

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

WRIT PETITION NO.2860 OF 2012

Nickunj Eximp Enterprises Pvt. Ltd.
Sir Joravar Bhavan.
93, Maharshi Karve Road,
Marine Lines,
Mumbai 400 020.
PA No.AABCN 0991K.

....Petitioner.

vs.

- 1) Assistant Commissioner of Income Tax,
Range 1(2), having his office at
Room No.535, 5th floor, Aayakar Bhavan,
M.K.Road, Mumbai 400 020.
- 2) Commissioner of Income Tax-1,
having his office at Aayakar Bhavan,
M.K.Road, Mumbai 400 020.

....Respondents.

Mr. J.D. Mistry, Senior Advocate i/by K. Gopal along with Jitendra Singh
for the Petitioner.

Mr. Suresh Kumar for the Respondent.

**CORAM : M. S. SANKLECHA AND
G.S. KULKARNI, JJ.**

DATE : 18 JUNE 2014

JUDGMENT: (Per M.S. SANKLECHA, J.)

In this petition, the challenge is to a notice dated 7 December 2010 of the Assessing Officer issued under Section 148 of the Income Tax Act, 1961 ("the Act") seeking to reopen the assessment for the Assessment Year 2005-06 along with the order dated 12 June

2012 of the Assessing Officer rejecting the petitioner's objection to the reasons for issuing the impugned notice dated 7 December 2010.

2) On 31 October 2005, the petitioner filed its return of income declaring its income at Rs.43.05 lacs for A.Y. 2005-06. Thereafter, on 27 March 2007, the Assessing Officer passed an assessment order under Section 143(3) of the Act determining the petitioner's income at Rs.50.36 lacs for A.Y. 2005-06.

3) Thereafter, the impugned notice dated 7 December 2010 was issued under Section 148 of the Act seeking to reopen the petitioner's assessment for A.Y. 2005-06. On 11 July 2011, the reasons recorded for reopening the assessment for assessment year 2005-06 were furnished to the petitioner. The reasons recorded for reopening assessment read as under:-

“The assessee company is engaged in trading of various industrial products viz. Crucibles, graphites, spare parts of industry equipments safety equipments, safety masks etc. The suppliers of trading goods of the company both foreign as well as domestics. The clients of the company include Indian Ordinance authorities, DRDO BARC apart from other private corporate.

During the scrutiny proceedings in the past assessment years as well as pending scrutiny proceedings for assessment year 2008-09 (pending with Addl. CIT), it is noticed that certain suppliers were found as bogus and additions are made on the issue. For A.Y.2007-08 addition on GP from bogus sales turnover as well as investment in bogus

purchase amounting to Rs.4.76 crores was made and the case is pending before CIT(A).

Verification of the suppliers indicated one party M/s. Saileela Trading P. Ltd. from which the assessee had shown purchase worth Rs.14.5 crores for A.Y. 2008-09. This supplier has been proved as bogus biller during the course of various searches/survey by Mumbai investigation Wing.

Knowing this fact as well as the status of additions made in the past assessment years, it was decided to undertake action u/s. 133A of the I. T. Act to find out further evidences strengthening the bogus purchase transactions. The result of survey clearly brings out findings supporting and strengthening the evidences regarding the bogus purchase transactions done by the assessee company from year to year. A rough working of Rs.35 crores (from A.Y.2005-06 to A.Y.2010-11) worth of purchase are found to be from the parties which are non-existent/bogus billers. The chart annexed shows the year wise amount of bogus transactions done by the assessee. Hence, accordingly I have reason to believe that income chargeable to tax for A.Y. 2005-067 has escaped assessment.

Issue notice u/s. 148.”

Date : 7/12/2010

sd/-

(S.N. Bhatia),

Dy. Commissioner of
Income Tax 1(2), Mumbai.

The petitioner made a grievance of not receiving a chart stated to be annexed to the reasons. Therefore, on 2nd April 2012 the Assessing Officer furnished the petitioner with another copy of the reasons recorded along with a chart annexed to the reasons for

reopening the assessment.

