



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

WRIT PETITION NO. 1783 OF 2022

Imperial Consultants and Securities Ltd.

...Petitioner

Versus

1. Deputy Commissioner of Income Tax, Circle-6(1)(2)
2. Principal Commissioner of Income-tax- 6
3. National Faceless Assessment Centre
4. The Union of India, through the Secretary

...Respondents

Mr. Nishant Thakkar with Ms. Jasmin Amalsadvala i/b. Lumiere Law Partners,
for Petitioner.

Mr. Suresh Kumar, for Respondents.

CORAM: G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.

DATE 20 DECEMBER 2024

JUDGMENT: (G. S. Kulkarni, J.)

1. Rule returnable forthwith. Respondents waive service. By consent of the parties, heard finally.
2. This petition under Article 226 of the Constitution of India challenges the legality and validity of the notice dated 31 March 2021 issued to the petitioner under Section 148 of the Income Tax Act, 1961 (for short '**the IT Act**') and an order dated 24 February 2022 disposing of the objections filed for reopening of the assessment and the consequential notice dated 14 November 2021 issued under Section 143(2) of the IT Act. It also assails the notice dated 24 February 2022 issued under Section

142(1) of the IT Act. There is a further prayer that the respondents be directed by a writ of this Court, not to act upon the impugned orders and the impugned notices.

3. The petitioner has also raised an issue in regard to the approval granted under Section 151 of the IT Act for reopening of the assessment. In this regard, a prayer is made for a direction to the respondents to furnish a copy of the approval obtained under Section 151 of the IT Act for reopening of the assessment. Considering such prayer, on 14 March 2022 after hearing the parties, a coordinate Bench of this Court granted an interim relief to the petitioner in terms of the said prayer whereby the respondents were directed to furnish to the petitioner a copy of the approval under Section 151 of the IT Act. The Court also granted an ad-interim relief, of a protection in terms of prayer clause (d) restraining the respondents from acting upon the impugned order and the impugned notices. These ad-interim orders granted by the Court continue to operate till date.

4. In pursuance of the order passed by this Court, a reply affidavit on behalf of the respondents of Shri Sandip Mandal, Deputy Commissioner of Income Tax-6(1) (2), Mumbai, is placed on record, opposing the reliefs as prayed in the petition.

5. The facts relevant for adjudication of the proceedings are : The assessment year in question is Assessment Year 2013-14. The petitioner was formerly known as “Essar Infrastructure Services Pvt. Limited”. The petitioner filed its return of income on 24 September 2013. On 20 July 2015 a notice under Section 142(1) of the IT Act was issued to the petitioner in relation to the assessment in question, calling upon the petitioner to furnish in writing and verified in the prescribed manner,

information on the thirteen requirements which were set out in the Annexure. The relevant requirements being: a brief note on the nature of business of the petitioner, copies of return of income (original and revised, if any), also significant information as sought was in regard to the balance sheet, Profit & Loss Account, Tax Audit Report alongwith relevant schedules, as also statement of computation of total income showing the working of income admitted under each head as also auditor's report in Form No.29B, in regard to Book Profit under Section 115JB alongwith computation of Book Profit and liability thereon.

6. The petitioner replied to the said notice by its letter dated 3 August 2015 furnishing the necessary information under such notice issued by him under Section 142(1) of the IT Act. The petitioner furnished copies of balance sheet, profit and loss account and tax audit report under Section 44AB for the financial year 2012-13 as also computation of total income. The petitioner also informed the Assessing Officer that the petitioner is not having any book profit and it has a business loss, hence, the tax payable as per normal provisions was higher than MAT as per Section 115JB, during the assessment year under consideration.

7. Thereafter, another notice dated 1 January, 2016 under Section 142(1) of the IT Act was issued to the petitioner whereby the petitioner was called upon to furnish information on the points/ matters specified in the annexure which were about 24 requirements, the relevant being item Nos.6, 7, 8, 9 and 10 which read thus:

“ M/s.Essar Infrastructure Services Private Limited

Annexure

... ..

6. Furnish the agreement for secured loan of Rs.1,07,85,00,000/-.
7. Furnish party wise details of deposits of Rs.2,00,82,74,877/-.
8. Furnish party wise details and ledger confirmation along with income tax return and bank statement of parties for short term borrowings of Rs.25,00,00,000/-.
9. Furnish party wise details of trade payables of Rs.5,01,81,376.
10. Furnish party wise details and ledger confirmation along with income tax return and bank statement of parties for other loans and advances of Rs.78,64,71,626/-."

