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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.177 of 2016

Order reserved on: 27-4-2017

Order delivered on: 19-6-2017

Smt. Kamala Ojha, aged about 71 years, wife of Shri Pankaj Ojha, R/o Qr.No.MIG-II-06, MP Nagar, Korba (C.G.)

---- Petitioner

Versus

1. Income Tax Officer-1, Korba, Mahanadi Complex, Niharika Road, Korba (C.G.)
2. Income Tax Officer Ward-3, Korba, Mahanadi Complex, Niharika Road, Korba (C.G.)
3. Deputy Commissioner of Income Tax, Korba, Mahanadi Complex, Niharika Road, Korba (C.G.)
4. Assistant Valuation Officer-II, Income Tax Department, 2nd Floor, Piramal Chamber, Parel, Mumbai-12 (Maharashtra)
5. Union of India, through its Secretary, Ministry of Finance, Department of Revenue, North Block, New Delhi.

---- Respondents

For Petitioner: Mr. Siddharth Dubey, Advocate.
For Respondents: Mrs. Naushina Ali, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner herein calls in question the reassessment proceedings initiated under Section 148 of the Income Tax Act, 1961, dated 21-9-2015 and the order dated 13-12-2016 disposing of the preliminary objections in response to the

initiation of reassessment proceedings and thereby the final assessment order dated 20-12-2016.

2. Essential facts requisite to adjudicate the above-stated challenges are as under: -

2.1) The petitioner is an assessee for the purpose of the Income Tax Act, 1961 (for short, 'the Act, 1961'). She filed return for the assessment period 2011-12, financial year 2010-11, on 31-3-2013 along with necessary documents in which she was served with notice under Section 148 of the Act, 1961 on 12-9-2013 stating that the Assessment Officer has reasons to believe that income has escaped assessment and she was directed to file return within 30 days of the notice period. Thereafter, fresh notices were issued under Sections 142 (1) and 143 (2) of the Act, 1961 calling for revised return and documents in support thereof respectively, as scrutiny assessment was to be conducted under Section 143 (3) read with Section 147 of the Act, 1961. Thereafter, assessment order was passed under Section 147 read with Section 143 (3) of the Act, 1961, on 31-3-2015 accepting the earlier return filed on 31-3-2013, but in the meanwhile, a reference was made to the Departmental Valuation Officer (Assistant Valuation Officer-II), Mumbai in terms of Section 55-A of the Act, 1961 in which a preliminary valuation report was furnished on 2-3-2015, but the final report was furnished only after the completion of assessment proceedings. Thereafter, the petitioner was served with second notice under Section 148 of the

Act, 1961 directing her to file return within 30 days of the notice period to which a request was made by the petitioner that reasons recorded under Section 148 (2) of the Act, 1961 for reopening of the assessment / initiating reassessment proceedings, be communicated to her. The reasons recorded under Section 148 (2) of the Act, 1961 were furnished to the petitioner by memo dated 15-11-2016 to which the petitioner filed her preliminary objections. The preliminary objections were decided on 13-12-2016 and the petitioner filed this writ petition on 16-12-2016, but in the meanwhile, on 20-12-2016, final assessment order was passed. During the pendency of this writ petition, final assessment was also challenged by amending the writ petition. In the aforesaid background, the writ petition has been filed.

2.2) The respondents have filed their joint return. A preliminary objection has been raised on behalf of the respondents that the petitioner has have an efficacious alternative remedy under Section 246A of the Act, 1961 and she has to prefer an appeal against the order of reassessment before the Commissioner of Income Tax (Appeals). The Assessing Officer has exercised the power conferred by virtue of the provisions of the Income Tax Act, 1961 and has duly followed the prescribed procedure for initiation of reassessment proceedings in the case of the petitioner and, therefore, the action of the Assessing Officer cannot be held to be without jurisdiction and without authority of law. It has also been submitted that reasons have duly been assigned and objections have been disposed of by a speaking order, as such, there is

sufficient material for invoking Section 147/148 of the Act, 1961 for reopening the assessment. Therefore, the writ petition against the show cause notice seeking to reopen for reassessment is not maintainable in law. Thus, the writ petition deserves to be dismissed on merit as well as on the ground of alternative remedy.

2.3) Rejoinder has been filed on behalf of the petitioner contravening the allegation made in the return.

