

\$~

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

% **DATE OF JUDGMENT: 16.08.2018**

+ W.P.(C) 8907/2008

PRABHAT AGARWAL

..... Petitioner

Through: Mr.C.S.Aggarwal, Sr. Adv. with Mr.
Prakash Kumar, Ms.Pushpa Sharma and Mr.Uma
Shankar, Advocates.

Versus

DEPUTY COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr.Ruchir Bhatia, Sr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K.CHAWLA

S.RAVINDRA BHAT, J.(ORAL)

1. The writ petitioner (hereafter“assessee” is aggrieved by a re-assessment notice issued to him, under Section 147/148 of the Income Tax Act, 1961, by the respondent (hereafter “revenue”) on 25th May 2007, for the assessment year (AY) 2004-05; he seeks directions for the quashing of that notice.
2. Briefly, the case relates to assessment for AY 2004-05; the assessee had filed his original return of income on 25/10/2004 declaring ₹18,00,16,650/- including income of ₹60,00,000/- chargeable at normal rates and the balance from long term capital gains. The income from capital gain was further divided: into two parts, i.e., one

from sale of units of various mutual funds-(36 in: number) and second from sale of bonus shares' of M/s Terra Network SA, USA. The sale of shares of Terra Nova SA resulted in long term capital gain of ₹18,50,96,372/- but after claiming losses and B/F losses the net income offered to tax was ₹6,84,31,075/-. The losses claimed were in respect of two transactions; sale of shares of M/s Parsec Technology and on account of sale of mutual fund units.

3. On 25th May, 2007, the AO issued the impugned notice, proposing to reassess the petitioner's income. After repeated requests, the "reasons to believe" recorded by the AO were furnished to the assessee; they *inter alia*, read as follows:

"2. In the original return filed by the assessee. Long term capital gain of Rs.22,76,27,481/- have been shown. Short term capital loss of Rs.5,36,59,621/- has also been shown in the return. From the annexures enclosed with the return of income. It is seen that during the year the assessee has shown capital gains on sale of shares. Capital gains of Rs. 18,50,96,372/- have been shown on the sale of shares of M/s Terra Networks SA, USA. At the same time the assessee has also shown capital loss of Rs.4,53,69,983/- on the sale of shares of M/s Parsec Technologies Ltd. This loss has been adjusted against the capital gains accruing on account of sale of shares of M/s Terra Networks SA, USA. The assessee Sh. Prabhat Aggarwal, is the Promoter and Director of M/s Parsec Technologies Ltd. The address of M/s Parsec Technologies Ltd. is same as that of Sh Prabhat Aggarwal.

3. The shares of M/s Parsec Technologies Ltd. have been sold to Sh. Madan Mohan Aggarwal, the father of assessee. The address of Sh. Madan Mohan Aggarwal is the same as that of the assessee. As per the share transfer form, the sale has been

carried out on 26.3.2004 which has been mentioned as approved date in the share transfer form. The sale of shares has not been carried out through a recognized stock exchange. The following table provides the details relating to the sale of shares of M/s Parsec Technologies Ltd.”

The AO proceeded to record that the assessee had acquired ₹10/- face value 3,84,500 shares of Parsec Technologies (“Parsec”) at a premium of ₹ 130/- per share and later another 46500 shares for ₹ 10 (without any premium) from one Ravi Sikka. He then sold (on 26.3.2004) 4,00,000 shares to his father M.M. Agarwal at ₹ 25/- per share and declared a loss. This transaction, according to the AO was not genuine and was a device to avoid tax, to claim loss that was not warranted. The AO also reasoned that this share transaction was shown to offset other income. The AO also pointed to another transaction of sale of mutual funds, which according to him, could not result in legitimate capital gain, but other forms of income, because those units were held for less than 3 months from the record date.

The AO then proceeded to observe as follows:

“I have reason to believe that income chargeable to tax amounting to Rs. 9,29,09,875/- (Rs. 4,53,69,983/- on account of in genuine capital loss on shares of M/s Parsec Technologies Ltd as discussed above and Rs 4,75,39,692/- on account of excessive claim of short terms capital loss on mutual funds as discussed above)”.

The assessee/petitioner's objections to the reassessment notice, were turned down; consequently, he approached this court for the reliefs claimed.

