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

## WRIT PETITION (L) NO.3268 OF 2022

Bharat Amratlal Shah ]
505, Dun Apartments ]
225 / 227, J. D. Road ]
Tardeo, Mumbai – 400 007. ] .. Petitioner

v/s.

1. The Income Tax Officer ]
Ward – 19(1)(1) having ]
office at Room No.223, 2nd floor ]
Matru Mandir, Tardeo Road ]
Mumbai – 400 007. ]

2. The Principal Commissioner of ]
Income Tax – 19, ]
having office at Room no.228, ]
2nd floor, Matru Mandi ]
Tardeo Road, Mumbai-400 007. ]

3. Additional / Joint / Deputy / ]
Assistant Commissioner of Income ]
Tax / Income Tax Officer ]
National Faceless Assessment Centre ]
Income Tax Department ]
Delhi. ]

4. Union of India ]
having its office at ]

2nd floor, Aayakar Bhavan Annexe ]
New Marine Lines ]
Mumbai – 400 020. ] .. Respondents

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Mr. Vipul Joshi a/w Ms. Dinkle Hariya i/b. Ms. Rashmi Vyas for the petitioner.

Ms. Sushma Nagaraj a/w Mr. Tanmay Pawar for the respondents.

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**CORAM : DHIRAJ SINGH THAKUR AND KAMAL KHATA, JJ.**
**RESERVED ON : 12TH JANUARY 2023.**
**PRONOUNCED ON : 10TH FEBRUARY 2023.**

**JUDGMENT: (PER KAMAL R. KHATA, J.)**

1. By this Petition the Petitioner seeks to set aside notice dated 31st March, 2021 issued by Respondent no.1 under Section 148 read with **(r.w.)** Section 147 of the Income Tax Act **("IT Act"),** the approval granted by Principal Commissioner Income Tax **(PCIT)** under section **(u/s)** 151 of the Act and the Order dated 5th January, 2022, whereby the Respondent no.1 rejected the Petitioner's objections to the reopening.

**Facts:**

2. The petitioner's mother late Smt. Subhadra Amritlal Shah **("Subhadra")** since 1969-70 had leasehold rights and interest in land

situated at JVPD scheme,Vile Parle (West), Mumbai, **("the said plot")** owned by the Friends Co-operative Housing society **("the Society")** and was allotted 5 shares by the society acknowledging her rights in the land. Subhadra passed away intestate on 24th October, 1970, leaving her husband, two sons and four daughters as her only heirs. In 1985 the two sons with their own funds and resources constructed a three storey building and in 1998 added further three floors thereon. Subdhra's husband expired intestate on 24th March, 1987. The sons retained two flats viz. flat nos.10 and 11 on the 5th and 6th floor of the said building and sold the other flats on tenancy/structural ownership basis to various purchasers. In 2014, the two brothers proposed to sell off the entire property. The sons entered into a family arrangement /understanding with their sisters and on 4th October, 2014, the sisters executed release deed whereby they gave up their claim of any right over the entire property against payment of compensation. On 28th March, 2015, the sons executed an agreement of assignment cum transfer with the purchasers whereby they agreed to assign their leasehold rights, interest, and in the shares together with the structure / building in favour of the purchasers. The sons sold their respective flats nos.10 and 11 on the 5th and 6th floor of the said building to the purchasers by a deed of transfer for consideration of Rs.9,75,00,000/-

and Rs.9,25,00,000/- respectively. Out of the said sale proceeds, in May 2015, each sister was paid Rs.38 lakhs by each son towards settlement of their claim over the flats.

3. The Petitioner filed return of income and computation of income of the for A.Y. 2015-16 on 4th January 2016. The Petitioner computed Rs.6.82 crores as long-term capital gain (LTCG) after deducting the indexed cost of acquisition, payments made to their sisters, expenses including the cost of furniture left and as per exemptions available under Section 54(2) by depositing the balance amount in the Capital Gains Accounts Scheme and under Section 54EC under by investing in Bonds.