3. Mr. Siddharth Dubey, learned counsel appearing for the writ petitioner in support of the writ petition, would submit as under: -

3.1) Firstly, while replying to the preliminary objection with regard to efficacious alternative remedy, learned counsel would submit that petition challenging show cause notice under Section 148 of the Act, 1961 at the very threshold is maintainable in view of the judgments of the Supreme Court in the matter of **Calcutta Discount Co. Ltd. v. Income-Tax Officer, Companies District I, Calcutta**[1]. The order challenging final reassessment can also be challenged in writ proceeding, as the Revenue has proceeded hastily without waiting for the outcome of the instant writ petition.

3.2) The condition precedent for invoking Section 147 of the Act, 1961, did not exist for exercise of jurisdiction and reopening of the assessment relying upon the Assistant Valuation Officer's report without application of mind, is per se illegal and without authority of law. Reliance has been placed upon the judgment of the

1 AIR 1961 SC 372

Supreme Court in the matter of **Assistant Commissioner of Income Tax, Gujarat v. Dhariya Construction Company**[2] to buttress his submission.

3.3) The order disposing of the objections is not a speaking order and same does not dispose of the objections as it does not furnish any reasons why the objections are not tenable in law and simply reiterates the reasons recorded vide Annexure P-7. Reliance has been placed upon the judgment of the Supreme Court in the matter of **GKN Driveshafts (India) Ltd. v. Income Tax Officer and others**[3] to buttress his submission.

3.4) Only on the basis of the report of the Assistant Valuation Officer, proceeding cannot be reopened, it amounts to change of opinion and once the assessment proceeding has completed and report of the valuation officer is received later, it would be a case where the jurisdiction has to be invoked under Section 263 of the Act, 1961 by the Revenue. Therefore, reopening of reassessment proceeding is absolutely illegal and bad in law.

4. On the other hand, Mrs. Naushina Ali, learned counsel appearing for the respondents, would submit as under: -

4.1) The condition precedent for exercise of jurisdiction under Section 147/148 of the Act, 1961 was clearly available to the Revenue at the time when Section 147 jurisdiction was exercised by the learned Assessing Officer and the objections of the petitioner have been effectively disposed of by the order passed

2 (2010) 15 SCC 251
3 (2003) 1 SCC 72

by the Assessing Officer acting on the basis of the report of the Departmental Valuation Officer, it is not the case of change of opinion and as such, opening of reassessment proceedings and the order passed thereupon are strictly in accordance with law. She placed reliance on the decisions of the Supreme Court in the matters of **Kalyanji Mavji & Co. v. Commissioner of Income Tax**[4], **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Private Limited**[5] and **Commissioner of Income Tax and others v. Chhabil Dass Agarwal**[6].

4.2) This instant writ petition challenging the show cause notice as well as the final reassessment order is not maintainable in law, as the petitioner has effective alternative remedy of filing appeal against that order before appellate authority.

5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also perused the record critically and carefully.

6. The first issue for consideration would be whether the writ petition challenging the show cause notice issued under Section 147 read with Section 148 of the Act, 1961 is maintainable in law.

7. It was vehemently submitted on behalf of the respondents relying upon the decision of the Supreme Court in **Chhabil Dass Agarwal's** case (supra) that such a writ petition would not be maintainable, whereas the petitioner has relied upon the decision

4 (1976) 102 ITR 287 (SC)
5 (2008) 14 SCC 208
6 (2014) 1 SCC 603

of the Supreme Court in **Calcutta Discount** (supra).

8. In **Calcutta Discount** (supra), Their Lordships of the Supreme Court have clearly and unmistakably held that the High Court in appropriate cases has power to issue an order prohibiting the Income Tax Officer from proceeding to reassess the income when the conditions precedent do not exist. K.C. Das Gupta, J, speaking for the Supreme Court and delivering the majority judgment held as under: -

> "It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences
>
> The High Court may, therefore, issue a high prerogative writ prohibiting the Income-tax Officer from proceeding with reassessment when it appears that the Income-tax Officer had no jurisdiction to commence proceeding".

