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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision:-15.01.2020

\+ **W.P.(C) 12359/2018 & CM APPL. 47876/2018**

VANITA SANJEEV ANAND ..... Petitioner
Through: Mr.M.R.Manjani and Mr.B.K.Manjanai, Advocates.

versus

INCOME TAX OFFICER WARD 45(1) ..... Respondent
Through: Ms. Lakshmi Gurung, Senior Standing Counsel with Ms. Talha A. Rahman, Mr. Siddharth Gupta, Mr. Shaz Khan, Advocates.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J (Oral):

1. The present petition under Article 226 of the Constitution of India seeks quashing of the notice under Section 148 of the Income-Tax Act (hereinafter referred to as "the Act") dated 29.03.2018 for reopening of the assessment in respect of Assessment Year (hereinafter referred to as "AY") 2011-12.

2. The brief facts leading to the filing of present petition, are that the Petitioner who is a regular income tax assessee filed her return of income for the AY 2011-12 on 15.07.2011. The Assessing Officer (hereinafter referred to as "AO") vide letter dated 22.03.2018 issued under Section 133(6) of the Act, called for certain information from the assessee. The same was provided by the Petitioner on 28.03.2018, at the time of hearing. Subsequently, Respondent issued a notice dated 29.03.2018 under Section 148 of the Act, which is impugned in the present petition. In response thereto, Petitioner filed her return of income on 30.04.2018 and pursuant to a request for supply of 'reasons to believe', the AO furnished the same on 10.07.2018. Assessee's

3. Since the scope of challenge in the instant petition pertains to the assumption of jurisdiction by the AO under Section 147 of the Act, perusal of the reasons to believe is necessary. The same are extracted herein below:

> *"Reasons for reopening of the assessment in case of MsVanita S Anand Asstt.Year 2011-12 U/s.147 of the I.T.Act 1961*
>
> *1. The ITO (Inv.) Unit-7/2/2017-18/419 dated 09/03/2018 forwards the information that following transactions with M/s.Duggal Associates are appearing in the bank account NO.002901528361 of MsVanita S. Anand maintained with ICICI Bank, Greater Kailash Branch, New Delhi:*

S.No.	*Date*	*Amount Received*	*Amount Paid*
(i)	*08.04.2010*	*20,12,000/-*	*-*
(ii)	*26.04.2010*	*48,00,00/-*	*-*
(iii)	*25.05.2010*	*2,00,000/-*	*-*
(iv)	*11.08.2010*	*-*	*60,00,0001-*
	TOTAL	*70,12,0001-*	*60,00,0001-*

> *2. Ms.Vanita S. Anand submitted that she was received short term loan from Shri Anil Duggal proprietor of M/s.Duggal Associates and which was returned back.*
>
> *3. Enquiries were conducted with Shri Anil Duggal in respect of above mentioned transactions, in response to queries, Shri Anil Duggal filed a reply dated 20/02/2018 confirming that he has given loan to Ms.Vanita S. Anand and the same has been including as loan and advances in his books of account.*
>
> *4. Further Shri Anil Duggal filed a reply dated 01/03/2018 stating therein he he has given loan of Rs.20,12,2000/- and Rs.48,00,000/- to Ms. Vanita S. Anand @ 11% vide loan agreement dated 07/04/2010 and dated 26/04/2010 respectively.*
>
> ***5. On perusal of the loan agreement it was observed that the expiry of loan agreement is 15/03/2011 and on the same date loan alongwith interest will become due and further in the event of default the lender shall have the right to initiate legal action for the recovery of the loaned amount and interest, if any.***

against the loan taken of Rs.70,12,000/- and interest thereupon of Rs.7,05,320/- therefore Ms.Vanita S. Anand aggregate liability towards Shri Anil Duggal was of Rs.77, 17,320/-. Ms. Vanita S. Anand had paid only RS.60,00,000/- and remaining Rs.17,17,320/- (i.e. Rs.77,17,320- Rs.60,00,000 = Rs.17,17,320) remained unpaid.

