IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.1044 OF 2015

Bharat Jayantilal Patel ..Petitioner.

V/s.

Union of India & Ors. ..Respondents.

Mr.Percy Pardiwalla, Senior Advocate Ms.Aarti Sathe, Mr.Kalpesh Turalkar, Mr.Nikhil J., Mr.Ashish Rao i/b. M and M Legal Ventures for the petitioner.

Mr.A.K.Malhotra with Mr.N.A.Kazi for the respondents.

**CORAM : S.C.DHARMADHIKARI AND A.K. MENON, JJ.**

**DATED : 5TH MAY, 2015**

**ORAL ORDER**

1. Rule. Respondents waive service. By consent heard finally.

2. By this Writ Petition under Article 226 of the Constitution of India, the petitioner challenges the notice under section 148 of the Income Tax Act, 1961 (for short 'I.T. Act') dated 29th March, 2014 and the order dated dated 27th March, 2015 by which the objections of the petitioner-assessee to the reasons recorded by the assessing officer for reopening of the assessment

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came to be rejected.

3. The assessee, petitioner before us is an individual. He carries on business of share trading and investment in the name and style depicted in the cause title of these petitions. The petitioner is a member of the Bombay Stock Exchange. He carries on transactions in shares on behalf of his clients on which he receives brokerage that constitutes his income. In similar manner, he functions as a sub-broker on the National Stock Exchange. The petitioner has carried on share trading and speculation in shares from which activities, he has earned share trading profits and speculation profit / loss. The petitioner has made investments in shares on which he receives dividend and on the sale of the said shares, he earns capital gains also.

4. He filed his return for the assessment year 2007-08 declaring total income at ₹3,89,52,530/-, the break-up of the same has been set out in para 3 of the petition and annexure 'A' is the copy of the return filed in electronic form.

5. After filing of the return, the petitioner states that the petitioner's case was selected for scrutiny and a notice under section 142(2) of the I.T. Act dated 25th August, 2008 was issued. The petitioner appeared and filed all the requisite details required

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by the third respondent.

6. By another notice dated 12th August, 2009, the assessing officer sought details and on the points which have been set out in para 5 of the writ petition. Annexure 'B' is the copy of this notice issued by respondent No.3.

7. The petitioner has set out as to how the notices were complied with and the tax audit report, balance sheet, profit and loss account along with schedules thereof and other documents came to be filed. There were further details submitted on 12th October, 2009. Thereafter, the petitioner's representative appeared and tendered submissions. These were recorded in the letter dated 6th November, 2009. The petitioner pointed out as to how he has received dividend income which is exempt under section 10(34) of the I.T. Act. The petitioner further submitted that he has earned long term capital gains and short term capital gains in sums mentioned in para 8 of the writ petition. The petitioner pointed out as to how these amounts were offered to tax. Thus, there was a series of letters prior to the assessment order dated 14th December, 2009 under which petitioner's income was determined at ₹4,45,57,283/-. There were certain disallowances made. However, the treatment of the gains arising to the petitioner and the shares held by him by way of investment as long term capital gains and

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short term capital gains was accepted. The working thereof has been set out in the assessment order.

8. The petitioner was not satisfied with this assessment order and preferred an appeal to the Commissioner of Income Tax (Appeals) and the same was disposed of on 27th September, 2010 allowing certain grounds of the petitioner.

9. On 29th March, 2014 the third respondent issued a notice and which is impugned in the present writ petition. Annexure 'H' is a copy of this notice and the same purports to reopen the assessment and for the reasons recorded by the assessing officer.

10. On receipt of this notice, the petitioner filed a letter dated 28th April, 2014 and submitted that the return of income filed by the petitioner earlier be treated as return of income in pursuance of the notice under section 148 of the I.T. Act and at the same time, the reasons recorded for reopening the assessment be supplied to the petitioner. Annexure 'I' to the writ petition is the letter dated 28th April, 2014,

11. However, there was no response and once again the petitioner reiterated the demand by letter dated 16th July, 2014.

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12. Thereafter, the reasons recorded for reopening of the assessment were supplied and furnished on 20th August, 2014. Annexure 'K' is the copy of this communication under which the reasons came to be supplied.

