rajpal v. S.P. Chaliha & Others: (1971) 79 ITR 603***, the assessing officer sought to reopen the assessment on the basis of a communication received from the Commissioner of Income Tax to the effect that the creditors of the assesssee were "*name lenders and the transactions*

*are bogus*". The Supreme Court considered the question whether the same would constitute reasons to believe that the income of the assessee had escaped assessment and accepted the assessee's contention that the assessing officer did not have any such reasons. The Supreme Court observed that the assessing officer "*had not even come to a prima facie conclusion that the transactions to which he referred were not genuine transactions. He appears to have had only a vague feeling that there may be bogus transaction*".

23. The Supreme Court further expounded on the conditions to be satisfied before issuing notice under Section 148 of the Act as under:

> "Before issuing a notice under s. 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to, make a return under s. 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) (b) of s. 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice under s. 148."

24. On the aforesaid basis, the Supreme Court concluded that the assessing officer did not have any material before him, which would satisfy the requisite conditions under Section 147 of the Act. Thus, the assessing officer could not have issued a notice under Section 148 of the Act.

25. The threshold conditions to be satisfied for re-opening the assessment have been the subject matter of various other decisions rendered by the Supreme Court as well. At the stage of initiating the proceedings for re-assessment, it is necessary for the assessing officer to form a reasonable belief on the basis of tangible material that the income of an assessee has escaped assessment. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.: (2007) 291 ITR 502,*** the Supreme Court had held as under:

> "16. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.
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> 17. As observed by the Delhi High Court (*sic* the Supreme Court) in *Central Provinces Manganese Ore Co. Ltd. v. ITO [1991] 191 ITR 662*, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the

> escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. P. Ltd. [1996] 217 ITR 597 (SC) ; Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).*"

26. Thus, at the stage of initiation of proceedings for re-assessment under Section 147 of the Act, it is not necessary for the assessing officer to conclusively find that the assessee's income has escaped assessment. But it is necessary that the assessing officer has reason to believe that it has. In case where the assessment has been framed under Section 143(3) of the Act, there is an additional condition, which requires that no action be initiated after expiry of the period of four years unless the income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to fully and truly disclose all material facts necessary for its assessment.

27. In ***Commissioner of Income Tax v. Kelvinator of India Ltd.: 2010 (2) SCC 723***, the Supreme Court held that the assessing officer has the power to reopen the assessment if there was reason to believe that the income of the assessee had escaped assessment. The Supreme Court further held that reason to believe must be based on "tangible material" that has a "live link" with the formation of such belief.

28. In ***Commissioner of Income Tax II v. M/s Multiplex Trading and Industrial Co. Ltd., Neutral Citation No. 2015:DHC:7971-DB***, this Court took note of the amendment to Section 147 of the Act, with effect from 01.04.1989 and observed:

"29. It is at once seen that the Amendment in Section 147 of the Act brought about a material change in law w.e.f. 1st April, 1989. Section 147(a) as it stood prior to 1st April 1989 required the AO to have a reason to believe that (a) the income of the Assessee has escaped assessment and (b) that such escapement is by reason of omission or failure on the part of the Assessee to file a return or to disclose fully and truly all material facts necessary for his assessment for that year. After the Amendment, only one singular requirement is to be fulfilled under Section 147(a) and that is, that the AO has reason to believe that income of an Assessee has escaped assessment. However, the proviso to Section 147 of the Act provides a complete bar for reopening an assessment, which has been made under Section 143(3) of the Act, after the expiry of four years. However, this proscription is not applicable where the income of an Assessee has escaped assessment on account of failure on the part of the Assessee to make a return or to disclose fully and truly all material facts necessary for his assessment. Thus, in order to reopen an assessment which is beyond the period of four years from the end of the relevant assessment year, the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty. It is in the aforesaid context that this Court in ***M/s Haryana Acrylic Manufacturing Co. (P) Ltd.*** 308 ITR 38 (Del) explained that the ratio of the decision in ***Phool Chand Bajrang Lal*** *(supra)* may not be entirely applicable since the same was in respect of Section 147(a) as it existed prior to the amendment."