7. Keeping in view the nature of transaction entered by Ms.Vanita S. Anand with Shri Anil Duggal, the provisions of section 56(2) and 56(2)(vii)(a) are reproduced as under:

Provision of section 56(2) are reproduced as under:-

Income from other sources. 56(1) income of every kind which is not to be excluded from the total income under this act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items a to e.

(2) in particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "income from other sources", namely :- (i) dividends' 73[(ia) income referred to in sub-clause (viii) of clause (24) of section 2'} 74[ib) income referred to in sub-clause (ix) of clause (24) of section 2;] 75[(ic) income referred to in head "profits and gains of business or profession";] 76(id) income by way of interest on securities, if the income is not chargeable to income-tax under the head "profits and gains of business or profession";] (ii) income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head "profits and gains of business or profession"; (iii) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is insperable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "profits and gains of business or profession"; 77[liv) income referred to in sub-clause (xi) of clause (24) of section 2, if such income is not chargeable to income-tax under the head "profits and gains of business or profession" or under the head "salaries";] 78(v) where any sum of money exceeding twenty-five thousand rupees is received without consideration by an individual or hindu undivided family from any person on or after the 1st day of September 2004.

56(2)(vii)(a) where an individual or a hindu undivided

without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum"

I have carefully examined the report and material available on record and found that the amount of Rs.17, 17,320/- has escaped assessment.

8. Under such a situation, I have reason to believe that income at least to the sum of Rs.17,17,320/- for the A.Y.2011-12 has escaped assessment in the hands of assessee within the meaning of explanation 2(a) of section 147 and any other income which may come to the notice of assessing office subsequently during the course of proceeding under this section to bring to tax the income escaping assessment.

In view of the above, I propose to issue notice under section 148 of the Income Tax Act 1961 for A.Y. 2011-12.
Submitted for kind perusal and approval under section 15(1) of the Income Tax Act 1961."

4. Mr. K.R Manjani, learned counsel for the Petitioner argues that the proceedings under Section 148 are illegal and exhibit complete non application of mind on the part of the AO. Without verification of the information received from the ITO, Investigation Unit -7, New Delhi, the AO in a mechanical manner, without going through the complete record has proceeded to reopen the assessment. He further argued that approval was obtained on wrong facts and without providing the complete records to the higher authorities, who also granted the same in a mechanical and routine manner. The AO has verbatim reproduced the report of the investigation unit, and has relied upon the same without any independent enquiry. On merits, he argued that the AO has proceeded on a wrong premise by treating the genuine loan transaction in the year of receipt as income of the assessee, ignoring the confirmation by the creditor, who is also a regular income tax assessee and has confirmed to the investigation wing that the loan was interest bearing, and substantial amount thereof was returned in the next year. The said amount is shown as outstanding in his record and cannot be assumed to be the escaped income of the assessee.

Petitioner had filed her original return of income for AY 2011-12 on 15.07.2011, declaring an income of Rs.3,57,939/-. Subsequently, information was received from ITO (Investigation), Unit-7, New Delhi dated 09.03.2018, wherein it was intimated that the Petitioner-assessee had entered into suspicious transaction of receiving loan amount of Rs.70,12,000/- from Duggal Associates during Financial Year (hereinafter referred to as "FY") 2010-11 relevant to AY 2011-12. After careful perusal and examination of the information, the Investigation Wing issued a letter to the Petitioner, calling for certain information under Section 133(6) of the Act. Enquiries were conducted from Shri Anil Duggal, proprietor of M/s. Duggal Associates, who in response thereto furnished a reply stating that he had given loans of Rs. 70,12,000/- to the Petitioner with interest @11% amounting to Rs.7,05,320/-. Petitioner only made part payment to the tune of Rs. 60 lacs against the loan amount of Rs.70,12,000/- and interest thereupon of Rs.7,05,320/- and the remaining amount of Rs.17,17,320/- (Rs.77,17,320/- *minus* Rs.60,00,000/-) remained unpaid till date. Therefore, the aforesaid balance amount was liable to be added to the income of Petitioner in the AY 2011-12 as per Section 56(1) and 56(2)(vii)(a) of the Act. In view of the aforesaid facts, proceedings under Section 147 were initiated. He further argues that since at the first instance, the return of income of the Petitioner was processed under Section 143(1), it is not an 'assessment' and therefore, the ground of 'change of opinion' is not attracted. In support of his contention, he relies upon the judgement of the Supreme Court in ***Deputy Commissioner of Income Tax vs. Zuari Estate Development and Investment Company Limited (2015) 15 SCC 248.*** He also argues that the petitioner has herself filed income-tax return on the website for AY 2011-12, wherein she had shown different taxable income in her returns. Since, there are discrepancies in the return originally filed on 15.07.2011, on comparison with the return filed on 30.04.2018, in response to the notice under Section 148, assessment under Section 147 is required.

