IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5087 OF 2022

Jayant Avinash Dave
Age: 66 Years,
Sindoor, Plot No.15,
Serial No.81, Giriraj Society,
Aundh, Pune 411007 ...**Petitioner**

Versus

1. **The Assistant Commissioner of Income Tax, Circle 5, Pune**
Income Tax office, PMT building,
Shankar sheth road, Pune – 411037

2. **The Principal Commissioner of Income Tax-3, Pune**
Income Tax, Circle 5, Pune
Income Tax office, PMT building,
Shankar sheth road, Pune – 411037

3. **The Additional/Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer**
National Faceless Assessment Centre,
Through the Principal Chief
Commissioner of Income Tax
(National Faceless Assessment Centre)
Delhi
Room No.401, 2nd floor,
E-Ramp, Jawaharlal Nehru Stadium,
New Delhi – 110003 ...**Respondents**

Mr. Mihir Naniwadekar a/w Ms. Rucha Vaidya i/b. Mr. Ruturaj H. Gurjar for the Petitioner.
Mr. Suresh Kumar for the Respondents.

CORAM : M. S. Sonak &
Jitendra Jain, JJ.

RESERVED ON : 13 January 2025

PRONOUNCED ON : 15 January 2025

JUDGMENT (Per Jitendra Jain J)**:-**

1. Rule. The Rule is made returnable immediately at the request of and with the consent of the learned counsel for the parties.

2. By this petition, under Article 226 of the Constitution of India, the petitioner seeks to challenge notice under Section 148 of the Income Tax Act 1961 (the said Act) for the Assessment Year 2015-16, order rejecting the objection dated 27 March 2022, an Assessment order and demand notice both dated 30 March 2022.

Brief facts:

3. The petitioner is an individual regularly assessed to income tax and deriving income from salary, house property, business, capital gain and other sources.

4. On 30 September 2015, petitioner filed his return of income for Assessment year 2015-16 under section 139 of the Act declaring total income of Rs.69.68 crore which consisted of long-term and short-term capital gains.

5. On 19 September 2016, petitioner's case was selected for limited scrutiny by issuing notice under section 143(2) for examining long-term capital gain. The petitioner responded to the notice and filed return of income, audit report, financial statements, etc. including working of long term capital gain and short term capital loss. On 13 December 2017, the assessing officer converted the limited scrutiny to complete scrutiny after taking prior approval from Principal Commissioner Of

Income Tax, Pune to more particularly examine the transaction of sale and purchase of shares resulting into capital gain.

6. On 29 December 2017, an assessment order under section 143(3) of the Act came to be passed assessing income about Rs.72.84 crore. In the assessment order, addition/ disallowance was made on account of deemed rent, disallowance of commission, profit from sale of shares, withdrawal of long term capital gain, etc.

7. The petitioner challenged the assessment order by filing an appeal before the Commissioner of Income Tax (Appeals), who vide order dated 19 November 2018 gave partial relief. The order of the Commissioner (Appeal) was challenged by the petitioner and the respondents before the Income Tax Appellate Tribunal.

8. While the appeal before the Appellate Tribunal was pending, the respondents issued a notice dated 23 March 2021 under section 148 of the Act proposing to reassess the income for the Assessment Year 2015-16. The petitioner filed his return of income in response to the said notice on 1 April 2021 and also requested for reasons recorded for the issue of the notice.

9. The Assessing Officer without furnishing reasons recorded for reopening the case, issued notice under Section 142(1) dated 26 November 2021 seeking various details. The petitioner in response to the said notice under section 142(1) once again reiterated his request to provide the reasons for issuing notice under Section 148 of the Act. In

spite of the second request, the Assessing Officer issued notice under Section 143(2) dated 4 March 2022 for proceeding with assessment proceedings. For the third time, the petitioner in response to the notice under section 143(2) requested for reasons for issue of notice under Section 148 of the Act.