8. The said notice was also replied by the petitioner by its letter dated 14 January 2016 wherein the petitioner pointed out that it was engaged in the business of rendering of infrastructure services to various companies as also it was engaged in investment and trading of shares and securities. The petitioner stated that the petitioner had incurred interest expenditure during the year which includes interest on service tax liability, profession tax liability and interest on loan. The petitioner stated that the loan on which interest had accrued was taken for the purpose of purchase of assets used in business. It was stated that such assets were given on hire and the petitioner has earned Business Support Services. The petitioner pointed out that interest on such loan was fully allowable. The petitioner also stated that the petitioner had not earned any exempt income during the period under consideration and since no exempt income was earned, there was no question of making any disallowance on account of expenses incurred for earning exempt income under Section 14A of the IT Act. The petitioner also submitted the other details namely the agreement of secured loan, the details of deposits, the details of short term borrowings alongwith confirmations, the details of all the other loans and advances

were enclosed as Annexure 2 and Annexure 4 and Annexure 6 respectively, to the petitioner's reply.

9. The petitioner contends that during the course of assessment proceedings, respondent no.1 called upon the petitioner to submit a copy of the ledger, qua the secured loans taken by the petitioner from Yes Bank, along with the details of deposits received and the agreements in that regard, details of trade payables along with ageing analysis and details of unsecured borrowings. In compliance thereto, by its letter dated 15 December 2016, the petitioner submitted all such details to respondent no.1 thereby informing that the petitioner had interest free funds of Rs.374.29 Crores in the form of zero interest debentures issued to the related parties.

10. Respondent no.1 thereafter requested the petitioner to submit the details of long term borrowings as per return of income for assessment year 2013-14 and assessment year 2012-13 which too, was complied by the petitioner by its communication dated 29 February 2016 addressed to respondent no.1. Under the cover of such letter, the petitioner submitted the details of long term borrowings availed from the related parties and the various banks which again indicated that the petitioner had interest free funds of Rs. 374.29 Crores in the form of zero interest debentures.

11. On 23 March 2016, respondent no.1 passed an assessment order under Section 143(3) of the I.T. Act in which respondent no.1 *inter alia* made a disallowance under Section 14A of the IT Act holding that the interest bearing funds were utilized for making investments which were capable of yielding income exempt under Section 10 of the IT Act. Accordingly, a disallowance of interest of Rs. 2.71 Crores paid on the borrowings was made. The assessment order passed by respondent no.1 under Section 143(3) of the IT Act was assailed by the petitioner by filing an appeal before the Commissioner of Income Tax (Appeals) which is stated to be pending.

12. It is on the aforesaid backdrop, after 5 years from the assessment order being passed under Section 143(3) of the I.T. Act on 31 March 2021, the petitioner received the impugned notice under Section 148 of the IT Act reopening the assessment for the assessment year in question. By such notice, the petitioner was called upon to file a return of income. On 30 April 2021, the petitioner filed a return of income in response to the impugned notice.

13. On 30 June 2021, respondent no.1 furnished the reasons for reopening the assessment. However, respondent no.1 did not furnish to the petitioner a copy of the approval obtained under Section 151 of the IT Act. It is the petitioner's contention that the assessment was reopened to disallow the interest paid on the borrowings during the year as according to respondent

no.1, part of the borrowings were used to give interest free advances to the related parties and it is for such reason the proportionate interest of Rs.10.49 Crores was not allowable under Section 36(1)(iii) of the I.T Act. The petitioner contends that respondent no.1 did not refer to any material or evidence to come to this conclusion that interest bearing funds were used to give interest free advances nor did he refer to any evidence to hold that interest free advances were given for other than business purpose.

14. On 23 August 2021 the petitioner filed its objections against the reopening of the assessment. The petitioner submitted that the reopening was invalid for the reason that full and true disclosure was made by the petitioner and that there was no tangible material in possession of respondent no.1 to reopen the assessment as the reopening was based on pure change of opinion. The petitioner also brought to the notice of respondent no.1 that during the year, it had interest free funds of Rs.655.49 Crores available and therefore, there could not have been any reason to believe that interest bearing funds were used to give interest free advances to the related parties and consequently, proportionate interest being not allowable under Section 36(1)(iii) of the IT Act.

15. On 14 November 2021, respondent no.1 issued to the petitioner a notice under Section 143(2) of the IT Act selecting the petitioner's return of

income filed in response to the impugned notice, for scrutiny assessment. The petitioner by its letter dated 29 November 2021 addressed to respondent no.1 requested that the objections raised against the reopening of the assessment filed under the petitioner's letter dated 23 August 2021.