3) The petitioner by its letter dated 23 April 2012 objected to the impugned notice dated 7 December 2010. The objection was on the ground that the proposed reopening of assessment for A.Y. 2005-06 was beyond the period of 4 years from the end of the assessment year in the absence of any failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment. Besides, it was contended that as all the material was on record and a subject matter of assessment under Section 143(3) of the Act, the proposed reopening of assessment was not warranted. On 12 June 2012, the Assessing Officer rejected the objections of the petitioner to the proposed reopening of assessment. The rejection was on the basis that the material had been obtained during survey proceedings and assessment proceedings for assessment year 2008-09 which indicated that for the assessment year 2005-06 bogus bills had been received to evidence purchases. So far as change of opinion is concerned it was pointed out that the issue of alleged bogus bills by the petitioner's supplier is a new fact to which no mind had been applied earlier. Thus, it is contended that there was no change of opinion.

4) Mr. Mistry, learned Senior Counsel appearing for the petitioner submits that the grievance of the petitioner to the impugned notice and the reasons recorded both dated 7 December 2010 are as under:-

a) The impugned notice dated 7 December 2012 has been issued beyond the period of 4 years from the end of the assessment year 2005-06. Such cases are covered by the proviso to Section 147 of the Act and unless there is reason to believe that income chargeable to tax has escaped assessment coupled with the failure on the part of an assessee to disclose truly and fully all material facts necessary for assessment, then such a notice would be beyond jurisdiction. In this case, it is submitted that there was no failure on the part of the petitioner to disclose truly and fully all material facts necessary for assessment; and

b) In this case the assessment order dated 27 March 2007 was passed under Section 143(3) of the Act. All the facts were disclosed and the Assessing Officer passed the assessment order dated 27 March 2007 after verifying all the details furnished by the petitioner. In particular, our attention is drawn to the fact that in the chart annexed to the reasons recorded which gives a list of alleged purchases from parties which are non-existent/bogus bills for assessment year 2005-06, they were only two suppliers alleged as under:-

Sr.No.	Name of the Supplier	Amount of Purchase
a)	Rahul Industries	Rs.03.81,795/-
b)	Symphony Metalam P. Ltd.	Rs.46,60,056/-
	Total:-	Rs.50,41,851/-

Out of these two, he points out that during the assessment proceedings the Assessing Officer had asked for details of purchase and sales of

more than Rs.10 lacs by the individual parties. This is evident by a questionre issued by the Assessing officer which is annexed to the affidavit in rejoinder filed by the petitioner. In response the petitioner had given details of all its suppliers including Symphony Metalam Private Ltd. Therefore, according to the petitioner the same was not only a fact disclosed but also a subject matter of scrutiny at the time when the original assessment order was passed. In view of the above, it is submitted that the entire exercise is only a change of opinion. Besides, it was emphasized that there was no new material which would warrant a change of opinion.

5) Mr. Suresh Kumar, learned Counsel appearing for the revenue in support of the impugned order submits as under:-

a) The reasons recorded for issuing the impugned notice dated 7 December 2010 clearly indicates that fresh information was accessed during the scrutiny proceeding for subsequent years i.e. assessment year 2008-09 as well as a result of survey proceedings. The information obtained indicated that the petitioner had only obtained bills/accommodation entries from some of its so called suppliers without having received any goods. Non disclosure of the fact that the suppliers are bogus by the petitioner during the original proceedings would lead to the conclusion that there was failure to truly and fully disclose all material facts necessary for assessment; and

b) There was no change of opinion on the part of the Assessing Officer in issuing notice dated 7 December 2010. This is for the reasons that when the Assessing Officer had examined the supplier's

list during the assessment proceeding for assessment year 2005-06 it was on the basis that the same were genuine. Now there is information available that some of the suppliers were not genuine. This is fresh information and acting on the same cannot be said to be change of opinion. In view of the above, it is submitted that the petition may not be entertained.

