IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2896 OF 2022

Aashish Niranjan Shah,

Age: 55, Occupation: Business
Residing at: 39, Mantri Court
Ambedkar Road, Next to RTO
Pune- 411001, Maharashtra

...**Petitioner**

Versus

1. Union of India

   Notice to be served upon
   The Secretary, Ministry of Finance,
   Department of Revenue,
   North Block, New Delhi- 110001

2. Assistant Commissioner of Income Tax, Circle-7
   Office of The Assistant Commissioner of Income Tax, Circle-7, Room No.316, 3rd Floor, Aaykar Sadan, Bodhi Towers, Salisbury Park, Gultekadi, Pune- 411037, Maharashtra

3. The Principal Commissioner of Income Tax-4,
   Aaykar Sadan, Bodhi Towers, Salisbury Park, Gultekadi, Pune- 411037, Maharashtra

...**Respondents**

Mr. Sagar Tilak, *a/w Sachin Hande, Payal Rathod, Advocates for the Petitioner.*

Mr. Suresh Kumar, *Advocate for Respondent.*

CORAM : G. S. KULKARNI &
SOMASEKHAR SUNDARESAN, JJ.

RESERVED ON: AUGUST 06, 2024
PRONOUNCED ON: AUGUST 23, 2024

JUDGEMENT: (*Per, Somasekhar Sundaresan J.*)

1. Rule. With the consent of the parties, taken up for final hearing and disposal.

2. This petition is a challenge to reassessment proceedings initiated in respect of assessment year 2013-14 ("***AY-2013-14***"). The Petitioner, an individual had filed the relevant tax returns on 27th September, 2013, offering taxable income of Rs.73,08,942/-. The returns were subjected to scrutiny assessment under Section 142(2) of the Income-tax Act, 1961 ("***the Act***"). The assessment order came to be passed on 11th March, 2016. An addition of Rs.1,14,329/- was made to the returned income. In compliance with the same, the additional tax amount as assessed was paid on 12thApril, 2016.

3. On 31st March, 2021 i.e. seven years after the end of the relevant assessment year, a notice under Section 148 ("***Impugned Notice***") was issued to the Petitioner by the Assistant Commissioner of Income-tax, Circle 7 in Pune, Respondent No.2. The sanction for the issuance of the notice under Section 148 had been issued by the

Principal Commissioner of Income-tax-4, Pune, Respondent No.3. In response, the Petitioner submitted that he had no change to make to the originally filed returns and therefore, the very same returns were again filed by him on 28th April, 2021. On 30th June, 2021 Respondent No.2 issued a notice under Section 143(2) along with the reasons for reassessment. The stated reason provided for the proposed reassessment was that the returns had not been subjected to scrutiny assessment.

4. On 3rd July, 2021, the Petitioner submitted his written objections to the impugned notice questioning the validity of the reasons for which reassessment had been proposed. The Petitioner asserted that his returns for AY-2013-14 had indeed been subjected to scrutiny assessment. He also submitted that under Section 147 as then applicable, no reassessment would be permissible after the expiry of four years from the end of the relevant assessment year unless the escapement of income was attributable to failure on his part to disclose fully and truly all material facts necessary for assessment at the time of the original assessment. In short, the Petitioner's primary objection was that since he had filed his return for AY-2013-14 without default, and such return had been subjected to a scrutiny assessment, unless and

until there had been a demonstrated failure on his part to disclose fully and truly any material facts, the jurisdictional fact necessary to effect reassessment cannot be said to be in existence.

5. On 21st December, 2021, the Revenue communicated a rebuttal of objections raised by the Petitioner against the issuance of the notice for reassessment. In a nutshell, the case of Respondent No.2 was that income from trading in shares to the tune of Rs.20,69,450/- had escaped assessment, because of which reassessment was being proposed. The basis of such computation was said to be the stock broker of the Petitioner having modified client codes under which transactions had been effected on the stock exchange. However, the transactions in respect of which any client code had been modified; whether it was modified from the Petitioner's client code to another client code or *vice versa*; and the manner in which any such modification would lead to a different level of taxable income in the hands of the Petitioner even on a *prima facie* basis, was not spelt out.