9. The principle of law laid down in **Calcutta Discount** (supra) has been followed with approval by the Supreme Court thereafter in the matter of **The Commissioner of Income-tax, Gujarat v. M/s. A. Raman and Co.**[7] in which Their Lordships have held that the High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income Tax Act, 1961, if the conditions precedent to the exercise of jurisdiction under Section 147 of the Act do not

7 AIR 1968 SC 49

exist, and observed as under: -

> "6. The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income Tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income Tax Officer had in his possession any information: the Court may also determine whether from that information the Income Tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income Tax Officer and not by the High Court. The Income Tax Officer alone is entrusted with the power to administer the Act: if he has information from which it may be said, prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence."

10. The above-stated enunciation of law laid down in **Calcutta Discount** (supra) reiterated in **M/s. A. Raman and Co.'s** case (supra) by Their Lordships of the Supreme Court has further been followed very recently by the Supreme Court in the matter of **Jeans Knit Private Ltd. Bangalore v. Deputy Commissioner of Income Tax Bangalore**[8] and it has been clearly held that writ petition filed by the assessee challenging the issuance of notice under Section 148 of the Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment is maintainable, after noticing the earlier decision of the Supreme Court in **Chhabil Dass Agarwal's** case (supra) and observed as under: -

8 2016 SCC OnLine SC 1536

> "2. We find that the High Courts in all these cases have dismissed the writ petitions preferred by the appellant/assessee herein challenging the issuance of notice under Section 148 of the Income Tax Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment. These writ petitions are dismissed by the High Courts as not maintainable. The aforesaid view taken is contrary to the law laid down by this Court in Calcutta Discount Limited Company v. Income Tax Officer, Companies District I, Calcutta [(1961) 41 ITR 191 (SC)]. We, thus, set aside the impugned judgments and remit the cases to the respective High Courts to decide the writ petitions on merits.
>
> 3. We may make it clear that this Court has not made any observations on the merits of the cases, i.e. the contentions which are raised by the appellant challenging the move of the Income Tax Authorities to re-open the assessment. Each case shall be examined on its own merits keeping in view the scope of judicial review while entertaining such matters, as laid down by this Court in various judgments.
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> 4. We are conscious of the fact that the High Court has referred to the judgment of this Court in Commissioner of Income Tax v. Chhabil Dass Agarwal, [(2013) ITR 357 (SC)]. We find that the principle laid down in the said case does not apply to these cases."

11. Thus, in light of the principle of law laid down in **Calcutta Discount** (supra) followed in **M/s. A. Raman and Co.'s** case (supra) and **Jeans Knit Private Ltd.** (supra) and considering the facts leading to challenge to the show cause notice, I do not have any slightest doubt in my mind to hold that the writ petition is maintainable to challenge the notice for reassessment issued under Section 147 read with Section 148 of the Act, 1961 and accordingly, I overrule the first preliminary objection raised on behalf of the Revenue in that regard.

12. This would lead me to the next preliminary objection raised on

behalf of the Revenue that once the final order of reassessment has been passed on 20-12-2016, the petitioner ought to have preferred appeal under Section 246A of the Act, 1961 before the appellate authority and writ petition challenging the final order of reassessment is not maintainable in law.

13. In order to decide this objection, some few facts deserve to be noticed. In the present case, after issuing notice for reassessment under Section 147 of the Act, 1961, reasons recorded were furnished to the petitioner on 15-11-2016 and the preliminary objections raised by her were decided on 13-12-2016 and immediately, the petitioner filed writ petition before this Court challenging the notice issued for reassessment as well as the order rejecting the preliminary objection, on 16-12-2016, but before the writ petition would come up for hearing before this Court on 21-12-2016, the order of reassessment was passed on 20-12-2016 by the Assessing Officer.

14. The Bombay High Court in the matter of **Asian Paints Ltd. v. Deputy Commissioner of Income Tax and Anr.**[9] has clearly held that where the assessment is sought to be reopened under Section 148 of the Act, 1961 and the objections of the assessee have been over ruled by the Assessing Officer, then in such a case the Assessing Officer will not proceed further in the matter for a period of four weeks from the date of receipt of the order rejecting the objections of the assessee to enable him to question that order, if any, in accordance with law. This principle of law

9 (2008) 296 ITR 90 (Bom)

has further been followed by a Division Bench of the Bombay High Court in the matter of **Aroni Commercials Limited v. The Dy. Commissioner of Income Tax-2(1) and another**[10].