6)(a) It is well settled that where an efficacious alternative remedy is available to a petitioner, the Court would be slow to exercise its extra ordinary writ jurisdiction as a matter of self restraint. In proceedings for reopening of assessment taken by the revenue it is open to an assessee to contend before the Assessing Officer that the reopening is not sustainable in law and that on merits also the reassessment proceedings are not sustainable. The orders passed by the Assessing Officer for reopening are open to challenge along with the order passed on merits by way of an appeal to the Commissioner of Income Tax (Appeals), thereafter to the Tribunal and if a substantial question of law arises in that case by an appeal to the High Court. Thus, there is an efficacious alternative remedy provided under the Act.

(b) However, even where there is an efficacious alternative remedy available under the Act, we do exercise our extra ordinary writ jurisdiction where initiation of proceeding is itself without jurisdiction i.e. in the absence of basic jurisdictional fact being satisfied. The writ jurisdiction is exercised by us so as to ensure that the subject is not put to unnecessary hardship/harassment by reopening the assessment for the earlier year without satisfaction of the preconditions provided under Section 147 and 148 of the Act. This is for the reason that the

earlier assessment order which is being sought to be disturbed is not a waste paper but has sanctity attached to it. The reopening of an assessment under Section 148 of the Act cannot be arbitrary or on a mere change of opinion or at a mere whim and caprice of the Assessing Officer. It is for this reason that the Supreme Court in *GKN Drive Shafts India vs. ITO 259 ITR 19* has provided that the Assessing Officer would furnish reasons as recorded for issuing notice to reopen an assessment and the assessee would be entitled to file its objections. The Assessing Officer would then dispose of the objections by a speaking order. Thus one more safe guard was provided by the Apex Court to ensure that there is proper application of mind before an assessment is reopened as reopening of an assessment is likely to cause harassment. It is at this stage that assessee normally move the Court, if they are of the view that the notice for reopening is without jurisdiction. The Court would interfere at this stage if ex facie the pre conditions for issuing the notice viz. recording of reasons before issuing a notice, the reason to believe that income chargeable to tax has escaped assessment and when the assessment sought to be reopened beyond a period of 4 years prior to the issue of notice, there has been failure to disclose all facts which are material for assessment are not satisfied. The non satisfaction of the conditions precedent would lead to an absence of jurisdiction most certainly warranting interference by a writ Court. However, the lack of jurisdiction must be clear on the face of the reasons recorded for issuing a notice. One must also not loose sight of the fact that a notice for reopening of an assessment is only to be done on the satisfaction of the Assessing Officer that the conditions precedent for reopening the assessment are satisfied. The reason to believe that income chargeable

to tax has escaped assessment would be the subjective satisfaction on examination of material before the Assessing Officer. In case there is some material for the Assessing Officer to reach a prima facie view that income chargeable to tax has escaped assessment or that the conditions precedent as provided under Section-147 and 148 of the Act are satisfied then the court would not substitute its own judgment to that of the Assessing officer. In such cases it is best to have these issues determined in the first instance by the authorities including the appellate authorities and if so necessary to be examined by High Court in its appellate jurisdiction.

(c) Thus we would exercise our writ jurisdiction to interdict a proceeding under Section 148 of the Act seeking to reopen an assessment only when the same is clearly without jurisdiction and not otherwise as a matter of self restraint. We are constrained to reiterate the above long settled position of self restraint in exercise of our extraordinary writ jurisdiction only because we have noticed that in a number of cases the petitioners approach us in our writ jurisdiction as though we are an appeal Court and it is their statutory right that the Court must in all cases interfere with reopening of assessment. We trust that henceforth these filters would be kept in mind while seeking to invoke the writ jurisdiction of this Court. However, we wish to make it clear that where ever there is palpable injustice or a notice on the face of it is without jurisdiction or the proceedings leading to disposal of the objections is in breach of natural justice, infringement of fundamental rights or where the constitutionality of statute is challenged, then even in a petition challenging a notice under Section 148 of the Act we would in appropriate cases exercise our writ jurisdiction notwithstanding the

availability of an alternative remedy.