6. On 15th January, 2022, the Petitioner wrote a letter pointing out that the satisfaction and approval of the appropriate authority had not been shared until then, and asked for a copy of the same. On 14th February, 2022 Respondent No.2 passed an order disposing of the

objections raised by the Petitioner. This order, according to the Petitioner, does not record the basis on which it can be said that the Petitioner has not disclosed truly and fully all material facts during the original assessment. In a nutshell, the order asserted that the power to effect the reassessment beyond the period of four years and within a period of six years would be available to the Revenue even in cases where there has been a complete disclosure of all relevant facts during the original assessment. It was asserted by the Revenue that so long as there is some information in the possession of the Revenue which gives the Revenue "reason to believe" that income has either escaped assessment or is under assessed, the existence of such belief would confer jurisdiction for conducting a reassessment. The "information" in question was stated to be the modification of client codes by the stock broker, which could have led to fictitious profits and fictitious losses being claimed by different clients of the stock broker. Such information, according to the Revenue, pointed to the Petitioner having had a benefit of Rs.20,69,450/-, due to which the Revenue had "reason to believe" that income had escaped assessment. Such reason to believe would suffice to shift the onus to the Petitioner to substantiate and prove the genuineness of the transactions about which information was not in the possession of the Revenue.

7. The Petitioner also questioned the manner of approval of the reassessment proceedings. According to him, since a period of four years from the end of AY-2013-14 had expired on 31st March 2018, when reassessment was being considered in 2021, even assuming this was permissible under Section 149, it was incumbent for the more senior specified authorities under Section 151(ii) to have applied their mind to approve such reassessment. Authorities specified under Section 151(i) could only approve reassessments proposed within a period of three years, he would submit. Such senior specified authority ought to apply his mind and pass an order as to how he has been satisfied that the reassessment is necessary. Moreover, since the Petitioner was not given the order approving the reassessment, the Petitioner has challenged the entire reassessment proceedings.

8. Consequently, the Petitioner has sought our intervention under Article 226 of the Constitution of India praying for quashing and setting aside of:-

a) the Impugned Notice dated 31st March, 2021;

b) the notice under Section 143(2) dated 30th June, 2021;

c) the notice under Section 142(1) dated 21st December, 2021; and

d) the order dated 14th February, 2022, purporting to dispose of the objections raised by the Petitioner to the reassessment.

9. In these proceedings, in an affidavit in reply dated 31st March, 2022 but filed on 6th August, 2022, the Revenue has asserted that the element of income through client code modification to the extent of 20,69,450/- had not been covered during the original assessment. Therefore, the issue was never examined by the assessment officer in the earlier round. Therefore, invoking Section 148 and Section 151 as they stood on 31st March, 2021, the Revenue has asserted that the proposal to initiate reassessment was valid in law because the "main ingredient required to issue notice" is to form a "reason to believe" that income had escaped assessment.

10. The only question to be considered is whether any reasonable person could form a belief that income had escaped assessment and that would be adequate to reopen the assessment. Such belief, although a good justification for initiating reassessment, the Revenue has stated, may stand altered after conduct of the reassessment proceedings, and as a matter of final adjudication, it may be found that no income had escaped assessment. Besides, at the stage of initiating reassessment, "reason to believe" must be judged not as a judicial decision but as an

administrative decision, and so long as any information may have become available from any source that is considered to be reliable, that would be adequate to justifying reopening the assessment. It has been asserted that in the instant case, the information was the receipt of information from the Deputy Director of Income-tax (Investigation), Mumbai that stock brokers had misused client code modification facility and created fictitious profits and losses to benefit their clients. Since such information had not been available at the time of original assessment, the affidavit averred, it would be deemed that the Petitioner had failed to disclose material facts during the original assessment.