4. A notice u/s 143(2) was given on 20th September 2016 and notice u/s 142(1) was given on 11th July 2017. The Petitioner submitted responses thereto dated 18th September 2017 and 22nd September 2017 with all relevant details and documents. The Assessment u/s 143(3) was completed on 25th September 2017. The notice to reopen the assessment has been issued on 31st March 2021 i.e. more than four years after the end of the relevant assessment year viz. A.Y. 2015-16.

5. The Petitioner's case had been selected for scrutiny under CASS, on the issue of (i) Sale of Property mismatch, mismatch Income/Capital Gain on sale of land and building, (ii) Deduction claimed under head of Capital Gain. The Petitioner reconciled the differences with the AIR provided to him by the Respondent and after due examination the assessment was completed u/s 143 (3) of the IT Act on 25th September 2017 accepting the returned income of ₹ 1,22,980/-.

6. This case relates to section 147 prior to its substitution on 1st April 2021 which had stipulations that were required to be fulfilled for re-opening of an assessment. The relevant stipulations are as under:

> *(i) that the AO must have a "reason to believe" that ncome chargeable to tax has escaped assessment;*
> *(ii) that the "reason to believe" must be "on account of the omission or failure" on the part of the assessee "to disclose fully and truly" all material facts necessary;*
> *(iii) that the "reason to believe" must be on "tangible material"; and*
> *(iv) the sanction from the Principal Chief Commissioner or the authority (as the case may be) under section 151 who had to be satisfied with the reasons recorded by the ITO that it is a fit case to issue such notice.*

7. The reasons for reopening stated in paragraphs 10 to 15 of letter dated 28th August 2021 are as under:

> 10. *On analysis of the issue, it is clear that the shares of 4 assessee's sisters in the property sold by him as per Agreement-cum-transfer dated 28.3.2015 was acquired by the assessee on 04.10.2014 only and hence held for less than 3 years at the time of sale. Therefore, the gains arising out of the sale consideration received related to the shares acquired from his 4 sisters on 04.10.2014 would be Short Term Capital Gain and therefore indexed cost*

*of acquisition or deduction u/s.54 or 54EC cannot be claimed from it. From the above discussion it can be seen that the assessee has held only his 1/5th share in the property sold for more than 3 years and the 4/5$^{th}$ share acquired from his 4 sisters is held for less than 3 years. Therefore, the capital gains arising ou8t of the transfer of property in question, would be : 1/5th Long term capital gains and 4/5$^{th}$ Short term capital gains.*

11. *In view of the facts narrated in aforesaid paragraphs, the assessee has made wrong claim of long term capital gain instead of short term capital gain, incorrect claim of expenditure of Rs.8,33,400/- towards cost of furniture left in the flat and incorrect claim of deduction u/s. 54 and 54EC of the Act which were not examined in the assessment made u/s 143(2) of the Act. Thus, after applying my mind I have reason to believe that the income of the assessee chargeable to tax for the A.Y. 2015-16 amounting to Rs.6,16,40,000/- has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts in the return of income, in terms of provisions of section 147 of the Income Tax Act.*

12. *In this case, return of income was filed for the year under consideration and scrutiny assessment u/s 143(3) of the Act was made on 25.09.2017. Since more than 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceedings u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of the failure on the part of the assessee to disclose fully and truly all material facts of the case are covered by the Explanation 1 to section 147 of the Act.*

13. *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 1 to 12). 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 have not fully and truly disclosed the material facts necessary for the assessment for the year under consideration, thereby necessitating reopening u/s 147 of the Act.*

14. *It is evident from the above discussion that the issue under consideration were never examined during the course of regular assessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) and order sheet entries during the proceedings u/s 143(3). Therefore, it is not a case of change of opinion by the AO.*

15. *In this case more than four years have lapsed from the end of the assessment year under consideration. As per the Proviso to Sec. 151(1) of the Income Tax Act, 1961, permission of the Principal Commissioner of Income Tax-19, Mumbai is hereby sought to reopen the case of the assessee by issue of notice of the Income Tax Act, 1961."*

8. Admittedly, the initiation of re-assessment was on account of the audit objection. The said query raised by the audit team does not form a part of the reasons stated for re-opening. The sanction accorded by the PCIT in terms of Section 151 of the Act is also not placed on record.