4. The respondent revenue, in its counter affidavit, resists the claim in these proceedings. It urges that the proceedings initiated by the Assessing Officer under Section 148 is in accordance with law. There was enough material before the AO on the basis of which, he could form a belief that the income chargeable to tax had escaped assessment in the assessee's case. It is stated that no assessment order had been passed in the present case. It was only the intimation issued under Section 143(1)(a) of the Act, regarding whatever was returned by the assessee; that had been accepted by the Assessing Officer. It was only on the perusal of documents annexed by the assessee along with the return, it came to know that the transactions of sales of shares of M/s Parsec entered into by the assessee were not genuine and that the loss claimed on sale of mutual fund was excessive and was hit by provisions of Section 94(7) of the Act. Accordingly, AO correctly initiated proceedings under Section 147 of the Act. It is emphasized that the proceeding had been initiated within 04 years from the end of relevant assessment year and that the no infirmity could be found with it.
5. Mr. C.S. Agarwal, learned senior counsel for the petitioner argued that the revenue's argument that reasons been recorded on 28.5.2007 then there does not appear to be any reason, that why were those alleged reasons recorded were not furnished to the petitioner till

11.11.2008 despite the fact it had repeatedly been requesting the revenue for supply of a copy of such reasons recorded. The first of such request was made on 28.02.2008. The delay to furnish the alleged reasons recorded is highly inordinate i.e. 18 months from the date of initiation of proceedings under Section 147 of the Act and, entirely unreasonable, which itself shows that no reasons to believe were recorded as alleged when the notice under Section 148 of the Act was issued. Reliance here is placed on the judgment of this Court in the case of *Haryana Acrylic Manufacturing Co. Vs. CIT*(2009) 308 ITR 38. It is highlighted more seriously, that the learned AO before initiating proceedings under section 147 of the Act on 28.05.2017 had not recorded any reasons to believe prior to issue of the notice under Section 148 of the Act, as is mandated under Section 148(2) of the Act. Mr. Agarwal submits that in the reasons to believe (Pg. 187) recorded by the learned AO states that as per share transfer form (which is at Pg 120 of Writ Petition) the sale has been carried out on 26.03.2004, which was mentioned as approval date in the share transfer form. Counsel submits that it is significant that share transfer form had been furnished by the assessee only on 25.03.2008 and this share transfer form was not available to anyone other than the company and could not have been available to anyone and as such the initiation of proceedings on the basis that reasons were recorded on 28.05.2007, being anti-dated are untenable. In fact, that share transfer form was furnished by the petitioner in pursuance to a notice dated 10.01.2008 (Pg. 101). Counsel submits that it is evident that in the absence of share transfer form before the AO. Till 25.03.2008, the

assertion in the reasons to believe shows reasons to believe have been anti-dated.

6. It is further stated that in the reasons recorded the date of purchase of share has been mentioned as 27.02.2001 (page 187) whereas in the return, date of purchase was incorrectly stated as 27.12.2001. This date i.e. 27.02.2001 was provided by the petitioner only to the AO on 21.04.2008 (page 129 of the writ petition @ Pg. 127) and as such date of purchase as 27.02.2001 was not available to the AO till 21.04.2008. This fact further supports reasons to believe have been anti-dated. Next, it is urged that the fact that shares were sold to Shri Madan Mohan Aggarwal could alone be known from share transfer form which had been filed by the petitioner only on 25.03.2008 (Pg. 120) (On the official record @ Pg. 199) and as such on 28.05.2007, this fact could not have been recorded, which corroborates that the reasons to believe were ante dated. Counsel relied on *CIT vs. Ved & Co* 302 ITR 328 that a clandestine or back door entry to section 148. Counsel also relies on the orders of this court, made on 29 October, 2017, requiring the revenue to file affidavit in respect of the petitioner's argument with regard to *ante dating* of the reasons recorded, as well as order of 17 January, 2018 specifically asking for an affidavit on the subject.
7. The revenue had filed the digital record of the relevant assessment file, to substantiate that the "reasons to believe" were recorded in this case, *before* issuance of the reassessment notice and that there was no infirmity with the impugned notice.

8. This court has considered the record. The reassessment notice is based on reasons, which the revenue asserts, was recorded on 28 May, 2007. The question is whether the assessee is correct in asserting – as he does in this case, that these reasons were inserted later and did not exist, or were not reflected *when the notice was issued. In other words, the veracity of the revenue's position that reasons existed on the file, before the notice was issued, is disputed.*

9. A plain look at the documents and file notings produced by the revenue in the digital form on 02.04.2018, it is discernable that the reasons which it claims were to be recorded on 28.05.2007 do not seem to have been so recorded on that date, i.e. 28.05.2007, but were recorded subsequently, much later. This is evident from the ensuing facts. The “reasons to believe” state, *inter alia*, as under:

"The return was processed u/s 143(1) of the Act on 31.03.2006. Subsequently. Refunds of Rs. 91,41,462/- and of Rs. 3,26,480/- were issued to the assessee after passing the orders under Section 154 of the Income Tax Act."

10. The refund of ₹91,41,462/- and ₹ 3,26,4801/- were issued on 3 1.05.2007 and 6.11.2007 and an order under Section 154 of the Act dated 22.08.2007 (page 199/644 of original digital record) was passed. This order undeniably was been made after 28.05.2007. A copy of the order passed under Section 154 of the Act on 22.08.2007 is at page 644 of original record (also at page 199). Furthermore, in terms of the order passed on 22.08.2007, a refund of ₹ 94,67.942/- was been computed (by that order which includes a refund of ₹91,41,4621/-. This refund cheque was apparently sent to the

assessee/petitioner on 08.06.2007; and a cheque of ₹ 3,26,480/- was sent on 08.11.2007. Thus the total amount was ₹ 94,67,9421-, as referred to in the order under section 154 of the Act and is dated 22.08.2007. The petitioner/assessee has produced photocopies of cheques dated 31.05.2007 and 06.11.2007.