11. In rejoinder, by an affidavit dated 11th August, 2022, the Petitioner asserted that once scrutiny assessment had been conducted, when there has been an expiry of four years after the end of the assessment year, for the Revenue to initiate reassessment, it must be demonstrated that the escapement of income from assessment was due to failure on the part of the assessee to disclose material facts during the original assessment. In the instant case, the Revenue has asserted that no scrutiny assessment had taken place. Therefore, the very foundation of the reassessment stands disturbed. The Petitioner has asserted that all documents connected to securities trading by the Petitioner during

the relevant period had been examined during the scrutiny assessment and there was nothing to show that there had been any failure on the part of the Petitioner to disclose any material fact. The Petitioner also submitted that even in the proceedings before this Court a copy of the approval given by a specified authority under Section 151(ii) has not been filed although a specific ground has been taken up in the Writ Petition on this count.

12. On 14th March, 2022, a Division Bench of this Court had granted *ad-interim* relief restraining the Revenue from taking any further steps pursuant to the reassessment notice dated 31st March, 2021. On 19th September, 2022, this Court had allowed the Petitioner to amend the Petition to bring on record the order dated 14th February, 2022 purporting to deal with the objections raised, which too now stands challenged. Such interim protection granted on 14th March, 2022 has continued till date.

13. We have heard the Learned Counsel for the parties and have examined the material on record. The recorded reasons for initiating proceedings under Section 147 and Section 148 for reassessment, simply states that the Petitioner had bought shares of Rs.20,69,450/- through

modified client codes and that such transactions had not been explained. It was categorically stated that the return for AY-2013-14 had not been subjected to scrutiny assessment and therefore the Petitioner's case would be deemed to be one where income has escaped assessment.

Scrutiny Assessment indeed Conducted:

14. It is apparent that the reasons are *ex facie* wrong on one fundamental facet. The returns filed for AY-2013-14 had indeed been subject to scrutiny assessment, which led to the assessment order dated 11th March, 2016.

15. In those proceedings, notices had been issued on 5th September, 2014, 27th November, 2015 and 2nd December, 2015 and an opportunity of being heard had been provided and availed of. The assessment order records that the financial statements, bank account statements, ledger accounts and other relevant documentary evidence had been placed on record, and verified. The assessment resulted in certain expenses being disallowed to the tune of Rs.1,14,329/- and that was the only change effected to the returns. The consequential tax demand notice u/s 156 of the Act was raised for Rs.49,760/-, which was paid on 12th April, 2016. It is also evident that a questionnaire had been served on the Petitioner asking for various details, during the scrutiny

assessment. On 20th January, 2016, among the information sought from the Petitioner was a calculation of short-term and long-term capital gains, with details and explanation of dividend income. On 29th January, 2016, as part of the scrutiny assessment, proof of purchase of various shares that had been sold during the relevant year was demanded in order to ascertain whether the transactions indeed qualified for long-term capital gains. There is also a reference to charges said to have been paid by the Petitioner to the securities depository, stock exchange, and other transaction charges, with explanations being sought for justification of such amounts. Likewise, certain securities and bonds routed through the capital account were picked up for scrutiny and questions were raised.

16. In reply, various submissions had been made by the Petitioner including replies dated 13th August, 2015, 15th October, 2015, 18th January, 2016 and 28th January, 2016. The Petitioner also attended a personal hearing through an authorized representative. All of this culminated in the assessment order dated 11th March, 2016. Therefore, it is evident to us that the original assessment was an outcome of a robust examination of the returns, which included a detailed scrutiny of the trades in securities during the relevant financial year.

17. In these circumstances, it is blatantly erroneous for the Revenue to base its reassessment on the assertion that the returns had not been subjected to scrutiny assessment. Evidently, such an assertion presents a false picture, namely, that the absence of past scrutiny would justify the need to take a closer second look as to whether income may have escaped assessment.

