



IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
WRIT PETITION NO. 783 of 2016.

M/s. Aditi Constructions ]  
B/6, Shivkrupa ]  
Old Nagardas Road, Andheri (E) ]  
Mumbai - 400 069 ] ...Petitioner

Versus

1. Deputy Commissioner of Income Tax, ]  
Central Circle - 1 (3) Mumbai ]  
Pratishtha Bhavan, Old CGO Building, ]  
M.K. Road, Mumbai - 400 069. ]

2. Asst. Commissioner of Income ]  
Tax 24(1) ]  
Room No. 604, Piramal Chambers, Parel ]  
Lalbaug, Mumbai 400012 ]

3. Union of India, through the ]  
Secretary, Ministry of Finance ]  
North Block, New Delhi - 1100 01 ] ...Respondents

...  
Ms. Rucha Vaidya a/w. Mr. Mihir Naniwadekar and Mr. Sameer  
Dalal for the petitioner.

Mr. Suresh Kumar for the respondents.

...  
**CORAM** : **DHIRAJ SINGH THAKUR AND**  
**KAMAL KHATA, JJ.**  
**RESERVED ON** : **3RD MARCH 2023.**  
**PRONOUNCED ON** : **4TH MAY 2023.**

## J U D G M E N T

[PER: KAMAL KHATA, J.]

1. This Petition under Article 226 of the Constitution of India challenges the notice under section (u/s) 148 of the Income-tax Act, 1961 ('Act') dated 9<sup>th</sup> March 2015 issued by Respondent No.1 for reopening of assessment for assessment year ('A.Y.') 2008-09 and the order dated 21<sup>st</sup> January 2016, rejecting the objections raised by Petitioner to the notice issued to re-assess the income.

2. Rule was issued on 16<sup>th</sup> April 2016. No reply filed till date.

### **FACTS:**

3. Petitioner a partnership firm filed its return of income for AY 2008-09 on 15<sup>th</sup> September 2008. It's case was selected for scrutiny and a Notice u/s 143(2) was issued on 19<sup>th</sup> August 2009. Thereafter, by a notice u/s 142(1) dated 12<sup>th</sup> July 2010 a questionnaire seeking details regarding loans and advances of secured and unsecured loans with names /address details, interest payment, loan confirmation details of unsecured loans, details of source and capacity of creditor, complete address of creditor with PAN and bank statements were sought. All queries

were answered with particulars and supporting documents. An assessment order u/s 143(3) was passed on 29<sup>th</sup> October 2010.

4. After four years, Respondent No.1 issued a notice dated 9<sup>th</sup> March 2015 under section u/s 148 of the Act, to reopen the assessment which was responded by letter dated 8<sup>th</sup> April 2015. After supplying i) the notice u/s 142(1) and ii) recorded reasons, matter was fixed for hearing on 21<sup>st</sup> August 2015. Petitioner filed its objections on 11<sup>th</sup> September 2015 and pointed out that: (a) all material facts were fully and truly disclosed in the original assessment, (b) original assessment was completed u/s 143(3), (c) no fresh or tangible material for re-opening beyond 4 years was found, (d) re-opening was based on mere change of opinion, (e) information, which was the basis for, 'reasons recorded' was not made available, (f) the case of M/s Rushabh Enterprises in Writ Petition No. 167/2015, part of the same group, with similar facts and reasons, be considered.

5. Respondent No.1 selectively reproduced and dealt with the objections whilst passing an order dated 21<sup>st</sup> January 2016, rejecting objections.

6. Petitioner has, therefore filed the present Petition, challenging impugned notice and impugned order issued by Respondent No.1.

7. Respondent No. 1 in its reply stated that the Petitioner has failed to 'fully and truly' disclose material facts in the original assessment and contended that the department had to only make out a 'prima facie case' on the basis of which the Department could reopen the case and the 'sufficiency and correctness' of the material was not a thing to be considered at this stage. In support, they relied on the following cases:

- i. M/s Bright Star Syntex Pvt. Ltd v ITO 9(2)(1) & Ors<sup>1</sup>*
- ii. Nickunj Eximp Enterprises Pvt. Ltd vs ACIT Range 1 (2)<sup>2</sup>*
- iii. Phool Chand Bajrang Lal v ITO<sup>3</sup>*
- iv. Ess Ess Kay Engg. Co. (P) Ltd v CIT<sup>4</sup>*
- v. Raymond Woollen Mills Ltd. v ITO<sup>5</sup>*