Duggal and the same were made available to the AO subsequent to filing of return and its processing, an intimation was sent under Section 143(1), it was sufficient for formation of an opinion that income had escaped assessment. He has further relied upon the decision of the Supreme Court in ***Income-Tax Officer, Kolkata vs. Selected Dalurband Coal Company Private Ltd.,*** **(1997) 10 SCC 68,** to contend that this stage, the Court would not go into the merits of the matter beyond being satisfied that there was sufficient basis for reopening of the assessment. He also referred to the decision of the Supreme Court in the case of ***Phool Chand Bajrang Lal vs. ITO,*** **1993 4 SCC 77**, wherein it was held as under:

> ***"25.*** *From a combined review of the judgments of this Court, it follows that an Income Tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information****. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief****. It would be immaterial whether the Income Tax Officer at the time of making the original*

a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted Burlop Dealer case [(1971) 1 SCC 462 : (1971) 79 ITR 609] as laying down law to the contrary fell in error and did not appreciate the import of that judgment correctly.

26. *We are not persuaded to accept the argument of Mr Sharma that the question regarding truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the plain phraseology Sections 147(a) and 148 of the Act and is against the settled law by this Court. We have to look to the purpose and intent of the provisions. One of the purposes of Section 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude."*

[Emphasis Supplied]

7. We have carefully examined the records and considered the submissions advanced by the learned counsel for the parties. In the instant case, the assessee has indeed filed a return of income on 15.07.2011.In the 'Annexure A' attached to the Form for recording the reasons for initiating the proceedings under Section 148, the AO has recorded the reasons under the head *'WHERE NO RETURN IS FILED BY THE ASSESSEE',* which is absolutely incorrect. In the counter affidavit, Revenue while admitting this mistake sought to justify the said response. The explanation offered makes a very interesting reading and we therefore, consider it necessary to reproduce the same:

"XI. In Paragraph 13(c) the Petitioner-Assessee submitted that the Deponent had obtained approval by stating wrong facts that no return was filed by the Petitioner-Assessee. It is put forth that ***due to urgency and paucity of time, the clerical mistake occurred in the Annexure only. Otherwise, there is no other***

has filed income tax returns on the income tax website for A.Y. 2011-12 wherein she had shown different taxable income in her returns. Firstly, return was filed on 15/07/2011 with taxable income of Rs.2,93,100/-; further another return of income in response to notice u/s 148 was filed under protest on 30/04/2018 and shown taxable income of Rs.1,75,110/-. In its letter dated 02.05.208, filed on 07.05.2018 the petitioner has made as wrong statement stating that "From the computation of income enclosed your goodself will observe that the assessee's taxable income of Asstt. Year 2011-12 was below taxable limit and therefore there was no obligation to file return of income." It is further submitted that while disposing of the objection against initiation of proceedings u/s 147, it is mentioned in para 2 that the assessee filed original return of income declaring income of Rs. 2,93,100/- on 15.07.2011 for AY 2011-12. Thus Department is ***aware that original return of income was passed on 15.07.2011 but due to clerical mistake it is mentioned in the Annexure that WHERE NO RETURN FILED BY THE ASESSEE"****. In the facts of the present case that assessee herself has filed two different returns, processing of assessment u/s 148 /147 is required."*