7) Now, we shall examine the present facts. The petitioner has contended that the impugned notice dated 7 December 2010 was beyond the period of 4 years from the end of the relevant assessment year i.e. 2005-06 and the jurisdictional requirement of reason to believe that income chargeable to tax has escaped assessment on account of failure of the petitioner to disclose all material facts truly and fully at the time of the original assessment is not satisfied.

8) It was first contended by the petitioner that the escapement of tax on income must arise out of failure to disclose fully and truly all facts necessary for assessment of income. In this case, it is submitted that all documents including the bills received from Rahul Industries and M/s. Symphony Metalam Private Ltd. as well as other suppliers were disclosed by the assessee during the original assessment proceedings leading to assessment order dated 27 March 2007. Therefore, there has been no failure to disclose truly and fully all material facts necessary for assessment. The aforesaid submission on the part of the petitioner ignores the fact that it was only on account of survey proceedings under Section 133A of the Act and also during the assessment proceedings for assessment year 2008-09 that information was obtained that the certain purchases were made from non existing/ bogus dealers. The information pertaining to assessment year 2005-06 suggested that Rahul Industries and M/s. Symphony Metalam Private Ltd. were either non existing or engaged in issuing bogus bills. The shield under the proviso to Section 147 of the Act can come to the petitioner's aid only if there has been a full and true disclosure of all

facts necessary for assessment. In case there is a prima facie doubt about the truthfulness and/or completeness of the disclosure at the time of original assessment in view of information obtained later the provisions cannot aid the petitioner at the stage of notice under Section 148 of the Act. It is likely that during the assessment proceedings the assessee may be able to satisfy the Assessing Officer that there was a true and full disclosure. Once the Assessing Officer has received information that invoices issued by M/s. Rahul Industries are bogus then the same is necessarily to be the subject matter of enquiry during the reassessment proceedings. The information that bills produced were not genuine does give rise to a reasonable belief in the mind of the Assessing Officer that income chargeable to tax has escaped assessment, as recorded in the reasons as under:-

“.....The result of survey clearly brings out findings supporting and strengthening the evidences regarding bogus purchase transaction done by the assessee company for year to year. A rough working of Rs.35 crore (for A.Y. 2005-06 to A.Y. 2010-11) worth of purchases are found to be from parties which are nonexistent/bogus billers. The chart annexed shows the year wise amount of bogus transaction due by the assessee. Hence, accordingly I have reason to believe that income chargeable to tax for A.Y.2005-06 has escaped assessment.”

As stated earlier that at the time of issuing a notice under Section 148 of the Act, it is not necessary for the Assessing Officer to conclusively arrive at a finding that there has been escapement of

income. At the stage of issue of the notice the only requirement is to examine whether on the available material a reasonable person could form a reasonable view to believe that income chargeable to tax has escaped assessment. This satisfaction has necessarily to be the subjective satisfaction of the Assessing Officer and unless it is shown by the petitioner that such a reasonable belief as arrived at by the Assessing Officer in the facts of the case is just not possible, this Court will not stall proceedings for reassessment duly initiated. In this case, we are of the view that the satisfaction of the Assessing Officer to form a reasonable belief that income chargeable to tax has escaped assessment is not unreasonable.