13. The petitioner responded to the same by a communication dated 11th September, 2014 and pointed out as to how the reasons supplied or furnished are inadequate and do not meet the statutory requirements. The petitioner pointed out that the respondent No.3 was duty bound to dispose of the objections by a speaking order. This was pointed out by the petitioner by letter dated 8th December, 2014, a copy of which is at annexure 'M'. The petitioner complains that by a communication dated 5th March, 2015 the objections raised by the petitioner came to be rejected and without any speaking order. Annexure 'N' is a copy of this communication from the respondent No.3.

14. Thereafter, the petitioner communicated with the respondent No.3 by a letter dated 12th March, 2015 and now the grievance raised is that on 27th March, 2015 an assessment order came to be passed in pursuance of the notice under section 148 of the I.T. Act.

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15. Thus, the grievance raised is that the assessing officer did not wait for the requisite period to expire and namely, four weeks from the date of communication of the order rejecting the objections and secondly, that the said order not being in conformity with the law laid down by this Court in the case of ***Aroni Commercials Limited V/s. Deputy Commissioner of Income Tax & Anr.*** in Writ petition No.137 of 2014 decided on 11th February, 2014 [*reported in* ***(2014) 362 ITR 403***]. Thirdly, it is urged that notice purportedly issued and invoking section 147 of the I.T. Act does not satisfy the statutory requirements. The pre-conditions for reopening the assessment are that the assessing officer must have reason to believe that income chargeable to tax has escaped assessment. If the assessment is sought to be reopened after four years from the date of the assessment, then, as in this case, the reasons must disclose failure on the part of the assessee to fully and truly set out material facts necessary for the assessment for the said assessment year. The jurisdictional ingredients according to the petitioner are not satisfied. Further, it is pointed out that whether the petitioner is a investor or a trader is a matter examined at the time of the assessment order under section 143(3) of the I.T. Act. The petitioner's income has not escaped any assessment. The declared long term capital gains and short term capital gains earned on the sale of shares have been fully set out and disclosed. They form part

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of the order passed by the assessing officer as well. In the circumstances, when all requisite details were furnished, explanation offered in respect of this assessment and the earning of share income by way of capital gains, then, the requirement as set out in the proviso to section 147 of the I.T. Act has not been satisfied.

16. These contentions have been reiterated before us by Mr.Pardiwalla, learned senior counsel appearing on behalf of the petitioner. He relied upon the judgment of the Division Bench of this Court in the case of *M/s.Aroni Commercials Ltd*. (supra). That was to support the first contention. The first contention, according to Mr.Pardiwalla, is on identical terms as dealt with by this Court in *M/s.Aroni Commercials Ltd*. (supra). There as well the assessing officer without waiting for the period of four weeks had chosen to pass an assessment order. That assessment order was, therefore, completely ignored by the Division Bench and it proceeded to test the validity and legality of the notice.

17. On the legality and validity of the notice, Mr.Pardiwalla points out that there is a circular No.4 of 2007 dated 15th June, 2007 issued by the revenue. That is on the subject of a distinction between shares held as stock-in-trade and shares held as investment. The relevant and requisite steps have been laid down