10. On 11 March 2022 i.e. after almost close to one year from the date of issue of notice under Section 148, and after repeated reminders and at the fag end of the assessment getting time barred, the Assessing Officer provided reasons for reopening, which reads as under:

> ***Reason:***
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> ***1. Brief of the assessee:-***
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> *The assessee JAYANT AVINASH DAVE is an Individual having PAN – AAQPD6875J falls within the jurisdiction of Circle - 5, Pune. On verification of this office records it is noticed that the assessee has filed its return of income for the Assessment Year 2015-16, with total income of Rs. 69,68,33,360/-. The assessment u/s 143(3) of the I.T. Act was completed on 29.12.2017 by assessing income at Rs. 72,84,98,920/-.*
>
> *Brief details of information collected / received by the AO:-*
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> ***While going through the case records*** *it is seen that assessee has claimed set off of Short Term Capital Loss of Rs. 13,58,86,715/- against the Long Term Capital Gain which was taxable @ 20%. This case was converted into Complete Scrutiny as per the approval taken by A.O. from PCIT. In the order u/s 143(3), A.O. treated Long Term Capital Gain as business income but allowed Short Term Capital loss of Rs. 13,18,27,767/- to be set off. On going through the records, it is seen that the assessee has carried out Purchase and Sale of large quantity of shares of HCL Technology, Persistent Systems and Tech Mahindra in the month of March 2015. In all these Shares, companies had declared 1:1 Bonus and Shares were purchased about 8-10 days before the record date and sold within one week from the record date.*
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> *The details of these transactions are tabulated in table no. 1:-*

Table No. 1

Sr. No.	Name of the Company	No. of Shares	Record date for bonus shares has been taken from money control.com Date of Bonus & Ratio of Bonus shares allowed	Date of Acquisition (in Rs.)	Cost of Acquisition	Date of transfer	Net Sale consideration (in Rs.)	Capital Gain/Loss (in Rs.)
			20/03/2015					
1.	Tech Mahindra	13,432	1:1	09.03.2015	19356430	25.03.2015	8836528	-10519902
			20/03/2015					
2.	Tech Mahindra	16,942	1:1	11.03.2015	24466130	25.03.2015	11145656	-13320474
			20/03/2015					
3.	Tech Mahindra	25,000	1:1	11.03.2015	36102777	26.03.2015	16467505	-19635272
			20/03/2015					
4.	HCL Technologies	43,755	1:1	09.03.2015	89199991	24.03.2015	42772914	-46427077
			20/03/2015					
5.	HCL Technologies	14,890	1:1	11.03.2015	30691839	24.03.2015	14555792	-16136047
			11/03/2015					
6.	Persistent System	26,700	1:1	09.03.2015	50133327	18.03.2015	20580036	-29553291
	Total				**249950494**		**114358431**	**-135592063**

From the above, it is clear that assessee has created a Short Term Capital Loss within a span of two weeks with a view to reduce its tax liability by setting off against Long Term Capital Gain which was taxable @ 20% and bonus shares held for one year and could be sold there after by showing Long Term Capital Gain without paying any taxes. These facts clearly shows that the large scale purchase and sale of shares during March 2015 have been carried out only with a view to create Short Term Capital Loss during F.Y.2015-16 to avoid payment of taxes on the entire Long Term

Capital Gain. Supreme Court case of "McDowell And Co. Vs CTO 154 ITR148 (SC)" is clearly applicable to the facts of this case. The Apex Court has held that colorable devices cannot be permitted to be part of tax planning and it is wrong to encourage or entertain the belief that payment of tax can be avoided by resorting to dubious methods.

In view of the above, Short Term Capital Loss of Rs. 13,18,27,767/- should have been disallowed. Thus resulted in under assessment of income by Rs. 13,18,27,767/-.

3. Analysis of information collected/received:-

On going through the case records *it is clear that the assessee has created a Short Term Capital Loss within a span of two weeks with a view to reduce its tax liability by setting off against Long Term Capital Gain which was taxable @ 20% and bonus shares held for one year and could be sold there after by showing Long Term Capital Gain without paying any taxes. These facts clearly shows that the large scale purchase and sale of shares during March 2015 have been carried out only with a view to create Short Term Capital Loss during F.Y.2015-16 to avoid payment of taxes on the entire Long Term Capital Gain. Supreme Court case of "McDowell And Co. Vs CTO 154 ITR148 (SC)" is clearly applicable to the facts of this case. The Apex Court has held that colorable devices cannot be permitted to be part of tax planning and it is wrong to encourage or entertain the belief that payment of tax can be avoided by resorting to dubious methods.*

In view of the above, Short Term Capital Loss of Rs. 13,18,27,767/- should have been disallowed. Thus resulted in under assessment of income by Rs. 13,18,27,767/-.