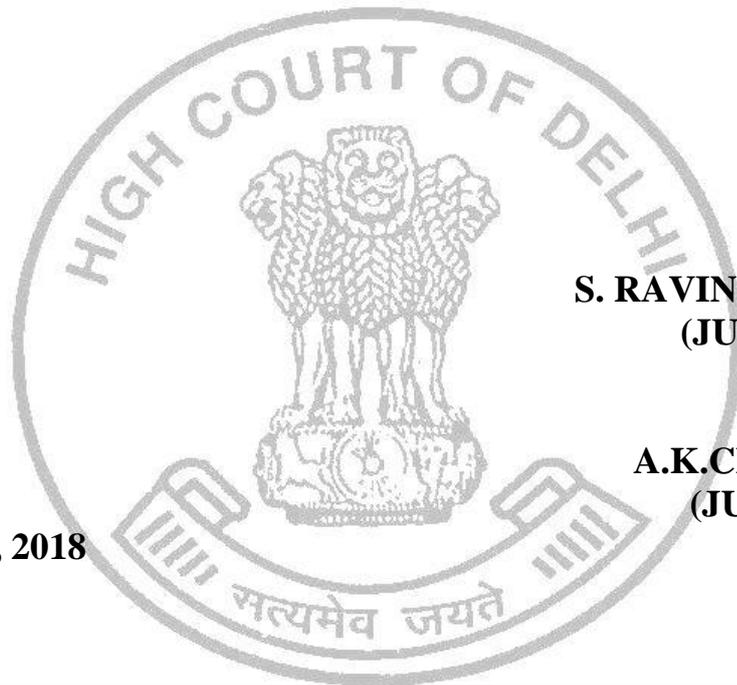
11. These circumstances, in the opinion of the court, show that the reasons had been recorded only after 22.08.2007 and not before. The inescapable inference from the records made available is that but the “reasons to believe” had not been recorded on 28.05.2007 i.e. prior to the issue of notice under Section 148 of the Act but were recorded later. Therefore, this court is of the opinion that the official record lends credence- rather proves the petitioner’s allegations that no reasons were recorded prior to the issue of the notice on 28.05.2007. The AO should have recorded some reasons to justify such reassessment notice, *before it was issued*, given that it is a mandatory requirement under section 148(2) of the Act.

12. The petitioner also highlights that other similar documents placed in the digital form show that new numbers were assigned to the old page numbers in order to manipulate the placement of the documents. If initial (old) numbers are reckoned, it would be seen that reasons had not been recorded before the issue of the notice on 28.05.2007 and were recorded only after 5 November 2008, when the same were handed over to the petitioner on 11.11.2008 and not before despite repeated request. The petitioner also highlights that the copy of reasons recorded appears at pages 653 - 654 which is in "Arial Font" (original pages were 213 -214); whereas the documents of the same

date (see Pg. 655 and 657) is in "Times New Roman Font", which shows "Arial Font" was not available. Also, the assessee points out that the pages/file notes prior to original page 213 are documents which had been filed by the petitioner before the AO in the course of proceedings initiated by him under section 148 of the Act and these also establish that such reasons had not been recorded prior to the issue of notice, because were they so then immediately after the return of income was filed, such reasons would have been in the file and numbered appropriately. These facts also corroborate the circumstance that the reasons were not recorded as alleged on 28.05.2007.

13. It goes without saying that whilst the "reasons" shown to the court and the petitioner may *ipso facto* not be faulted, yet the file tells a different story; they were not recorded before the impugned notice was issued. In fact, the revenue played a subterfuge, in trying to cover up its omission, and in *ante dating* the record, in the attempt to establish that such reasons existed, and this court's interference was not called for. In these circumstances, this court hereby directs the Chief Commissioner concerned to cause an inquiry to be conducted as to the involvement of the officials or employee in the manipulation of the record in this case, and take strict disciplinary action, according to the concerned rules and regulations. This inquiry should be in regard to the conduct of the concerned AO posted at the time, who issued the notice under Section 147/148 as well as the officers who filed the affidavits in these proceedings. The investigation and consequential action shall be completed within four months.

14. The writ petition is allowed in the above terms; the impugned reassessment notice and all subsequent orders, made pursuant thereto are hereby quashed. The matter shall be listed for the revenue to report its action, to the court, in the form of an Action taken Report, on or before second Tuesday of January, 2019. The matter shall be listed before the court on 15 January, 2019 for considering the said report. The writ petition is allowed, in the above terms and in terms of the above directions. No costs.



**S. RAVINDRA BHAT
(JUDGE)**

**A.K. CHAWLA
(JUDGE)**

AUGUST 16 , 2018