9. Mr. Joshi, the learned counsel for the assessee submitted that the Petitioner had made submissions before the assessing officer as narrated at paragraph no. 3.3 of the Petition as well as at Exh. E and Exh. H annexed to the Petition which evinces that the very basis of the reasons recorded namely, that the facts and figures in the entire transaction of the sale of the property were the part of the assessment record. He contended that once an assessing officer conducted enquiry on an issue but the order of assessment is silent thereon, the assessing officer is deemed to have applied his mind to the material before him, has formed an opinion and also accepted the view canvassed by the petitioner. He submitted that there is no material much less tangible material brought on the record by the Respondents to support their action of initiation of re-assessment. It was submitted that another officer is not entitled to review the matter from the same material without bringing on record fresh material / reasoning, to form a belief, that income has escaped assessment. The learned counsel submitted that since the reassessment proceeding was initiated after 4 years from the end of the assessment

year under the proviso to Section 147 of the IT Act, no reassessment could be made unless the alleged escapement of income was on account of failure on the part of the assessee to disclose *"fully and truly all material facts"* for its assessment which the first respondent had failed to assert and prove. He submitted that the first respondent was required to specifically point out which material facts were not truly and fully disclosed by the petitioner. He submitted that the petitioner had not only disclosed the particulars of capital gains but also the corresponding claim of exemption under Section 54EC and 54(2) of the Act in his return of income hence there was no such failure. He submitted that the Petitioner had also placed on record all relevant material and explanation during the course of scrutiny of the original assessment taken up to investigate the issue of capital gain. He submitted that the AO had not found any adverse material or any discrepancy and had fully verified this aspect.

10. The learned counsel submitted that a mere bald and mechanical averment in the reasons recorded could not fulfill the important jurisdictional condition and would render the initiation *ex facie* bad, illegal and without jurisdiction. In support of his contention, he relied upon the following judgments:

(i) *Ipca Laboratories Ltd. v/s. DCIT*[1]

(ii) *Hindustan Lever Ltd. v/s. CIT*[2]

(iii) *Dynacraft Air Controls v/s. Sneha Joshi & Ors.*[3]

11. The learned counsel for the petitioner submitted that under the Scheme of the IT Act, once an assessment reaches finality, it could be disturbed only in exceptional circumstances as specifically provided under the IT Act. He submitted that the extraordinary power to reopen the assessment is subject to various conditions which are to be used only in extraordinary circumstances. He submitted that the conditions so imposed for opening an assessment are required to be followed strictly and the AO has to prove that such requisite conditions were not fully and properly fulfilled by bringing on record cogent material. He submitted that the power u/s 147 cannot be exercised arbitrarily or mechanically or in a casual manner. He submitted that the term *"reason to believe "* that an income has escaped assessment necessarily implies application of judicial and judicious mind of a prudent and reasonable person. He submitted that a mere bald averment that there is a *"reason to believe " that* income has escaped assessment is not sufficient.

1 (2001) 251 ITR 416 (Bom.)
2 (2004) 268 ITR 339 (Bom)
3 (2013) 355 ITR

12. The learned counsel further submitted that there has to be a rational connection and a live link with such material that income has escaped assessment and mere suspicion cannot be on a subjective satisfaction of the AO. In support of his contention, he relied on the following judgments;

***(i) ITO v/s. Lakhmani Mewal Das***[4]

***(ii) CIT v/s. Kelvinator of India***[5]

***(iii) Prashant S. Joshi v/s. ITO***[6]

13. The learned counsel submitted that the belief that an income has escaped assessment ought to have been based on "*tangible material*" which alone would be the basis for arriving at satisfaction of escapement of income. He submitted that the first respondent had failed to fulfill the basic preconditions of Section 147 of the IT Act inasmuch as the basic facts that were brought on record by the petitioner were not disputed/controverted. He further submitted that a perusal of the reasons as provided, revealed that the initiation of reassessment proceeding was solely on the same material that was a part of the assessment records. He submitted that the transfer deed itself revealed the following facts;