No failure to disclose material facts:

18. It is quite clear that the invocation of Section 148 for reassessment was initiated only on 31st March, 2021, which is seven years after the end of the relevant assessment year. Section 147, as applicable at the time of issuance of the Impugned Notice (31st March, 2021), sets out certain essential ingredients for initiating reassessment after the expiry of four years from the end of the relevant assessment year. A vital ingredient for invoking the jurisdiction of Section 147 read with Section 148 is that the assessee ought to have failed to disclose all material facts fully and truly during the original assessment. The relevant extracts of Section 147 are set out below:-

> *"**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):

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:*

*Provided further ******

*Provided also ******

*Explanation 1 to Explanation 4 ******

*[****Emphasis Supplied****]*

19. Even a plain reading of the foregoing would show that a vital precondition for invoking Section 147 of the Act after the expiry of four years from the end of the relevant assessment year, is that during the original assessment, the assessee ought to have failed to fully and truly disclose all material facts necessary for the assessment.

20. We note from the record that in his objections to the proposed reassessment, the Petitioner had indeed pointed out that client code modifications for orders placed by the stock broker on the

stock market system, are a matter of what the stock broker may have done as part of his operations. The Petitioner pointed out that all the trades instructed by him had indeed been executed as instructed and they are reflected in contract notes issued to him, and indeed tally with his ledger. The trades executed for him, therefore, form part of his books of accounts and financial statements and are reflected in his tax returns, which have been scrutinized and assessed. Therefore, all trades in his returns are indeed trades that have indeed been executed, and under instructions from the Petitioner. The contract notes, the ledger entries, the computation of capital gains, all form part of the material that was made available for scrutiny during the original assessment.

21. It is seen from the notice dated 29th January, 2016 during scrutiny assessment proceedings, that the information sought by the Revenue indeed relates to securities transactions and computation of capital gains, the material for all of which had been made available during the original assessment. Therefore, there can be no reasonable basis to conclude that there had been any failure on the part of the Petitioner in disclosing all material facts fully and truly, to thereby infer that any income had escaped assessment. In this context, the Revenue's assertion that there had been no scrutiny assessment gains greater

significance. The Revenue's initial stance was that there had been no scrutiny assessment. As the pleadings in the matter progressed, the Revenue's arguments have been moulded further in the affidavit in reply to claim that since the information about client code modification by stock brokers had been received from the Deputy Director of Income-tax (Investigation), Mumbai subsequent to the original assessment, such information could not have been scrutinized.

22. It is also seen that the order dated 14th February, 2022 which was also impugned in the Petition by way of an amendment does not contain any other material except to state that the information that is arousing the Revenue's suspicion had not been available to the Assessing Officer during the original assessment. There is nothing on the record to show as to what the information relating to the client code modification was, when it was received, and how it would point to any income in the hands of the Petitioner escaping assessment. Equally, there is not a whisper that the Petitioner instructed modification of client codes.

23. It is evident that the necessary ingredient of the provisions is to establish that there is a failure on the part of the Petitioner to furnish material facts. In other words, there ought to have been a fact that is

material to the assessment in question and there ought to have been a failure on the part of the Petitioner to fully and truly disclose such fact. Put differently, the Petitioner ought to have been in possession of facts for him to be able to disclose the same and despite him having such facts in its possession he ought to have failed to make a disclosure. In the absence of such necessary ingredients, it would be impossible to invoke a provisions under Section 147 unless such jurisdictional facts are present. In our opinion, it would not be open to the Revenue to initiate reassessment on the premise that it can simply form a belief and that such belief is supported by its own reasons, thereby ignoring the explicit formulation of the jurisdiction within which reassessment may be initiated.