4. Enquiries made by the AO as sequel to information collected/received:-

This office has perused the details available on record *and found that the assessee has created a Short Term Capital Loss within a span of two weeks with a view to reduce its tax liability by setting off against Long Term Capital Gain which was taxable @ 20% and bonus shares held for one year and could be sold there after by showing Long Term Capital Gain without paying any taxes. These facts clearly shows that the large scale purchase and sale of shares during March 2015 have been carried out only with a view to create Short Term Capital Loss during F.Y.2015-16 to avoid payment of taxes on the entire Long Term Capital Gain. Supreme Court case of "McDowell And Co. Vs CTO 154 ITR148 (SC)" is clearly applicable to the facts of this case. The Apex Court has*

held that colorable devices cannot be permitted to be part of tax planning and it is wrong to encourage or entertain the belief that payment of tax can be avoided by resorting to dubious methods.
Thus, Short Term Capital Loss of Rs. 13,18,27,767/- to be disallowed and added back to the total income. Thus resulted in under assessment of income by Rs. 13,18,27,767/-.

5. Findings of the AO:-

The office of the undersigned ***perused the details available on record*** *and found that the assessee has created a Short Term Capital Loss within a span of two weeks with a view to reduce its tax liability by setting off against Long Term Capital Gain which was taxable @ 20% and bonus shares held for one year and could be sold there after by showing Long Term Capital Gain without paying any taxes. These facts clearly shows that the large scale purchase and sale of shares during March 2015 have been carried out only with a view to create Short Term Capital Loss during F.Y.2015-16 to avoid payment of taxes on the entire Long Term Capital Gain. Supreme Court case of "McDowell And Co. Vs CTO 154 ITR148 (SC) is clearly applicable to the facts of this case. The Apex Court has held that colorable devices cannot be permitted to be part of tax planning and it is wrong to encourage or entertain the belief that payment of tax can be avoided by resorting to dubious methods.*
Thus, Short Term Capital Loss of Rs. 13,18,27,767/- to be disallowed and added back to the total income. Thus resulted in under assessment of income by Rs. 13,18,27,767/-.

6. Basis of forming reason to believe and details of escapement of income:-

In view of the above para No. 2, 3, 4 and 5 and information ***available on the record of this office,*** *I have reason to believe that the income chargeable to tax to the extent of Rs. 13,18,27,767/- is escaped income for A. Y. 2015-16. I am, therefore, satisfied that it is a fit case for initiating the proceedings u/s 147 or the Income Tax Act, 1961 to assess above discussed income and to assess any other income which may come to the notice during the assessment proceedings u/s 147 of the Income Tax Act, 1961.*

7. Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India:- *N.A.*

8. Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to section 147:

As discussed in para 2 to 6, it is proved that the failure was on

the part of the assessee in disclosing fully and truly all material facts before the AO which was necessary for the relevant assessment.

Therefore, the income of the assessee chargeable to tax to the extent at Rs.13,18,27,767/- has been escaped assessment as per information gathered for the A.Y. 2015-16.

9. Applicability of the provisions of section 147 / 151 to the facts of the case:-

In this case, a return of income was filed for the year under consideration and regular assessment u/s 143(3) was made on 29.12.2017 by assessing income at Rs. 72,84,98,920/-. Since 4 years from the end of the relevant year have expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration i.e. A. Y 2015-16.

It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer paragraphs 2 to 6). I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the above mentioned material facts, necessary for its assessment for the year under consideration.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for its assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P & L A/c and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P & L A/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of section 147

> *of the Act.*
> ***It is important to highlight here that material facts relevant for the assessment on the issues under consideration were not filed and disclosed during the course of assessment proceeding and the same may be embedded in annual report, audited P&L A/c, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For aforesaid reasons, it is not a case of change of opinion by the AO.***
>
> ***(emphasis supplied)***

11. On 22 March 2022, the Assessing Officer issued draft assessment order proposing to assess income at Rs.86.03 crore by disallowing short-term capital loss of Rs.13.18 crore.

12. On 24 March 2022, the petitioner filed his objection to reopening and requested to drop the re-assessment proceedings on the ground more particularly set out therein.

13. On 25 March 2022 petitioner also filed his reply to the draft assessment order and requested the Assessing Officer not to proceed with the assessment till the objections to reopening the case are decided.

14. On 27 March 2022, the Assessing Officer passed a brief one page order rejecting the objections filed by the petitioner and immediately thereafter within three days on 30 March 2022 passed the impugned order assessing income at Rs.86.03 Crores.