15. If the facts of the present case are examined in light of the principle of law laid down in **Asian Paints Ltd.** (supra) and **Aroni Commercials Limited** (supra), it would appear that in the present case, preliminary objections filed by the assessee were rejected on 13-12-2016 and the petitioner immediately filed writ petition challenging the notice issued under Section 147 read with Section 148 of the Act, 1961, on 16-12-2016, but on 20-12-2016, the Assessing Officer passed order of reassessment without granting reasonable time and opportunity to the petitioner to lay challenge to that order. Thus, the Assessing Officer has passed order in haste and it does not appear to be bona fide. The Assessing Officer ought to have, in all fairness, granted sufficient/reasonable time to the assessee to question in view of the principle of law laid down in **Asian Paints Ltd.** (supra) and **Aroni Commercials Limited** (supra) in which Their Lordships have clearly held that undue haste in passing the order of reassessment without giving sufficient time to the assessee to challenge the order rejecting preliminary objections is an attempt to overreach the Court and to thwart the petitioner's challenge to the order rejecting preliminary objections. I respectfully agree with the view rendered by the Bombay High Court in this regard and hold that the Revenue has shown undue haste in passing the order of reassessment without

10 2014 SCC OnLine Bom 221

even waiting for few days in order to enable the petitioner to challenge the order rejecting preliminary objections filed by her. Therefore, the writ petition cannot be thrown on the ground that the petitioner has alternative statutory remedy of filing appeal before the appellate authority under Section 246A of the Act, 1961.

16. This would bring me to consider the merits of the matter. Notice for reassessment has been issued to the petitioner under Section 147 read with Section 148 of the Act, 1961.

17. In order to judge the plea raised at the Bar, it would be appropriate to notice Section 147 of the Act, 1961 which provides for income escaping assessment as well as Section 148 which provides for issue of notice where income has escaped assessment. Sections 147 and 148 of the Act, 1961 (relevant portion) provide as follows: -

> "147. 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):
>
> 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:

148. (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

18. The expression 'reason to believe' employed in Section 147 of the Act, 1961 has been considered and explained by Their Lordships of the Supreme Court in various judgments. It has been held that the words 'reason to believe' mean that a reasonable man, under the circumstances, would form a belief which will impel him to take action under the law. The formation of opinion has to be in good faith and not a pretense. (See **Ajit Jain v. Union of India and others**[11].)

19. Thus, "reason to believe" is a common feature in taxing statutes. It has been considered to be the most salutary safeguard on the exercise of power by the officer concerned. The reasons are objective but belief thereon is subjective.

11 242 ITR 302 (2003) (SC)

20. Section 147 of the Act, 1961 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to believe to reason that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for public exchequer with in-built idea of fairness to tax-payers. The Supreme Court in the matter of **Central Provinces Manganese Ore Co. Ltd. v. Assessing Officer**[12] while considering the provisions contained in Section 147(a) of the Act, 1961 (as the provision stood at the relevant time) held that for initiation of action under Section 147(a) fulfillment of the two requisite conditions in that regard is essential. It was further held that at the initial stage, what is required is “reason to believe”, but at the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction. (Also see

12 (1991) 191 ITR 662 (SC)

Assessing Officer v. Selected Dalurband Coal Co. (P) Ltd.[13] and **Raymond Woollen Mills Ltd. v. Assessing Officer and others**[14].)

21. In the matter of **Commissioner of Income-Tax v. Kelvinator of India Ltd.**[15], the Supreme Court has clearly said that only one condition precedent remained in Section 147 of the Act, 1961, after amending in 1989, is that the reason to believe that income has escaped assessment has to be recorded in writing, there must be tangible material for the formation of the belief. The Assessing Officer cannot reopen the assessment on mere change of opinion. The Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief.

22. Now, the question is whether the Assessing Officer is justified in seeking to reopen the scrutiny assessment for the year 2011-12 solely relying upon the Assistant Valuation Officer's report as in the present case, notice under Section 148 of the Act, 1961 was issued to the assessee by the Assessing Officer on 21-9-2016 and reasons recorded were furnished under Section 148 on 15-11-2016 holding that before completion of assessment after examining the papers and documents, a reference was made to the Assistant Valuation Officer-II, Mumbai for valuation of FMV of