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so that the assessing officer can assess the income and in case of such assessee who have two portfolios, one may be an investment portfolio comprising of securities which are to be treated as capital assets and a trading portfolio comprising of stock-in-trade which are to be treated as trading assets. The assessee may have earned income under both heads and how such income should be dealt with by the assessing officer is set out in this circular, according to Mr.Pardiwalla. Mr.Pardiwalla also submits that the reopening of the assessment is not permissible merely because of a change of opinion. He would submit that the reasons furnished completely ignore the fact that how the income has been dealt with in the assessment order and if it is dealt with and discussed in a particular manner, then, revisiting that conclusion or decision is not permissible. That would amount to proceeding on a change of opinion. He invites our attention to page 92 of the paper-book and to submit that rather than recording the reasons, the assessing officer proposes to further pursue the matter of petitioner's income. If the assessee is doing business of earning income, both as an investor and as a share broker, then, the requisite details were fully and truly disclosed. There is nothing by which the assessing officer could have reason to believe that income of more than one lakh rupees chargeable to tax has escaped assessment in the case of the assessee for the assessment year 2007-08. Further, what are the material facts and relevant to the assessment which are not

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fully and truly disclosed have not been set out in the impugned notice. He, therefore, submits that the notice be quashed and set aside.

18. On the other hand, it has been pointed out by Mr. Malhotra that the petitioner is a trader and not an investor. If this Court was to entertain this writ petition now, it would be considering disputed questions of fact. Such a course is impermissible in writ jurisdiction. Mr.Malhotra heavily relied upon the assessment order which is passed pursuant to the notice under section 148 of the I.T. Act on 27th March, 2015. For all these reasons, he would submit that the writ petition be dismissed.

19. For properly appreciating the rival contentions, we must at once refer to the undisputed factual position. In the present case, the earlier / original assessment order under sub-section (3) of section 143 of the I.T. Act was passed on 14th December, 2009. The notice under section 148 of the I.T. Act is dated 29th March, 2014. The petitioner by a letter addressed to the assessing officer sought reasons for reopening the assessment and the reasons recorded were supplied / furnished along with a communication dated 20th August, 2014.

20. The reasons recorded would be referred a little later.

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21. For the first contention of Mr.Pardiwalla to be considered, it is material to note that on 11th September, 2014 the petitioner addressed a detailed communication setting out his objections to the recorded reasons. These objections which are elaborate run into about 9 pages. Thereafter, the petitioner pointed out on 8th December, 2014 that he was required to attend the office of the Deputy Commissioner of Income Tax on 9th December, 2014. He pointed out as to how the reasons were supplied and how they have been dealt with and objected to by him. The petitioner specifically requested the assessing officer not to proceed with the scheduled hearing till the objections raised to the reasons have been disposed of by a speaking order.

22. On 5th March, 2015 a communication was addressed to the petitioner which purported to reject his objections. The objections have not been referred to in detail but what has been stated is that the case has not been reopened merely on the basis of a change of opinion. The fact that came to light during the assessment proceedings for assessment year 2011-12 are the basis for reopening the case pertaining to the assessment year 2007-08. Since the petitioner is stated to have filed a new return of income, he was called upon to attend the office with the information required on 13th March, 2015. The petitioner addressed a letter on

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12th March, 2015 and pointed out that the communication dated 5th March, 2015 was received on 12th March, 2015, but no speaking order has been passed rejecting the objections and which is required by the law laid down in the case of **GKN Driveshaft (India) Ltd. V/s. Income Tax Officer** reported in **(2003) 259 ITR 19** and **Asian Paints Ltd. V/s. Deputy Commissioner of Income Tax & Anr.** reported in **(2009) 308 ITR 195 (Bom).** The petitioner specifically invited the attention of the assessing officer to the directions in the case of Asian Paints (supra) and to the effect that if the assessing officer does not accept the objections to the reopening of the assessment or the reasons recorded, he shall not proceed further in the matter within a period of four weeks from the date of receipt or service of the said order on the assessee. Since the order dated 5th March, 2015 is stated to be rejecting the objections, then, the assessee prayed that for a period of four weeks from that order, no steps should be taken.