29. At this stage, it would also be relevant to refer to the following observations of the Supreme Court in ***Income Tax Officer, I Ward District VI, Calcutta and Ors. v. Lakhmani Mewal Das: (1976) 3 SCC 757***:

"11. 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 farfetched, 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 can now be taken for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

12. The powers of the Income Tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect" The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax Authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and

quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income Tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

30. In the present case, the assessee had filed its return of income showing Nil return. The petitioner had also annexed his balance sheet showing unsecured loan of ₹5,00,000/-. The AO had initiated the re-assessment proceedings solely on the basis that the petitioner's balance sheet recorded an outstanding unsecured loan of ₹5,00,000/-. This is apparent from a plain reading of the reasons for reopening of the assessment as recorded by the AO. The relevant extract of the said reasons is set out below:

"In this case Company was incorporated 09.07.2011 and has authorized capital Rs. 1,00,000/-. It has not shown any sales/receipts or any other Income. But on perusal of Balance sheet noticed that it has unsecured loan Rs. 5,00,000/- from others. Since the assessee has not carried out any business activity during the year. Therefore, I have reason to believe that income Rs.5,00,000/- has escaped assessment for AY

> 2012-13. The assessment/reassessment proceedings in this case for AY 2012-13 pertain to period beyond four years but before the expiry of six years from the date of issue of notice.
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> The assessment/reassessment proceedings in this case for AY 2012-13 pertain to period beyond four years but before the expiry of six years from the date of issue of notice. In view of the same, as no assessment has been made in this case for AY 2012-13, u/s 143(3) or u/s 147, the first proviso to section 147 is not applicable to the case."

31. We are at loss to comprehend as to how availing of a loan by the assessee as reflected in its books of account could be a reason for the AO to believe that the assessee's income had escaped assessment. There is no material to indicate that the AO had any ground to believe that the loan availed by the assessee (as reflected in the books of accounts) was chargeable to tax under the Act.

32. There is neither any allegation nor any material to even remotely suggest that the assessee had earned income chargeable to tax, which was camouflaged as an unsecured loan and reflected in its books of accounts. The AO had clearly no material on record to form any belief that the income of the assessee had escaped assessment.

33. The impugned order does not reflect any ground for believing that the income of the assessee had escaped assessment in the relevant financial year. The AO had rightly rejected the contention that this is not a case of any change of opinion as an assessment had not been framed under Section 143(3) of the Act. However, the impugned order throws no light as to how an unsecured loan reflected in the assessee's book was reason enough to believe that the income of the assessee had escaped assessment.

34. The assessee had, in its letter dated 27.11.2012, explained that it had availed of the unsecured loan from its the then director Sh. Ashok Kumar Jain. It had also pointed out that the notes to the accounts for the financial year ended on 31.03.2012 and also disclosed that loan ₹5,00,000/- was received from Sh Ashok Kumar Jain, who was the Key Management Personnel. Notwithstanding the note, the AO has proceeded on the unfounded premise that the amount shown outstanding as unsecured loan in the balance sheet is unexplained and, thus chargeable to tax under Section 68 of the Act.

35. As explained in ***Income Tax Officer, I Ward District VI, Calcutta and Ors. v. Lakhmani Mewal Das*** (*supra*) the assessment can be reopened only on account of 'reason to believe' and not 'reason to suspect'. In the present case, *a fortiori*, there is no reason to even suspect that the balance sheet of the assessee did not correctly reflect its state of affairs.

36. In view of the above, the necessary condition for initiating re-assessment under Section 147 of the Act is not satisfied. The impugned notice is, thus, set aside. Consequently, the impugned re-assessment order is also set aside.

**VIBHU BAKHRU, J**

**SWARANA KANTA SHARMA, J**

**SEPTEMBER 26, 2024**
**RK**

*Click here to check corrigendum, if any*