4 (1976) 103 ITR 437 (SC)
5 (2010) 320 ITR 561 (SC)
6 (2010) 324 ITR 154 (Bom)

*(i) That the late Subhadra had wished to bequeath her right and interest in the land to her two sons and only a formal writing remained to be executed during her lifetime.*
*(ii) The daughters had orally released their rights.*
*(iii) Consequently, after death of Subhadra, her husband, in his capacity as Administrator of her Estate, took out the procedure to ransfer the property in the name of the two sons, which ultimately resulted into the society transferring the share certificate in favour of the two sons and changes in property card.*
*(iv) Most importantly, the building was constructed by the sons after the death of the mother, Subhadra, which was constructed in their own name and our their own efforts and funds.*
*(v) Even all agreements of tenancy/sale were executed by the sons alone.*
*(vi) The formal release by the daughters in 2014 was 'only for the sake of good order'.*

14. He accordingly submitted that there was no *tangible material* available with the first respondent to initiate the reassessment proceeding, and consequently, the initiation of reassessment was bad in law and without jurisdiction. In support of his contention, he relied upon the following decisions;

(i) ***CIT v/s. Kelvinator of India***[7]

(ii) ***Prashant S. Joshi v/s. ITO***[8]

15. The learned counsel submitted that it was clear that the reassessment proceeding is initiated merely on account of *change of opinion*. He submitted that the documents such as Deed of Transfer and

7 (2010) 320 ITR 561 (SC)
8 (2010) 324 ITR 154 (Bom.)

Agreement for Assignment cum Transfer dated 28th March 2015, clarification and evidences regarding cost of acquisition of the flat, replies by the petitioner during the assessment proceeding, notice given by the Solicitors of the petitioner's sisters, receipts issued by the petitioner's sisters and evidences regarding the expenses, were all submitted with the first respondent during the assessment proceeding and the reasons recorded also evince the reference to the aforestated documents. Consequently, there is no new document / material which calls for reassessment that is mentioned in the reasons recorded by the AO. He submitted that a mere review of the same material would amount to a *change of opinion* in the absence of any *tangible material* to justify the conclusion that an income had escaped assessment.

16. The learned counsel submitted that neither in the reasons recorded nor in the purported order disposing the objections, there was any specific allegation supported by any cogent material to evince that the earlier AO had failed to apply his mind to the issue. Consequently, it is to be assumed that there was due application of mind on all aspects by the AO. In support of the contention, he relied upon the case of ***Aroni Commercials Ltd. v/s. DCIT.***[9]

[9] (2014) 362 ITR 403 (Bom.)

17. Mr. Kumar the learned counsel for the respondents, in reply submitted that, the property sold was held by the assessee along with his brother has a joint family property where the four sisters also had a right. He submitted that the shares of four sisters in the property were acquired by the assessee on 4th October 2014 as per the Agreement for Assignment cum transfer dated 28th March 2015. Consequently, it was held that the gains arising out of the sale transaction relating to the shares acquired from the four sisters that was on 4th October 2014 would be short term capital gain and therefore, the index cost of acquisition or deduction u/s 54 or 54EC cannot be claimed from it. He submitted that the assessee had held only 1/5th share in the property sold for more than 3 years and therefore the capital gains arising out of transfer of property of the assessee's 1/5th share would be construed as long term capital gain.

18. The learned counsel submitted that the return of income was processed u/s 143 (1) of the Act. Subsequently, the case was selected for scrutiny under CASS – Limited Scrutiny for examining issues with regard to mismatch of the Sale of Property, Income/Capital Gain on sale of land and building and deduction claimed under the head Capital Gain. He submitted that the assessment was completed u/s143 (3) of the

Act, after the Petitioner reconciled the differences with the AIR provided to him by the respondent on 25th September 2017 accepting the returned income of ₹ 1,22,980/-.