9) The petitioner next emphasized the fact that the assessment was completed under Section 143(3) of the Act. Further, during the course of assessment proceedings the petitioner was specifically asked by the Assessing Officer to furnish the details of sales and purchase of more than Rs.10 lacs. Consequently, the purchases of Rs.46,61,056/- from M/s. Symphony Metalam P. Ltd. was a subject matter of examination by the Assessing Officer during the original assessment proceedings. It is submitted that on the same set of facts as were in existence during assessment proceedings leading to order dated 27 March 2007 the Assessing Officer now seeks to take a view different from that taken earlier. This submission over looks the fact that so far as the purchases from Rahul Industries to the extent of Rs.3.81 lacs is concerned, on which also reliance is placed by the revenue to reopen the assessment, was never a subject matter of enquiry by the Assessing Officer during the proceedings leading to assessment order dated 27

March 2007. Thus, so far as purchases from Rahul Industries are concerned, there can be no occasion for change of opinion as there was no opinion formed by the Assessing officer at the time when the original assessment order was passed. It is only during the course of survey proceedings and scrutiny proceedings for Assessment Year 2008-09 that information was received that the bills were not genuine.

10) It was next contended that in any view of the matter, the reasons recorded for reopening of the assessment by the Assessing Officer does not record that there was any failure on the part of the petitioner to fully and truly disclose all material facts necessary for assessment. In support, the petitioner made a reference to the decision of this Court in the matter of Hindustan Lever Ltd. vs. R. B.Wadkar, Assistant Commissioner of Income Tax and others (2004) 268 ITR 332. In the above case this Court did observe that there is no averment in the reasons that there has been failure to disclose all material facts necessary for the assessment. However, the above observation proceeded on the basis that the reasons as recorded therein when read as a whole did not indicate any failure to disclose truly and fully all material facts necessary for assessment. It may be useful to reproduce the reasons for reopening given in Hindustan Lever Ltd. (supra) as under:-

“From the notes to the audited accounts, it is seen that while valuing closing stock, Central Excise and customs duty leviable on stock lying in godown was not considered as forming part of cost of the closing stock. Although no such duty was paid during the relevant previous year, liability to pay such duty

arises immediately on manufacture of excisable goods. Also, the Board's Instruction No.1389 dated March 24, 1981. provides for inclusion of Central excise and customs duty in valuation of inventory. In view of this position, I have reason to believe that income chargeable to tax has escaped assessment inasmuch as excise and customs duty leviable, Rs.5.85 crores has not been added to the value of the closing stock, while completing the scrutiny assessment under section 143(3) on January 29, 1999.”

It was in the above context, that this Court held that “The reasons recorded by the Assessing Officer nowhere state that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year”. The above observation has to be read in the light of the reasons recorded for reopening the assessment. The recording or non recording of the words “failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment” would not by itself bestow or oust jurisdiction. One would necessarily have to read the reasons as a whole to find out whether or not there has been a failure to disclose truly and fully all necessary facts for assessment. In the present case, the reasons recorded clearly indicates that scrutiny proceedings for assessment year 2008-09 and survey action taken under Section 133A of the Act has brought on record evidence indicating bogus purchase bills from various parties, one of them being M/s. Rahul Industries for the assessment year 2005-06 as indicated in the chart annexed to the reasons recorded. Therefore, in the facts of the present case the impugned notice and the reasons recorded to our mind does indicate that there is relevant material obtained during the survey and

assessment proceedings for assessment year 2008-09 on the basis of which a reasonable person could reasonably form the belief that income chargeable to tax has escaped assessment.

11) It is in the above circumstances, that we do not interfere at this stage with the impugned notice for reassessment issued under Section 148 of the Act. However, we must make it clear that our observations are prima facie observations and made in the context of whether or not we should exercise our writ jurisdiction under Article 226 of the Constitution of India. The petitioner may during the assessment proceedings have a complete answer to the charge of bogus bills issued by Rahul Industries or others. The Assessing Officer will not in any manner be influenced by the observations made by us in this order while examining the petitioner's case on merits including the petitioner's submission that reopening proceedings are not justified in the present facts during the reassessment proceedings. All contentions are left open to be urged by the petitioner before the Assessing Officer.

12) In view of the above, the petition is dismissed at the stage of admission. No order as to costs.

(G.S. KULKARNI, J.)

(M.S. SANKLECHA, J.)