23. However, as has been rightly contended by Mr. Pardiwalla, ignoring this mandate in the decisions of this Court and the Hon'ble Supreme Court which has been further reiterated in *M/s.Aroni Commercials Ltd*. (supra), the impugned assessment order has been passed, that is dated 27th March, 2015. That is clearly within the period of four weeks from 5th March, 2015. The first contention of Mr.Pardiwalla, therefore, deserves acceptance as

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nothing contrary to the same has been placed before us.

24. However, we will not rest our conclusion only on the first contention. Suffice it to state that we have observed and held that the first contention deserves acceptance only to hold that we are not bound by the assessment order passed on 27th March, 2015. We are, therefore, not inclined to accept the contention of Mr. Malhotra that there are statutory remedies available to assail the assessment order and the petitioner must avail of the same.

25. We are not deciding any disputed questions of fact in our limited jurisdiction. The assessment is sought to be reopened for the assessment year 2007-08. The assessment order was passed on 14th December, 2009. The impugned notice is dated 29th March, 2014. Therefore, the requirement in law is that the assessing officer must have reason to believe that any income chargeable to tax has escaped assessment for the relevant assessment year and in this case on account of failure of the assessee-petitioner to disclose fully and truly all material facts necessary for the assessment for that assessment year. Thus, the argument is that the assessment cannot be reopened on mere change of opinion. We find in the present case that the reasons for reopening the assessment indicate that the electronic return was filed and for the said assessment year 2007-08. The short term

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capital gains are disclosed. The scrutiny assessment under section 143(3) has been completed on a total income of Rs.4,47,57,283/- after making additions on account of disallowance under section 14A of the I.T. Act. The disallowance under section 40(a)(ia) of the I.T. Act and for business promotion and motor cars. The reasons disclosed as to how income from house property, income from business or profession, income from speculation business and income from long term capital gains and income from short term capital gains and income from other sources was set out. The reasons furnished to the petitioner and in support of reopening of the assessment refer to the figures. The reasons conclude that the assessee is earning from business or profession. He has also earned income from the capital gains. The petitioner-assessee was investor or trader but he is required to be examined on certain grounds and which are indicated in detail. The grounds inter alia are that the correct characterization of securities in the books of the assessee in balance sheet and stock-in-trade or investment has to be examined. This aspect though relevant is not conclusive. The shares held as investment may be treated as stock-in-trade because of the extensive dealing and other circumstances of the case, then, the substantial nature of the transaction, magnitude of purchase and sale and ratio between purchase and sale, the holding of share is taken as a price to determine the nature of transaction. All these aspects and which have been set out in the

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reasons disclose that the revenue intends to revisit the conclusion in the assessment order. They are also sought to be revisited, without reference to the order passed by the Commissioner of Income Tax (Appeals) on 27th September, 2010. That may be an appeal preferred by the petitioner-assessee aggrieved by the assessment order and on some points and issues. However, we do not find any reference being made to this appellate order. Further, if from the record it is evident that the assessee has earned interest income amounting to ₹14,67,288/-, then, how that interest income has to be treated and assessed in law is a matter which cannot be gone into and in such details after the assessment order was passed. If these facts have not been examined while passing the assessment order, then, it is clear change of opinion on the part of the respondents. Nothing prevented the assessing officer from treating the income and in the manner suggested in these reasons. The reasons recorded do not indicate as to what aspects of the case could not be examined or were not examined for failure on the part of the assessee to fully and truly disclose material facts relevant to the assessment and for the assessment year concerned. In that regard, Mr.Pardiwalla has rightly placed reliance upon the proviso and which we have also referred above. He has brought to our notice that at page 38 of the paper-book is a copy of the communication dated 10th August, 2009, rather it is a notice under section 142 of the I.T. Act calling upon the petitioner-assessee to

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remain present and produce or sought to be produced the accounts, documents specified in the said notice. The item-wise details which have been sought pertain to the books of account and related documents and papers. They also refer to the stock valuation methods. Then, the petitioner complied with this on 24th August, 2009 and produced the tax audit report, balance-sheet, profit and loss account along with schedules, TDS certificates and copy of tax payment challans.

