

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

WRIT PETITION NO. 2506 OF 2019

Usha Exports ... Petitioner.
V/s.
Assistant Commissioner of Income Tax. ... Respondents.

Dr.K.Shivram, Senior Advocate with Mr.Rahul Kakani
for the Petitioner.

Mr.Sham Walve for the Respondents.

CORAM : NITIN JAMDAR AND
M.S. KARNIK, JJ.

DATE : 12 December 2019.

PC.

By this petition, the Petitioner challenges the notice dated 28 March 2019 seeking to reopen the assessment for the assessment year 2012-13, and the order dated 4 September 2019 disposing of the objections raised by the Petitioner to the said notice.

2. The Petitioner is a partnership firm carrying on the business of manufacturing and exports of diamonds. The Petitioner filed the return of income for the assessment year 2012-13 on 20 September 2012 declaring total income of Rs.29,76,330/-. The Respondent No.1- Assessing Officer sought details from the

Petitioner regarding purchases, sundry creditors and sundry debtors and a notice to that effect under section 142(1) of the Income Tax Act, 1961 was issued on 31 July 2014. The Petitioner replied to the said notice on 19 August 2014 and submitted details as sought for. An assessment order was passed by the Assessing Officer on 19 February 2015 under section 143(3) of the Act without making any disallowances of the purchases.

3. The Petitioner received a notice from the Assessing Officer dated 29 September 2012, seeking to reopen the assessment for the assessment year 2012-13. The reasons supplied along with notice were as follows:

In this case, the assessee has filed the Return of Income for the AY 2012-13 declaring Total income of at Rs.29,76,330/- on 29/09/2012. Information gathered by this office reveals that the captioned assessee is one of the beneficiaries who purchased HAWALA bills from companies; managed by the Rajendra Jain Group, who are engaged in the business/ activity of issuing bogus bills without delivery of goods as per requirements of their customers. Information collected by the office of DGIT (Inv), Mumbai also confirmed the fact that the above assessee is a beneficiary on account of purchasing bogus bills without delivery of goods from parties mentioned below for the FY 2011-12 relevant to the assessment year 2012-13.

The Name of Parties from whom assessee has made purchases is a under:-

Sr.no	Name of Bill Provider	Amount
1	M/s Aadi Impex	4,14,18,494/-

2	M/s Kalash Enterprises	4,69,23,678/-
	TOTAL	8,83,42,172/-

As per the information, the above mentioned party is engaged in the business of issuing fraudulent sales bills without delivery of goods. In the statement recorded from the above party by the Income Tax Department, it was admitted that, they had sold bills as per the requirement of the assessee. In view of these facts, I have reason to believe that income of Rs.8,83,42,172/- chargeable to tax, has escaped for assessment year 2012-13, and therefore, the assessment needs to be re-opened as per the provision of section 147 of the IT Act 1961 for A.Y. 2012-13 and notice u/s. 148 of the I.T. Act needs to be issued.

After considering the response of the Petitioner, the Assessing Officer concluded that the purchases were made, however, they were made at a lower cost from the grey market and disallowed certain purchases as bogus purchases.

4. On 28 March 2019, the Respondent No.1- Assessing Officer issued the impugned notice under section 148 of the Act. Reasons for issuing the notice were supplied to the Petitioner, which are reproduced as under:

The assessee is engaged in the business of Manufacturing Industry, trading and exporting of rough diamonds and diamond powder. Assessee had filed its return on 20/09/2012 for A.Y. 2012-13 declaring total business income of Rs.29,76,330/-. In this case, information gathered by the office that assessee is one of the beneficiaries of having indulged in taking bogus

accommodation entries of Rs.7,87,00,670/- from the group of entities managed by Shri Rajendra Jain, Shri Dharmichand Jain and Shri Sanjay Choudhary Group, the case was reopened and the assessment was finalized u/s 143(3) r.w.s. 147 of I.T. Act, 1961 on 28/12/2017 determining assessed income at Rs.52,12,360/- after disallowance of Rs.21,72,138/- [i.e. 2.76% of non-genuine/ bogus purchase of Rs.7,87,00,670/-).

The issue of bogus accommodation entries were widely discussed in the assessment order. Further, assessee had debited an amount of 7,87,00,670/- on account of purchases from M/s Aadi Impex and M/s. Kalash Enterprises. All these enterprises are ultimately controlled by Shri Rajendra Jain. This fact has been established during scrutiny assessments that such transactions were bogus accommodation entries. However, on scrutiny of the assessment order, it was observed that the Assessing Officer had made only addition of Rs.21,72,138/- [ie. 2.76% of non genuine/bogus purchase of Rs.7,87,00,670/-).