19. The learned counsel submitted that internal audit vide appeal memo no. CIT (Audit)-2 Mumbai/2018-19/ITO Audit 2(10) 10805 dated 18th March 2019, had raised the objection based on their working of capital gains according to which the Petitioner was liable for Short Term Capital Gains (STCG) of ₹ 6,16,40,000/-. It was submitted that on account of a remedial action to settle the major audit objection, reopening of assessment by action u/s 148 of the Act was done after taking due approval from the Principal Commissioner of Income Tax-19, Mumbai as per the provisions of section 151 of the Act.

20. The learned counsel submitted that after taking necessary approvals from the Principal Commissioner of Income Tax-19 Mumbai as per the provisions of section151 of the IT Act, a notice u/s 148 dated 31st March 2021 was issued to the Petitioner. Pursuant to the notice u/s 148 the Petitioner filed return of income on 3rd April 2021. The reasons for reopening the scrutiny assessment was provided to the Petitioner by

letter dated 28th August 2021 to which objection was filed on 10th October 2021.

21. The learned counsel submitted that the Jurisdictional Assessing Officer (JAO) 19(1)(1), Mumbai who took charge on 21st December 2021 had this case on his ITBA – Assessment worklist and the case was getting time barred on 31st March 2022. Since he had no jurisdiction over the said assessment, he made a requisition to NaFAC to assign the case to the Assessment unit of NaFAC. Under the DCIT 2(2)'s direction vide email dated 29th December 2021 the objections filed by the Petitioner were addressed and notice u/s143(2) of the Act was issued on 5th January 2022 to assign the case to NaFAC.

22. The learned counsel submitted that since the AO had restricted scope of assessment, the original order of assessment had not opined on the issue of short term capital gain when assessment was completed u/s 143 (3) of the Act and consequently the Petition deserves to be dismissed.

## Conclusion:

23. We find merit in this Petition. In the present case, the period of four years came to an end on 31st March 2020. The affidavit filed by the

Respondent evinces that an order of assessment under section 143(3) was passed on 25th September 2017 computing the total income of the assessee at ₹ 1,22,980/-. That subsequently on 31st March 2021 a notice u/s 148 was issued and reasons for issuance of such notice was forwarded on 28th August 2021. The Respondent has formed an opinion that the income of ₹6,16,40,000/- chargeable to tax has escaped assessment.

24. We have gone through the reasons. It is clear that on account of the internal audit objection that a remedial action of reopening the assessment by an action u/s 148 of the Act was taken with a view to settle the audit objection as more particularly stated on page 167 of the affidavit in reply dated 13th April 2022. The basic facts that were canvassed and brought on record by the petitioner were neither disputed / controverted in the reasons recorded.

25. The position in law as contended by the Petitioner is not in dispute. By virtue of a proviso to section 147, no action can be taken for reopening after four years unless the AO has reason to believe that income has escaped assessment by reason of the failure on the part of the assess to disclose fully and truly all material facts necessary for

assessment. The affidavit clearly evinces that the department has purported to reopen the assessment only on the basis of change of opinion as stated on page nos. 164 and 167 of the reply. The reasons dated 28th August 2021 at page nos. 110 to 114 of the Petition do not spell out failure on the part of the assessee to disclose fully and truly all material facts. The Petitioner has disclosed all primary facts.

26. We are required to consider whether the pre-condition for issue of a valid notice u/s 148 has been fulfilled or not. We are satisfied that the reopening is sought on the basis of change of opinion as apparent from the reply and there is nothing in the reasons to indicate that reopening is sought on the ground of failure on the part of the Petitioner to disclose truly and fully all material facts. This case is clearly covered by the judgement of this Court in the case of ***Ananta Landmark Pvt. Ltd vs. DCIT reported in 439 ITR 168 (Bom)*** and we are in agreement with the same.

27. In the circumstances, the impugned notice is set aside and Writ Petition is made absolute in terms of prayer (a) with no order as to costs.

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