26. On 12th October, 2009 the petitioner pointed out the details of the office and residential address. The petitioner has also invited the attention of the assessing officer to the nature of his business and income that he earned. At page 41 of the paper-book and at serial No.7, the petitioner has set out script wise details of purchase and sale of shares. They were enclosed with the letter which has been addressed by the petitioner on 12th October, 2009. The petitioner clarified that the explanation to section 73 is not applicable as the assessee is an individual and not a company. He also mentioned that the profit is earned on the sale of shares, hence explanation is not applicable. The stock exchange membership, the card and complete details of payment made to persons specified under section 40A(2a)(b) of the I.T. Act are given in annexure 'D' the auditor's report, stock details were also furnished. The petitioner also pointed out as to how the investment

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in shares has been made for which he received dividend and capital gain income. What we find and further material for our purpose is the details which have been forwarded on 6th November. 2009 along with the letter annexure 'E', page 43. There the petitioner explained the details of the rent received, the earnings by way of long term capital gains, complete details giving the names of script, purchase quantity, amount, sale quantity, amount and profits earned have been enclosed to this letter. Similar details with regard to short term capital gains and shares are also set out (item Nos. 10 & 11 on page 44 of the paper-book). Thus, everything that was relevant, according to the petitioner and for the purpose of the assessment came to be disclosed and prior to the assessment order. Our attention has also been invited to pages 45 & 46 of the paper-book, particularly a response to the queries of the assessing officer as to why the income from the assessment could not treated as business income. In that regard, the petitioner replied as under:-

> *"With reference to your honour's query as to why income from investment should not be treated as 'business income', we are to submit that the assessee has not taken any loans whatsoever for making investments in shares. Hence investment was made entirely out of assessee's own funds only. The assessee has offered income as STCG only in respect of 11 scripts which is held for investment. The shares on which such STCG has been earned hold for more than three months in all the cases. The investment made in such shares has been shown as 'investment' in the Balance sheet*

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*year to year. Hence profit earned on sale of such Investments has correctly been classified as Income from capital gain."*

27. We find similar response at item Nos.13.3, 13.4, so also 13.5. The legal position has been summarised that the capital gains earned by the assessee should be assessed as such and not as business income. Thus, each of the queries which have been raised came to be replied and, then, there is a further communication on 11th December, 2009 under which the petitioner furnished the details of profits on share credit and calculated in the manner set out in this communication. The share transactions on which the short term capital gains and long term capital gains were computed were thus available. In the assessment order and a copy of which is at annexure 'G' at page 52 of the paper-book, we find reference being made to the membership of the petitioner of the Stock Exchange and the gains which have been declared so also the total income. There is further reference to all the communications from the petitioner. We find that the issues and which are subject matter of the impugned notice have been examined and duly considered from paras 4.3 to 4.7 of the assessment order. The issue of disallowance under section 40(a)(ia) of the I.T. Act has been dealt with from para 6.1 onwards. In the circumstances, we do not find as to on what basis the assessment could have been reopened. If not only the main contention and stand of the assessee has been dealt with but even the alternate contention and there is a reference to

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all the details which were supplied, then, there was no reason at all for reopening the assessment. We have also been shown the details in the books of account. The break-up of income is extensively referred even in the assessment order. Thus, the present one is a clear case of reopening of the assessment on a mere change of opinion and that such a course is impermissible in law is by now well settled.

28. We do not, therefore, find that the reasons which have been recorded for reopening the assessment meet and satisfy the statutory pre-conditions. Those having not being satisfied, there is no alternative but to quash and set aside the impugned notice and the assessment order following the same.

29. As a result of the above discussion, the writ petition succeeds. Rule is made absolute in terms of prayer clause (a). There will be not order as to costs.

**(A.K.MENON, J.)** **(S.C.DHARMADHIKARI, J.)**

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