13 (1996) 217 ITR 597 (SC)
14 (1999) 236 ITR 34 (SC)
15 (2010) 2 SCC 723

the said property as on 1-4-1981, but considering the fact of limitation, assessment was completed under Section 143(3)/147 of the Act, 1961. The assessment order was passed and report from the Assistant Valuation Officer-II, Mumbai dated 12-6-2015 has received in the Office of the Income Tax Officer-I, Korba on 18-6-2015 where the FMV of the property as on 1-4-1981 was again determined at ₹ 8,34,300/-. The income on account of capital gain has not been correctly disclosed by the assessee in the return of income for assessment year 2011-12 belatedly filed on 31-3-2013 and now, it has to be worked out as per the report of the Assistant Valuation Officer-II, Mumbai on the basis of FMV determined as on 1-4-1981. Therefore, the Income Tax Officer has reason to believe that the said income under the head "capital gain" has escaped assessment within the meaning of the provisions of Section 147 of the Act, 1961.

23. Thus, from a careful perusal of reasons recorded under Section 148 (2) of the Act, 1961 for initiation of reassessment proceeding it appears that the entire basis for initiation of reopening reassessment is the report received from the Assistant Valuation Officer-II, Mumbai on 12-6-2015.

24. The argument in this behalf by learned counsel for the petitioner is that the opinion of the Assistant Valuation Officer per se is not information for the purpose of reopening the proceeding under Section 147 of the Act, 1961. Therefore, on the basis of such an information, reassessment proceeding cannot be initiated.

25. The Supreme Court in **M/s. A. Raman and Co.'s** case (supra) while considering Section 147 (1)(b) of the Act, 1961 (as then existed), has clearly held that under Section 147 (1) (b) reason to believe that income chargeable to tax has escaped assessment in consequence of information in the possession of the Income-tax Officer is a condition precedent to the exercise of his jurisdiction to assess or reassess the income of the assessee. The expression “information” in the context in which it occurs must mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. Their Lordships observed in its report as under: -

> “5. The condition which invests the Income-tax Officer with jurisdiction has two branches: (i) that the Income-tax Officer has reason to believe that income chargeable to tax has escaped assessment; and (ii) that it is in consequence of information which he has in his possession and that he has reason so to believe. Since the learned Judges of the High Court have concentrated their attention upon the second branch of the condition and have reached their conclusion in favour of the assessees on that branch, it would be appropriate to deal with the correctness of that approach. The expression "information" in the context in which it occurs must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. If as a result of information in his possession the Income-tax Officer has reason to believe that income chargeable to tax had escaped assessment, the Income-tax Officer has jurisdiction to assess or reassess income under Section 147 (1) (b) of the Income-tax Act, 1961. Information in his possession that income chargeable to tax has escaped assessment furnishes a starting point for assessing or re-assessing income. If he has that information, the Income-tax Officer may commence proceedings for assessment or reassessment. ...”

26. Thereafter, the Supreme Court in **Dhariya Construction Company's** case (supra) has clearly held that opinion of the District Valuation Officer per se is not an information for the purposes of reopening assessment under Section 147 of the Act, 1961. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon.

27. The High Court of Madhya Pradesh in the matter of **Prakash Chand v. Deputy Commissioner of Income-Tax and another**[16] has held that the Assessing Officer had no jurisdiction to reopen the concluded assessment by recourse to Section 148 of the Act on the strength of such valuation report, obtained subsequently. Similar is the proposition of law laid down by the High Court of Gujarat in the matter of **Akshar Infrastructure Pvt. Ltd. v. Income Tax Officer – Ward 1(1)**[17] following the principle of law laid down by the Supreme Court in **Dhariya Construction Company's** case (supra).

28. A valuation report is only an opinion of a valuer. The same does not amount to information within the meaning of Section 147(b) nor can it form a ground for reason to believe that the assessee had failed to disclose his income fully and truly within the meaning of Section 147(a) of the Act. The condition precedent for assumption of jurisdiction under Section 147(a) of the Act is reason to believe of the Income-tax Officer. If that be so, then a report or information of a valuer cannot substitute the words

16 (2004) 269 ITR 260 (MP)
17 Manu/GJ/0317/2017

"reason to believe" of the Income-tax Officer. An opinion of a third person cannot be "a reason to believe" of the Income-tax Officer. It is the Income-tax Officer who has to assert on materials available that he has reason to believe that any income chargeable to tax has escaped assessment or that the same was due to the fact that the assessee failed to disclose his income truly and fully. The reason to believe of an Income-tax Officer cannot be substituted by an opinion of a valuer. No condition precedent for assumption of jurisdiction under Section 147(a) is satisfied. (See **Bhola Nath Majumdar v. Income-Tax Officer and others**[18].)