15. Mr. Naniwadekar, learned counsel for the petitioner submits that the reasons recorded do not disclose what were material facts which the petitioner failed to disclose so as to satisfy the conditions provided

under first proviso to Section 147 of the Act. Mr. Naniwadekar further submitted that the Assessing Officer furnished the reasons recorded at the fag end of the assessment getting time barred and thereafter, within 3 days passed the impugned assessment order which is contrary to various decisions of this Court. Mr. Naniwadekar further submitted that all the facts were disclosed in the assessment proceedings, and same has been admitted in the reasons recorded for reopening the case and therefore, the conditions prescribed in the first proviso to section 147 are not satisfied for reopening the case.

16. Mr. Naniwadekar further submits that Explanation I to Section 147 relied upon by the respondents is not applicable to the facts of the present case and therefore, the impugned proceedings are without jurisdiction.

17. Mr. Naniwadekar in support of his various submissions relied upon the following decisions:

(i) *Hindustan Lever Ltd. Vs. R.B.Wadkar, Assistant Commissioner of Income Tax and Ors.* [1]

(ii) *Bombay Stock Exchange Ltd. Vs Deputy Director of Income Tax*[2]

(iii) *Aroni Commercials Ltd. Vs Deputy Commissioner of Income Tax 2(1)*[3]

(iv) *Ananta Landmark (P.) Ltd. Vs Deputy Commissioner of Income-tax, Central Circle 5(3), Mumbai*[4]

1 (2004) 268 ITR 332 (Bom).
2 (2014) 52 taxmann.com 29 (bombay)
3 (2014) 44 taxmann.com 304 (bombay)
4 (2021) 131 taxmann.com 52 (bombay)

(v) ***Imperial Consultants and Securities Ltd. Vs Deputy Commissioner of Income Tax***[5]

18. Mr. Suresh Kumar, learned Counsel for the respondents vehemently opposed the submissions made by the petitioner and placed heavy reliance on Explanation-I to Section 147 of the Act to justify the reopening. The learned Counsel for the respondents did not make any other submissions except what is recorded herein.

19. We have heard Mr. Naniwadekar, learned counsel for the petitioner and Mr. Suresh Kumar for the respondents and with their assistance have perused the documents which were brought to the notice.

20. There is no dispute that in this case an order under Section 143(3) of the Act was passed on 29 December 2017 and the impugned notice under Section 148 of the Act has been issued on 23 March 2021 which is beyond a period of four years from the end of the assessment year 2015–2016. Therefore, proviso to Section 147 of the Act as it exists is applicable and which reads as under :-

> *147. Income escaping assessment. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment" for any assessment year, he may", subject to the provisions of sections 148 to 153, assess or reassess" such" income "and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings" under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):*

5 (2024) 169 taxmann.com 587 (bombay)

> *"**Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section 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 by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"*
>
> *Explanation 1. Production before the Assessing Officer of account books or other vidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.*

21. As per the first proviso to section 147 of the Act an assessment made under Section 143(3) of the Act can be reopened after the expiry of four years only if there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

22. In the instant case before us, on a perusal of the reasons recorded, there is no allegation as to what are the material facts which the petitioner failed to disclose at the time of his assessment. Mere reproducing the wordings of the proviso does not satisfy the jurisdictional condition which the Assessing Officer is required to satisfy prior to reopening the case. Having said so, the reasons themselves record that the same is based on the case records of the petitioner. This statement is appearing in paragraphs 1 to 6 of the reasons recorded. Therefore, if based on these case records which case records are filed by the petitioner- assessee during the course of the assessment proceedings and are forming part of the assessment records, if a reopening is sought to be done after a period of four years then that would be wholly

without jurisdiction in the absence of satisfaction of the condition prescribed in first proviso to Section 147 of the Act. The reasons recorded clearly proves that condition as per first proviso are not satisfied.

23. In the reasons recorded there is no mention as to what are the material facts which the petitioner-assessee ought to have disclosed and which came to the notice of the Assessing Officer post the assessment order from any source outside the assessment records. The Co-ordinate Bench of this Court in the case of ***Hindustan Lever Ltd. (supra)*** have observed that the reasons should disclose as to which fact or material was not disclosed by the assessee fully which was necessary for assessment so as to establish the vital link between the reasons and evidence. Mere mentioning that there was a failure to disclose fully and truly material facts does not confer jurisdiction on the Assessing Officer to reopen the case after the expiry of four years. In our view, considering the facts of the present case, the ratio laid down by the Co-ordinate bench in the case of ***Hindustan Lever Ltd. (supra)*** squarely applies and, therefore, the impugned proceedings are wholly without jurisdiction.