[Emphasis supplied]

8. On the basis of the explanation offered in the counter affidavit, Revenue has argued that they were aware that the original return of income was filed on 15.07.2011 and the mistake in the annexure is only a clerical one. Further, to demonstrate that the officer was conscious and aware of the filing of return, Revenue relies upon the order passed on the objections raised by the assessee to the reasons for reopening. The exposition given by the Revenue in the order disposing of the objections is not convincing, as the same is obviously subsequent to the recording of reason. In the recorded reasons for reopening, there is no reference or discussion with respect to the return of income filed by the assessee, and it does not seem to be an unintentional error. This is also evident from the fact that in the recorded reasons in paragraph No. 8, AO states that *"I have reason to believe that income atleast to the sum of Rs.17,17,320/- for the AY 2011-12 has escaped assessment in the hands of assessee within the meaning of explanation 2(a) of Section 147"*. The explanation 2(a) is relevant to a case where no return of income

vide letter dated 22.03.2018 had called for certain information from the assessee. The said letter notes "*As per this office record, you have not filed your Income Tax Return for the A.Y. 2011-12"* Thus, it manifests that the AO was clueless of the fact that the petitioner-assessee had filed the original return of income and, therefore, the entire basis for reopening gets vitiated.

9. Be that as it may, the recorded reasons are entirely based on the information received from the office of Income-Tax Officer (Investigation) Unit-7, New Delhi vide letter dated 09.03.2018. The premise for reopening as spelt out in the recorded reasons is that the petitioner-assessee had transactions with Duggal Associates and had received certain credits in her account maintained with ICICI Bank, Greater Kailash Branch, New Delhi. This transaction was considered to be a short term loan from Shri. Anil Duggal, proprietor of M/s Duggal Associates and was partly returned back. It is also the case of Revenue that on enquiries, Shri Anil Duggal confirmed that he had given loan to the Petitioner and the same had been included in his books of account as *"Loans and Advances"*. On a perusal of the loan agreement, the AO concluded that the expiry date of the loan agreement was 15.03.2011 and on the said date, the loan alongwith interest became due. Thereon, taking note of the fact that the Petitioner-assessee has made a payment of Rs.60,00,000/- to Anil Duggal on 11.08.2011, against the loan amount of Rs.70,12,000/-, he arrived at the aggregate liability due to Shri Anil Duggal from the Petitioner as Rs.77,17,320/- after factoring the interest amount of Rs.7,05,320/-. After adjusting the amount of Rs.60,00,000/- against the aforesaid liability it was concluded that Rs.17,17,320/- remain unpaid and the same has to be treated as income chargeable to Income-Tax under the head of *"Income from other sources"* in terms of Section 56(2) and 56(2)(vii)(a) of the Act. On this basis, it was assumed that the aforesaid income had escaped assessment in the hands of the assessee within the meaning of explanation 2(a) of the Section 147 of the Act.

there was no scrutiny assessment under Section 143(3) of the Act and the return of income was merely processed under Section 143(1) of the Act. There is, thus, no quarrel on the proposition canvassed by Revenue on the basis of the judgment of the Supreme Court in ***Deputy Commissioner of Income-Tax vs. Zuari Estate Development (supra)***, which follows the earlier judgment in the case of ***Rajesh Jhaveri Stock Brokers (P) Ltd.,*** **(2008) 14 SCC 2008**, that the principle of *"change of opinion"* would not be attracted, as the AO had no occasion to form any opinion in the first place. We are also not examining as to whether there was any tangible material for for reopening the assessment. However, notwithstanding the fact that the reopening in the present case relates to the return which was only processed under Section 143(1) of the Act, it is still open to the assessee to contest the reopening on the ground that there was, either no reason to believe, or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax escaped assessment.