29. If the facts of the present case are examined in light of the principles of law laid down by Their Lordships of the Supreme Court and subsequent decisions of the High Courts of Gauhati and Madhya Pradesh, it would appear that reassessment proceeding has been sought to be reopened by the assessing authority as apparent from Annexure P-7 which is the reason recorded under Section 148 (2) of the Act, 1961 for initiation of action under Section 147 of the Act is the report of the Assistant Valuation Officer-II, Mumbai dated 12-6-2015, which states as under: -

> “The report from the AVO-II, Mumbai dated 12.6.2015 was received in this office on 18.6.2015 where the FMV of the property as on 1.4.1981 was again determined at Rs.8,34,300/-.
>
> The income on a/c of capital gain has not been correctly disclosed in her return of income for a.y.

18 (1996) 221 ITR 608 (Gau)

> 2011-12 belatedly filed on 31.3.2013 and now it has to be worked out as per AVO-II, Mumbai's report on the basis of FMV determined as on 1.4.1981 at Rs.8,34,300/-. Therefore, I have reason to believe that the said income under the head “capital gain” has escaped assessment within the meaning of provisions of section 147 of the Act.”

30. Thus, it appears that only on the basis of the valuation report received from the said officer – Assistant Valuation Officer, the assessing authority sought to reopen the proceeding under Section 147 of the Act, 1961 which is clearly not an information for reopening the assessment proceeding as held by the Supreme Court in **Dhariya Construction Company's** case (supra) wherein it has been observed that opinion of the District Valuation Officer is not an information for the purposes of reopening assessment under Section 147 of the Act and the Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon, as such, opinion of a third person cannot be the basis for reopening the proceeding for reassessment under Section 147 of the Act, as in the present case, the reopening proceeding is based only on the report received from the Assistant Valuation Officer and the assessing authority has not applied its mind and solely relied upon that opinion of the AVO to reopen the assessment under Section 147 read with Section 148 of the Act, 1961, which is in teeth of the decision of the Supreme Court in **Dhariya Construction Company's** case (supra) and as such, contrary to law.

31. This would bring me to the next submission raised on behalf of the petitioner that the order disposing of the preliminary objections

is not a reasoned and speaking order, therefore, that order is liable to be quashed.

32. The petitioner raised preliminary objections after serving of reasons to believe furnished by the petitioner vide Annexure P-8 clearly stating that no independent satisfaction has been arrived by the assessing authority and therefore there is no jurisdictional facts available for initiation of proceeding under Section 147 of the Act, 1961 which was rejected by order dated 13-12-2016 by the Revenue.

33. In order to consider the question as to whether the preliminary objections were decided in accordance with law or not, it would be appropriate to notice the law on the relevant subject i.e. the law regarding the manner of disposal of preliminary objections by the competent authority.

34. Their Lordships of the Supreme Court in **GKN Driveshafts (India) Ltd.** (supra) have clearly held that preliminary objections must be decided by the assessing authority by a reasoned and speaking order and observed in paragraph 5 as under: -

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the

> assessment in respect of the abovesaid five assessment years."

35. Similarly, in the matter of **Godrej Industries Ltd. v. Deputy Commissioner of Income Tax and others**[19], the Bombay High Court has clearly held that the order disposing of the objections has to clearly record reasons why the objections are not tenable. The Bombay High Court further held that the reproduction of the reasons and reiterating them again is no compliance with the law laid down, there must be application of mind by the assessing authority. It has also been held that if the objections are not found to be worthy of acceptance or have no merits, then, the order must speak as to why the said conclusion has been reached. The statutory power has to be exercised having regard to the provisions of Section 147 of the Act, 1961. The Bombay High Court observed in paragraph 33 of its report as under: -

> "33. If the objection is raised, then the speaking order must indicate as to why the same has not been found tenable. The objection cannot be refuted or dealt with by reiterating or repeating the reasons which have been recorded. Once the reasons have been objected to, then the justification for the same ought to be spelt out and that is how a speaking order would meat the requirement of law."

36. If the impugned order of the Revenue disposing of the preliminary objections is looked into, it is apparent that the Assessing Officer in the said order, which is in the shape of reply, mentioned the entire facts in the first page of the order and recorded as under: -

> "Considering the request of the Assistant Valuation Officer, and since it was a time barring matter on 31.03.2015, the A.O. passed the order accepting the

19 (2015) 281 CTR (Bom) 372

returned income subject to receiving the final valuation report (as mentioned in the office note dated 31.03.2015).