1 It is observed that all the purchases made by the assessee were bogus and not actually purchased by the assessee, then as per proviso mentioned above, all the expenditure belongs to the bogus purchase would have been disallowed. Also, the parties who had issued the bogus bills they have given their statements on oath, that only bills and no actual transaction had taken place between them and the assessee company. In this connection, it is pertinent to note that the Hon'ble Supreme Court while dismissing the SLP had upheld the decision of High Court for addition of entire income on account of bogus purchases in the case of M/s NK Proteins Ltd. v/s. DCIT [2017-TIOL-23-SC-IT] vide its order dated 16/01/2017. Subsequently, the department in other cases too had made 100% disallowance on account of accommodation entry/bogus purchases. Accordingly,

bogus purchases amounting to Rs.7,87,00,670/- were required to be disallowed and added back to total income of the assessee.

In view of the above, I have reason to believe that income chargeable to tax of above Rs.1,00,000/- has escaped assessment within the meaning of section 147 of the Income-tax Act, r.w. explanation thereto for A.Y. 2012-13.'

The Petitioner submitted its objections on 2 May 2019. These objections have been disposed of by the impugned order dated 4 September 2019. The Petitioner is, therefore, before this Court by filing the present writ petition under Article 226 of the Constitution of India.

5. By order dated 20 November 2019, the parties were put to notice that the Petition would be taken up for final disposal at the admission stage. Accordingly, the petition is taken up for final disposal.

6. Heard Dr.K.Shivram, learned Senior Advocate for the Petitioner and Shri Sham Walve for the Respondents.

7. The assessment for the year 2012-13 is sought to be reopened by the impugned notice dated 28 March 2019. This is beyond the period of four years. The period of four years is of significance because of the first proviso to section 147 of the Act. It

stipulates an additional requirement when the assessment is sought to be reopened after the expiry of four years from the end of the relevant assessment year. Where an assessment under section 143(3) is made for the relevant assessment year, then no action shall be taken 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 for the assessee's failure to disclose fully and truly all material facts necessary for his assessment for that assessment year. By various judicial pronouncements, this condition is now firmly established as the jurisdictional requirement to reopen of the assessment. Further, the reassessment shall not be undertaken on a mere change of opinion and reassessment proceedings are not akin to review. In such circumstances, a writ petition under Article 226 can be entertained by the Courts despite the availability of an alternate remedy of appeal.

8. Dr. Shivram, learned Senior Advocate for the Petitioner submits that there two main points on which the petitioner is entitled to succeed. First, that not only there is no failure by the Petitioner to disclose all material facts fully and truly, but there is not even a mention to that effect in the reasons supplied to the Petitioner. Second, all the material was available and looked into by the Assessing office when first reassessment proceeding took place and now it is only a change of opinion. Mr. Walve, the learned counsel for the Respondent, based on the contentions raised in reply affidavit, supported the impugned action of the Assessing Officer.

9. The first contention raised by Dr. Shivram regarding the absence of statement regarding petitioner's failure in the reasons is correct. The reasons supplied along with the impugned notice, which are reproduced above, contain no assertion there was any failure of the petitioner to disclose fully and truly all material facts necessary for the assessment. This omission can be a ground to set aside the Reassessment notice. Pursuant to the reasons given along with first reopening notice dated 29 September 2012, the Petitioner had supplied all the material regarding the very same allegations against the Petitioner and the same were examined by the Assessing Officer. All the material was placed before the Assessing Officer by the Petitioner. Acting upon this material, the Assessing Officer had, in fact, made certain additions. Therefore, it cannot be said that there was a failure by the Petitioner to disclose all material facts fully and truly. In the circumstances, the jurisdictional requirement to reopen the assessment proceeding after four years is not present. Neither it has been alleged.

10. Dr. Shivram then submitted that the foundation of the first reopening notice and the second notice is the same. That is the issue of bogus purchases and accommodation of entries and that there is a clear change of opinion by the Assessing Officer. He submitted that, in the reasons supplied along with first reopening notice, the issue of bogus accommodation of entries regarding purchases was discussed. The reasons given for second reopening

notice reproduced above also refer to the said fact. The reasons also refer to a decision of the Supreme Court in the case of *M/s.N.K.Proteins Ltd. (2017-TIOL-23-SC-IT v. DCIT)*. Even this decision was before the Assessing Officer in the proceeding pursuant to first reopening notice. The Petitioner, along with its objections, placed explanatory note as to how the said decision of the Supreme Court in *M/s.N.K.Proteins* did not apply to the facts of the case. Therefore, this aspect was also considered when the proceeding under the first reopening notice was conducted. In the circumstances, the contention of the Petitioner that the impugned reopening notice is issued only on mere change of opinion will have to be accepted.

11. Since we are satisfied that the jurisdictional requirements for reopening of the assessment of the Petitioner for the assessment year 2012-13 after four years are absent, and the action of the Respondent No.1- Assessing Officer is without jurisdiction, the Petitioner is entitled to succeed.

12. Writ Petition is allowed. The impugned notice notice dated 28 March 2019 seeking to reopen the assessment for the assessment year 2012-13 and the order dated 4 September 2019 disposing of the objections are quashed and set aside.

(M.S. KARNIK, J.)

(NITIN JAMDAR, J.)