# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
## CIVIL APPELLATE JURISDICTION

## WRIT PETITION NO. 5098 OF 2022

Ajay Ajit Tanna }
Age- 58 years, B-5, Sharad }
Kunj, Behind Woodland Furniture }
Thane, Mumbai 400 602 } ...Petitioner

*Versus*

1. Union of India }
Ministry of Law, }
Aayakar Bhavan, M. K. Road, }
Mumbai - 400020 }

2. Income Tax Officer, }
Ward 1(1), Thane, Ashar IT Park, }
6th Floor, Road No. 16Z, Wagle }
Industrial Estate, Thane (West) }
- 400604 }

3. Additional/Joint/Deputy }
/Assistant Commissioner of In- }
Come Tax/Income-tax Officer, }
National Faceless Assessment }
Centre, Delhi }

4. Principal CIT, Thane – 1, }
Ashar I. T. Park, 6th Floor, }
Road No. 16, Wagle Indl. Estate, }
Thane (West) – 400604 } ...Respondents

* * * *

Ms Aarti Sathe a/w Ms Asawari Kadam, Advocates for the Petitioner.

Mr. Suresh Kumar, Advocate for the Respondents.

* * * *

CORAM : DHIRAJ SINGH THAKUR AND
KAMAL KHATA, JJ.

**DATE : 08th MARCH, 2023.**

**ORDER**

**PER DHIRAJ SINGH THAKUR, J.:**

. The Petitioner in the present petition *inter alia* seeks the issuance of writ of certiorari for quashing the impugned notice issued under Section 148 of the Income Tax Act, 1961 ("the Act") dated 31st March, 2021, the order of assessment dated 28th March, 2022 passed under Section 147 r/w Section 144B of the Act as also the show cause notice for penalty issued under Section 271D of the Act dated 30th July, 2022 on the ground that the order in show cause notices impugned have been issued contrary to the procedure prescribed under the Act as also the letter and spirit of the judgment in the case of ***GKN Driveshafts (India) Ltd. V/s. Income Tax Officer and Others***[1].

2. Briefly stated the material facts are as under:

The Petitioner who is an individual claims that he was a salaried employee with *M/s. Jaya Travels & Tours* which was a partnership firm duly registered under the Indian Partnership Act, 1932. A return of income was filed by the Petitioner for the

1 (2003) 1 SCC 72.

assessment year 2015-16 declaring a total income of Rs.6,26,910/-. The said return was processed under Section 143(1) of the Act and an intimation was issued in regard to the same to the Petitioner.

A notice under Section 148 of the Act dated 31st March, 2021 was issued by the Respondents seeking to reopen the assessment for the assessment year 2015-16 on the ground that income had escaped assessment within the meaning of Section 147 of the Act. The Petitioner was directed to file a return in the prescribed form for the said assessment year within thirty days from the service of the said notice. The Petitioner states that in response to the said notice under Section 148 of the Act, the return of income was filed once again. The Petitioner also sought from Respondent No. 2, the reasons for reopening the said assessment.

3. In response to the said request of the Petitioner, it is stated that a notice dated 30th June 2021 was received by the Petitioner under Section 143(2) r/w Section 147 of the Act from Respondent No. 2 asking the Petitioner to furnish documents in support of his submission.

In the said notice, the A.O. in paragraph 2 recorded as under:

"**.....Issues as per reasons recorded for reopening**
null"

4. The Petitioner claims that no response was filed to the notice dated 30th June, 2021. Thereafter, a further notice under Section 142(1) of the Act was issued on 02nd December, 2021 asking the Petitioner to furnish further information. The information sought was also in regard to the alleged receipt of Rs.85 lakhs from *M/s. Evergreen Enterprises* during the financial year 2014-15.

The Petitioner claims that a response was filed to the said notice wherein the Petitioner denied having received any loan or advance from *M/s. Evergreen Enterprises* and sought from Respondent No. 3, information regarding the aforementioned loan. It is stated that Respondent No. 3 without furnishing any material or information regarding the aforesaid loan proceeded to pass the order under Section 147 r/w Section 144B of the Act.

5. It was urged by Ms. Aarti Sathe, learned Counsel for the Petitioner that the entire process of reopening the assessment for the aforementioned assessment year was illegal and unsustainable for the reason that Respondent No. 3 had followed in breach the

procedure as was prescribed by the Apex Court in the case of ***GKN Driveshafts (India) Ltd. V/s. Income Tax Officer and Others,*** which specifically mandated that when a notice under Section 148 of the Act is issued, the noticee is to file a return and if he so desires, to seek reasons for issuing the notices. It further mandates that the Assessing Officer (A.O.) was bound to furnish reasons within a reasonable time and on receipt of reasons, the noticee was entitled to file objections to the issuance of notice, which objections, the A.O. was bound to dispose of by passing a speaking order.

6. In the present case it was urged by Ms. Aarti Sathe that even when the Petitioner had sought the reasons for reopening from Respondent No. 3, no reasons were furnished and on the other hand, in the notice dated 30th June, 2021 under Section 143(2) r/w Section 147 of the Act, the reasons recorded for reopening are stated to be 'null'. It was therefore urged that if there were no reasons for supporting the belief of the A.O. that income had escaped assessment, then the action of reopening the assessment for the assessment year in question was nothing but an exercise undertaken arbitrarily and without complying with the jurisdictional requirement envisaged under Section 147 of the Act.