24. It is a matter of public knowledge that client codes entered by a stock broker at the time of execution of the trades are permitted to be modified within a stipulated time after execution, if the stock broker finds that there had been any error in entering the correct client code. In the instant case, there is nothing to show whether such modification had been effected by the stock broker to deal with his errors in execution or whether the modification was effected under instructions of the Petitioner. Besides, every transaction executed under the Petitioner's

client code and thereby captured in his books of accounts have been subjected to scrutiny assessment. If someone else's client code had been entered by the stock broker and that had been changed to the Petitioner's client code, the transaction would get captured in the Petitioner's books and would be part of the material scrutinized. If it is the Petitioner's client code that had been originally entered by the stock broker, leading to it being modified after execution, it would have no bearing on the income of the Petitioner, since it would be the person whose client code was entered upon modification, whose taxation would be impacted. Therefore, without any basis to show that there had been a failure on the Petitioner's part in making a full and truthful disclosure of material facts, the very jurisdiction to initiate reassessment as provided for in Section 147 would not be attracted.

25. It is because the Revenue cannot demonstrate a failure on the part of the Petitioner to make full and truthful disclosure of facts in his possession, that its stance has been moulded to state that such demonstration is not necessary, and it would suffice if the Revenue formulates a "reason to believe" that income has escaped assessment. We are afraid that we cannot agree to such a proposition, which would require ignoring the explicit provisions of Section 147 and supplanting it

with a new formulation as is being canvassed by the Revenue.

26. Section 147 explicitly stipulates the grounds on which, and the framework within which, such reassessment may be initiated. The Revenue has invoked the first *proviso* to Section 147(1) in order to initiate the reassessment. An essential ingredient of the first *proviso* is that no action for reassessment can be taken after the expiry four years from the end of the relevant assessment year, unless the income escaping assessment has been caused by the failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. That vital element is sorely missing in the instant case.

27. The imperative requirement of compliance with the ingredients of Section 147 and Section 148 is underlined in innumerable judgments. However, we note with approval, a judgment of a Division Bench of this Court cited on behalf of the Petitioner, in case of *Hindustan Lever Ltd. v. R.B. Wadkar*[1] (*per V.C. Daga and J.P. Devadhar JJ.*), and profitably extract the following:

> *18. Reading of proviso to section 147 makes it clear that 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*

[1] *[2004] 268 ITR 332 (Bombay)*

*income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceeding under section 147, or recompute the loss or the depreciation allowance or any other allowance, as the case may be for the concerned assessment year. However, **where an assessment under sub-section (3) of section 143 has been made for relevant assessment year, no action can be taken under section 147 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 reasons of the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year**.*

*19. In the case in hand **it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31st March, 1997 and from that date if four years are counted, the period of four years expired on 1st March, 2001**. The **notice issued is dated 5th November, 2002 and received by the assessee on 7th November, 2002. Under these circumstances, the notice is clearly beyond the period of four years**.*

*20. **The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year**. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. **It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness.** The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. **The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence.***

> ***The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record.*** *He must* ***disclose in the reasons as to which fact or material was not disclosed by the assessee*** *fully and truly necessary for assessment of that assessment year,* ***so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment****. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.*
>
> *21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of proviso to section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside.*
>
> ***[Emphasis supplied]***

28. The discussion in the case above would squarely fit the facts of the instant case too. Without anything to show that it was the Petitioner who had failed to disclose any material fact fully and truly, there is no scope for initiating reassessment. Consequently, this Writ Petition deserves to be allowed, quashing the Impugned Notice (dated 31st March, 2021), and both consequential notices under Section 143(2) (dated 30th June, 2021) and the notice under Section 142(1) (dated 21st December, 2021); and indeed, the order dated 14th February, 2022, purporting to dispose of the objections raised by the Petitioner to the

proposed reassessment.

29. Rule is made absolute in the aforesaid terms, and the Writ Petition is disposed of accordingly. There shall be no order as to costs.

30. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.] **[G. S. KULKARNI, J.]**