#### CONCLUSION:

8. We have heard both learned counsel and carefully perused the papers and proceedings.

9. We find that the jurisdictional conditions for invoking section 147 - 148 are not satisfied as there is no failure to disclose

1 Writ Petition No. 430 of 2016 (Bom) Judgment dated 14<sup>th</sup> March 2016.

2 Writ Petition No. 2860 of 2012 (Bom) Judgment dated 18<sup>th</sup> June 2014.

3 [1993] 69 Taxman 627

4 [2002] 124 Taxman 491 (Supreme Court)

5 [1999] 236 ITR 34 (Supreme Court)

material facts fully and truly. It is not in dispute that by the letter dated 11<sup>th</sup> September 2015 (Exhibit H) the Petitioner have submitted all the particulars along with supporting documents to the Respondent No.1. Hence the reasons to believe and a presumption based on the statement of Shri Bhanwarlal Jain (a third party) in the course of a search, that the loans of the entities were bogus or accommodation entries was clearly dispelled. Moreover, the specific provisions of S. 153C would prevail over the general provisions of section 147 in the case of search on 3<sup>rd</sup> party.

10. In our view, once the Petitioner provided the bank statements and details of parties as sought for, the AO must necessarily carefully examine the material and then give particulars and reason/s to believe otherwise, whilst rejecting the objections, more so, when there is an assessment order u/s 143(3). This process would be in tune with the principles of 'shifting of onus' under the evidence act. The Supreme Court in ***Lakhmani Mewal Das***<sup>6</sup> has held that:

*“The expression ‘reason to believe’ does not mean a purely subjective satisfaction on the part of the Income-tax officer. The reason must be held in good faith. It cannot be merely a pretence.*

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6 103 ITR 437

*It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section.”*

*“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.”*

11. We find that the ‘reasons recorded’, do not state the primary fact/s that had not been disclosed as laid down in the case of ***Gemini Leathers v ITO***<sup>7</sup>. It is further evident that the case of ***Rushabh Enterprises*** (same group as the Petitioner) in W.P No. 167 /2015 (decided on 15<sup>th</sup> April 2015) where the reopening was quashed on the basis that there is no tangible material for reopening was also not considered.

12. The criteria for reopening of assessment after a period of four years are no longer res integra in view of the judgement of this Court in the case of ***Ananta Landmark P. Ltd v Dy. CIT*** wherein this Court held that where assessment was not sought to be reopened on the reasonable belief that income had escaped

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7 [100 ITR 1]

assessment on account of failure of assessee to disclose truly and fully all material facts that were necessary for computation of income but was a case wherein assessment was sought to be reopened on account of change of opinion of AO the reopening was not justified. It is also held that where primary facts necessary for assessment are fully and truly disclosed the AO is not entitled to reopen the assessment on a change of opinion. It is held that while considering the material on record, one view is conclusively taken by AO, it would not be open for the AO to reopen the assessment based on the very same material and take another view.

13. In the present case, a perusal of the reasons recorded by Respondent No. 1, indicate that, the Respondent No. 1 has relied upon facts and figures on the record; and the queries were answered and particulars were provided vide letter dated 11<sup>th</sup> September 2015 is also not disputed. This Court in the case of Nickunj Eximp Enterprises (P) Ltd. (supra) has considered the above aspect whilst holding that:

*“...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 cases is just not possible, the proceedings for reassessment duly initiated will not be stalled.”*

In our view, the Petitioner has by production of bank statements and supporting documents shown that the reasonable belief of the AO was unfounded and consequently the presumption that the Petitioner was one of the beneficiary of the accommodation entries based on the statement of the third party was disproved. Consequently, the onus would be on the AO to provide reasons to disbelieve the bank statements and supporting documents for reopening the assessment. That in our view has not been spelled out and thereofre, the reassessment sought to be initiated deserves to be stalled.

14. There is no tangible material mentioned in the recorded reasons to conclude that income had escaped assessment, so also the nature of information is also not disclosed.

15. For the aforesaid reasons, the AO has acted in excess of the limit of his jurisdiction to reopen the assessment in the exercise of powers under section 147 read with section 148 of the Act. Accordingly the Petitioner would be entitled to succeed in this proceeding.



16. We, therefore pass the following order-

- i.* The impugned notice u/s 148 of the Act dated 9<sup>th</sup> March 2015, and the order dated 21<sup>st</sup> January 2016, by Respondent No. 1 for AY 2008-09 are quashed and set aside;
- ii.* Rule made absolute in above terms. No costs.

(KAMAL KHATA, J.)

(DHIRAJ SINGH THAKUR, J.)