It was further urged that even when the A.O. did not make any addition in regard to the cash loan of Rs.85 lakhs, which the A.O. alleged the Petitioner had received from *M/s. Evergreen Enterprises* during financial year 2014-15 on account of the explanation rendered by one of the partners of *M/s. Evergreen Enterprises,* yet the A.O. proceeded to initiate penalty proceedings under Section 271D of the Act for accepting the cash loan of Rs.85 lakhs in violation of the provisions of Section 269SS of the Act as the Petitioner had allegedly received a loan in cash for Rs.20,000/- or more contrary to the bar imposed under the said Section. It was thus urged that if the reopening of the assessment for the relevant assessment year was itself unsustainable, then the consequent action of the A.O. in initiating the penalty proceedings during the course of such reassessment proceedings would also be unsustainable in law.

7. In the reply affidavit filed by the revenue, the assertion of the Petitioner has not been specifically denied that no reasons were furnished for reopening. On the other hand, general assertions have been made regarding the passing of the orders and notices impugned following the principles of natural justice as also the statutory provisions in force. Mr. Kumar, learned Counsel for the

revenue also urged that the order of assessment having been already passed and the penalty proceedings having been initiated, it would be appropriate for the Petitioner to avail the alternate remedy as provided under the Income Tax Act. Reliance in this regard was placed upon ***Commissioner of Income Tax & others V/s. Chhabil Dass Agarwal*** [2].

8. We have heard learned Counsel for the parties.

9. The power vested in an A.O. to reopen an assessment in terms of the provisions of Section 147 of the Act as existed before 01st April, 2021, was 'reason to believe' that income chargeable to tax had escaped assessment for any assessment year. In ***Income-tax Officer V/s. Lakhmani Mewal Das*** [3] the Apex Court held that the powers of the ITO to reopen the assessment, though wide, were not plenary. It was held that the words of the statute were 'reason to believe' and not 'reason to suspect' and that there ought to be a live link or close nexus between the material before the ITO and the belief which he was to form regarding the escapement of the income of the assessee.

10. In ***Commissioner of Income-tax V/s. Kelvinator of India Ltd.***,

2 (2014) 1 SCC 603.
3 [1976] 103 ITR 437 (SC)

the Apex Court held :

> "4 .....Therefore, post-1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be *per se* reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1 st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief....."

11. Equally settled is the principle of law that the legality of the reassessment proceedings has to be tested on the touch stone of the reasons recorded by the A.O. for such reopening. In the present case even when the Petitioner had demanded the reasons for reopening the assessment, no such reasons were furnished to the Petitioner which was otherwise an obligation cast upon the A.O. in terms of the judgment in ***GKN Driveshafts (India) Ltd. V/s. Income Tax Officer and Others***. Interestingly the A.O. in the notice under Section 143(2) of the Act dated 30th June, 2021 has recorded the reasons as 'null' which to our understanding means that there were

no reasons at all with the A.O. to support his belief that income had escaped assessment for if there were any, the A.O. would not have recorded so. Further if at all there were any reasons in fact recorded and available with the A.O., then the same ought to have been furnished to the Petitioner in terms of the mandate of the judgment in ***GKN Driveshafts (India) Ltd.***

12. In ***Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax*** [4], the Court, in the background of section 147 of the Act, observed :

> ".....all that the Income-tax Officer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Officer has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.

4 [1998] 234 ITR 170

> It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Section 147/148 of the Act."

13. Testing the facts of the present case on the touch stone of the judgments mentioned hereinabove, it can be seen that only if reasons had been furnished to the Petitioner that one could ascertain whether there was tangible material available with the A.O. for formation of his 'reason to believe' that the income had escaped assessment. In the absence of any new tangible material and assuming that there was any material with the A.O. though not disclosed, in the absence of and on account of the failure of the A.O. establishing a live link with such a tangible material, it cannot be said that the jurisdictional condition had been satisfied by the A.O. while proceeding to issue a notice under Section 148 of the Act.

It can therefore clearly be held that the issuance of a notice

under Section 148 of the Act in the absence of any new tangible material was nothing but an attempt to review the earlier order of assessment passed by the A.O.

14. The contention of learned Counsel for the revenue is that the extra ordinary writ jurisdiction need not be exercised by this Court, in the facts and circumstances of the present case, as there was an equally efficacious alternate remedy available to the Petitioner under the Act. The other contention of Mr. Kumar, learned Counsel for the revenue is that this Court ought not to exercise its extra ordinary writ jurisdiction, reliance was placed upon ***CIT & others V/s. Chhabil Dass Agarwal*** . While it is true that High Court would not entertain a petition under Article 226 of the Constitution of India if an effective alternate remedy is available to an aggrieved person yet the said principle of alternate remedy has been held to be a matter of self imposed convenience and not as a matter of rule. The exceptions to the rule of alternate remedy where a writ Court may exercise its jurisdiction under Article 226 of the Constitution of India, are cases where statutory authority has not acted in accordance with the provisions of an enactment in question, or has acted in defiance of the fundamental principles of judicial

procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in violation of the principles of natural justice. Reference in this regard can be made to ***CIT & others V/s. Chhabil Dass Agarwal.***

15. In the present case, we do not wish to relegate the Petitioner to the alternate remedy as provided under the Income Tax Act for the simple reason that not only had the A.O. failed to satisfy the jurisdictional conditions for invoking its power under Sections 147/ 148 of the Act, but had also failed to comply with the directions of the Apex Court rendered in the case of ***GKN Driveshafts (India) Ltd.***

Be that as it may, the petition is allowed. The notice dated 31st March, 2021 issued under Section 148 of the Act, the order of assessment dated 28th March, 2022 and the consequent notice of demand dated 28th March, 2022 and the penalty notice dated 28th March, 2022, are hereby set aside.

The writ petition is disposed of accordingly. No order as to costs.

**(KAMAL KHATA, J.)** **(DHIRAJ SINGH THAKUR, J.)**