24. It is also important to note that the original assessment of the petitioner was selected for limited scrutiny which was converted into complete scrutiny to examine the transactions of capital gains. The petitioner in the course of the assessment proceedings gave the details

of long term capital gain and short term capital loss including the date of acquisition and date of transfer. The petitioner also gave details of loss on transfer of mutual funds. It is only after examining all the details relating to capital gain and capital loss that an assessment order came to be passed under Section 143 of the Act. In our view, based on these very details, the present proceedings have been initiated which is impermissible since it does not satisfy the pre-condition prescribed under the first proviso to Section 147 of the Act, it would amount to review of the assessment order which is not permissible.

25. Reliance placed by the Respondents on Explanation 1 is misconceived in the light of decision of the Co-ordinate Bench in the case of ***Imperial Consultants and Securities Ltd. (supra)***, wherein Co-ordinate Bench had an occasion to examine this very argument made and the Co-ordinate Bench observed as under:-

> *"45. Now coming to Mr. Suresh Kumar's contentions, we do not find ourselves in agreement with Mr. Suresh Kumar relying on "Explanation 1" below Section 147. We fail to understand as to how Explanation 1 would in any manner dilute and/or dispense with the rigors of the specific compliance of the first proviso, when the assessment is being reopened after a period of four years. Explanation 1 merely explains that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the preceding proviso. We may observe that this is certainly not a case where on the materials which are already produced before the Assessing Officer, the Assessing Officer has gathered or discovered further material evidence so as to construe that there was failure on the part of the assessee to make a disclosure of such materials. Moreover, there is no further tangible material which has been gathered on due diligence from the existing material and hence it is quite futile for the respondents to take recourse to this provision."*

26. Reliance placed by the respondent-revenue on Explanation 1 of Section 147 is not applicable to the facts of the present case. In the instant case, the Assessing Officer in the course of the regular assessment proceedings examined the issue of capital gain and the petitioner-assessee filed all the details relating to long term capital gain/loss and short term capital gain/capital loss. It was after considering these details, the assessing officer in order under Section 143(3) of the Act made additional/disallowance on account of capital gain. This is evident from the submissions filed before the assessing officer and the decision in the assessment order. Therefore, on these facts placing reliance on Explanation 1 of Section 147 by the respondent-Revenue is wholly mis-conceived.

27. It is also important to note that the petitioner had raised various objections to the reasons furnished for re-opening the case. In the order rejecting the objection none has been rebutted. In our view, even on these grounds the present proceeding is required to be quashed in the absence of any rebuttal in the order rejecting the rejection.

28. We also note that request for reasons recorded to be furnished was made by the petitioner on 1 April 2021, and thereafter reiterated subsequently vide letters dated 26 November 2021 and 11 March 2022 and in spite of repeated reminders, the Assessing Officer furnished the reasons recorded at the fag end of the assessment getting time barred which is 11 March 2022 i.e., after almost when a period of one year was

to get over. There is no reason mentioned as to why the Assessing Officer did not furnish the reasons to the petitioner immediately on the petitioner filing his return of income and making requests for the same on 1 April 2021 moreso, when the reasons have to be recorded before issuing the notice under Section 148 which was dated 23 March 2021. The object of furnishing the reasons is to give adequate opportunity to the assessee to file his objections and thereafter give sufficient time to the Assessing Officer to decide the objections before proceeding with the assessment proceedings. In this case, the decision making process adopted by the Assessing Officer is found to be unfair and unreasonable since the reasons recorded were furnished after repeated request only at the fag end of the assessment proceedings getting time barred. The petitioner objected to the reasons vide letter dated 24 March 2022 and the Assessing Officer without deciding the objections proposed a draft assessment order even before the same. On 27 March 2022, the order rejecting the objection was passed and thereafter immediately within three days an assessment order on 30 March 2022 was passed. In our view, the action of the Assessing Officer to furnish the reasons recorded at the fag end and thereafter to complete the assessment proceedings in haste without following the due process of law and decisions of this Court on time frame for furnishing the reasons deciding the objections and passing the assessment order is unconstitutional and therefore even on this count, the impugned proceedings and the decision making

process is bad in law.

29. In view of above, the Rule is made absolute in terms of prayer clause (b) which reads as under :-

> *"(b) Issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction, quashing the Impugned Reopening Notice dated 23 March 2021 (Exhibit A), Impugned Order on objections dated 27 March 2022 (Exhibit B), Impugned Assessment Order dated 30 March 2022 (Exhibit C) and Impugned Demand Notice dated 30 March 2022 (Exhibit D);*

(Jitendra Jain, J.) (M. S. Sonak, J.)