11. We are conscious of the fact that Section 147 of the Act does not postulate that the AO has to arrive at a final and definite conclusion that the income of the assessee has escaped assessment, particularly since assessee's return has only been processed under Section 143(1) of the Act. Nonetheless, we must analyze whether there was no reason to believe for reopening the assessment, or that the alleged reason is not relevant for the formation of belief that the income chargeable to tax has escaped the assessment. The AO formed the reason to believe that an amount of Rs.17,17,320/- is the unpaid loan liability towards Shri Anil Duggal, and the same is the notional income of the assessee - which has escaped assessment**.** The AO does not dispute the loan transaction**.** In fact the loan transaction forms the basis of computing this notional income. The AO on the basis of the loan transaction, which he does not suspect to be a bogus transaction, proceeds to calculate the interest liability and after hypothetically computing the same, adds it to the principal amount and makes a deduction of the amount repaid, and assumes that the

Act. A quick reference of the said provision would be useful. The same reads as under:

> **"56.** *(1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.*
>
> *(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—*
>
> *XXXX*
>
> ***[(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—***
>
> ***(a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;***
>
> *[(b) any immovable property,—*
>
> *(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;*
>
> *(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:*
>
> *Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:*
>
> *Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;]"* ***[****Emphasis Supplied]*

an outstanding loan liability can be categorised as notional income, even if it is unpaid. Unless the entire transaction in question is disputed, and the amount received is considered to be without consideration, outstanding loan amount cannot on the *ipse dixit* of the AO be classified to be income that has escaped assessment. The lender as well as the assessee /borrower have duly admitted that part of the loan and interest are outstanding. This fact has been recorded by the AO in the reasons for reopening of the case in paragraph 6 in the following words:

> "*Ms. Vanita S. Anand has made payment of Rs. 60,00,000/- to Sh. Anil Duggal on 11/08/2011 against the loan taken of Rs. 70,12,000/- and interest thereupon of Rs.17,17,320/- Ms. Vanita S. Anand had paid only Rs.60,00,000/- and remaining Rs.17,17,320/- the Rs.77,17,320 - Rs. 60,00,000 = Rs.17,17,320/- remained unpaid*".

13. It is clearly discernable that the AO has accepted genuineness of the loan transaction. The reasons are completely silent as to how, and on what basis, material or evidence, the AO has come to the conclusion that the loan transaction was an amount received without consideration, so as to bring the same within the ambit of Section 56 of the Act. The nature of the transaction depends solely on the intention of the parties. Both the parties have admitted that the same is an interest bearing loan, a fact accepted by the AO. The AO has, thus, not shown any rational for involving Section 56 to the transaction of loan. The reasons are completely and wholly silent as to how the provisions of Section 56 are attracted in respect of outstanding liability of loan. Moreover, the reasons also do not spell out as to how there has been escapement of income by the assessee. The approach of the AO is fundamentally flawed, as he has assumed that just because certain loan amount is outstanding, the same was liable to be added to the income of the petitioner-assessee. Thus, applying the test of *prima facie* evaluation of reasons for determining whether the commencement of reassessment

contention of the Revenue that reopening of assessment is justified and necessary as there are discrepancies in the return originally filed, and the return filed in response to the notice under Section 148 of the Act by the assessee. At this stage we are only concerned with the fact whether the reasons as recorded by the AO showcase due application of mind. The reasoning does not indicate the basis for coming to the conclusion that the petitioner's taxable income has escaped assessment and the reasons formulated by the AO are based on a fundamentally flawed approach. We do not find any such material or basis to justify the reopening of the assessment. Resultantly, the writ petition is allowed. The notice under Section 148 of the Act and the proceedings emanating therefrom are hereby quashed. Parties are left to bear their respective costs.

SANJEEV NARULA, J

VIPIN SANGHI, J

JANUARY 15, 2020
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