On 18.06.2016 the Assessing Officer received the final valuation report of the said property after removing the objection by the AVO, raised by the assessee, vide AVO letter no. AVO-II/ Mum/ CGT/312/2015-16/84 dated 12.06.2016, and accordingly necessary action as per Income Tax Act, 1961 was initiated against the assessee for taxing the Capital Gain amount which had escaped the assessment.

Your application for dropping the proceedings initiated u/s 147 of the income tax was considered and based on the facts mentioned above, the same is here by rejected, and you are requested to comply and attend the hearing on 20.12.2016 for final hearing."

37. In the entire reply/order facts have been serially mentioned and in the last paragraph it has been concluded that the application for dropping the proceedings initiated under Section 147 of the Act, 1961 was considered and same is based on the facts mentioned above, the objections are rejected and the case is fixed for final hearing on 20-12-2016. The petitioner has raised number of preliminary objections to question the notice initiating reassessment, none of them have been considered in seriatim on their merits and simply after narrating the entire facts, in one paragraph all objections have been rejected summarily holding that the objections are not tenable without assigning any reason and such a course is wholly impermissible in law, as it has already been held that preliminary objections have to be decided by a reasoned and speaking order giving reasons that why the objections are not tenable in law. No such reason appears to have been assigned, rather no application of mind has been made

by the assessing authority while deciding the objections which is contrary to the mandate of law declared in that behalf and in force. Therefore, the order deciding preliminary objections cannot be sustained.

38. Finally, the question is whether the reassessment proceeding is justified, as the scrutiny assessment under Section 143 of the Act, 1961 has already been made without considering the valuation report and on the basis of the valuation report, the reassessment has been initiated.

39. Submission of the petitioner in this behalf is that if assessment has been made without considering the valuation report and if the order is erroneous and prejudicial to the interest of the Revenue ex consequenti the proper course to be adopted by the Revenue is to take recourse to the provisions contained in Section 263 of the Act, 1961 and initiation of proceeding for reassessment is not the correct approach.

40. In view of the principle of law laid down in **Kelvinator of India Ltd.'s** case (supra), a wrong or erroneous opinion is not a good ground for reopening the assessment, this would be contrary to the jurisdictional requirement and mandatory pre-conditions which should be satisfied. Erroneous decision can be corrected by resort to exercise of power under Section 263 of the Act, 1961 which is the most appropriate remedy. The said power can also be exercised if the order passed by the Assessing Officer is erroneous and prejudicial to the interest of Revenue.

41. Thus, in the present case, if the order passed by the Revenue is perused, recourse to Section 263 of the Act, 1961 can certainly be made which the Assessing Officer did not do and proceeded to reopen the assessment under Section 147 of the Act, 1961 by issuing notice under Section 148 of the Act which does not satisfy the jurisdictional pre-requirement for exercise of jurisdiction under Section 147. Therefore, I am unreservedly and unhesitatingly of the opinion for the reasons mentioned herein-above that the order passed by the Assessing Officer under Section 147 of the Act, 1961 seeking to reopen the assessment already made is without jurisdiction and without authority of law and the order disposing of the preliminary objections is also not in accordance with law. Consequently, the order finally passed making reassessment is also contrary to law.

42. As a fallout and consequence of aforesaid discussion, the proceeding initiated under Section 147 of the Act, 1961 by issuing notice under Section 148 of the Act, 1961, order deciding preliminary objection and final order of reassessment are all hereby quashed. The petitioner is entitled for cost of ₹ 15,000/- from the respondents No.1 to 3.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (T) No.177 of 2016

Smt. Kamala Ojha

Versus

Income Tax Officer-1, Korba and others

HEAD NOTE

Proceeding for reassessment under Section 147-148 of the Income Tax Act, 1961 cannot be initiated on the basis of report of the Assistant Valuation Officer (proceedings quashed).

आयकर अधिनियम, 1961 की धारा 147–148 के अंतर्गत पुनः निर्धारण के लिए कार्यवाही सहायक मूल्यांकन अधिकारी की रिपोर्ट के आधार पर नहीं की जा सकती (कार्यवाही अपास्त की गई)।