16. On 24 February 2022, respondent no.3/NFAC passed an order disposing of the objections whereby it upheld the reassessment initiated by respondent no.1 vide impugned notice dated 31 March 2021. The petitioner contends that the petitioner was not issued any intimation by respondent no.1 before transfer of the reassessment proceeding to respondent no.3 as required under the provisions of Section 144B of the Act. On the very day, a notice was issued by respondent no.3 to the petitioner under Section 142(1) of the IT Act requiring the petitioner to submit certain details. To comply such requisition, the petitioner requested that sufficient time be granted to the petitioner. It was also informed that the petitioner was availing of a remedy against the reopening of the petitioner's assessment. It is in these circumstances, the petitioner is before the Court in the present proceedings.

Submissions

17. Mr. Nishant Thakkar, learned counsel for the petitioner would submit that in the present case, the reopening of the assessment is beyond the period of four years from the end of the relevant assessment year, which could be

initiated only if there is a failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment. It is submitted that in the present case, the details of the interest paid on borrowings, the details of interest free funds and interest bearing funds were on the record of the Assessing Officer, available for the assessment year under consideration. Such details were also submitted by the petitioner during the course of the proceeding by petitioner's letters dated 14 January 2016, 15 February 2016 and 29 February 2016. It is submitted that hence full and true disclosure as made by the petitioner was evident from the fact that respondent no.1 relied on the very disclosure to reopen the assessment. It is therefore submitted that there was no failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment.

18. Mr. Thakkar would next submit that respondent no. 1 has not furnished any reason as to what was the failure on the part of the petitioner in its disclosure of the facts relating to the deduction of interest claimed under Section 36(1)(iii) of the Act. It is submitted that bald statements are made by respondent no. 1 and without being substantiated, as to how the requirement of proviso to Section 147 of the Act was in any manner satisfied, in the case of the petitioner. It is, therefore, his submission that the reassessment initiated by respondent no. 1 is bad in law, being contrary to the proviso of Section 147 of the Act.

19. It is next submitted that it is a settled principle of law that reassessment cannot be initiated unless there was tangible material which had come in the possession of the Assessing Officer indicating that income chargeable to tax had escaped assessment. It is submitted that all the materials regarding the interest paid on borrowings, interest bearing loans taken by the petitioner and interest free advances given to the related parties were subject matter of disclosure in the financial statement as also all further details were submitted during the course of the assessment proceedings, by referring to letters dated 14 January, 2016, 15 February, 2016 and 29 February, 2016. It is, therefore, his submission that the reassessment is based on the same material, which was examined at the time of the original assessment. This would clearly show that there was no tangible material which had subsequently come in possession of respondent no. 1 after the assessment was finalized under Section 143(3) of the Act.

20. Mr. Thakkar would next submit that reassessment cannot be initiated on the basis of change of opinion, as Section 147 does not confer any such power to review an assessment. It is his submission that the present case is clearly a case of change of opinion, as respondent no.1 had inquired into the aspect of interest free funds and interest bearing funds borrowed by the petitioner from various parties and in fact made a disclosure of Rs.2.71 crores of interest paid on the borrowings under Section 14A of the Act was known to respondent no.

1. Mr. Thakkar would next submit that the reassessment could have been initiated only if on fresh tangible material any reason to believe could be gathered, that income chargeable to tax has escaped assessment. It is submitted that in the present case, during the year the petitioner had interest free funds of Rs.655.49 crores which were far in excess of the interest free advances of Rs.104.66 crores given to related parties. It is, therefore, submitted that respondent no.1 could not have formed any opinion so as to have any reason to believe that interest paid by the petitioner of Rs.10.49 crores is attributable to the interest free advances given to related parties and was not allowable under Section 36(1)(iii) of the Act.

21. Mr. Thakkar would next submit that there is also non-application of mind on the part of the Assessing Officer, which according to him is apparent from the reasons for reopening as furnished to the petitioner, as also clear from all the facts, which were already on record of respondent no. 1 and more importantly when the Revenue had not disputed the availability of interest free funds of Rs.655.49 crore reflected in the financial statements, the details of which were also submitted by the petitioner vide its letters dated 14 January, 2016, 15 February, 2016 and 29 February, 2016. It is submitted that despite this respondent no. 1 nonetheless has intended to reopen the assessment, on an erroneous basis that the petitioner had given interest free advances of

Rs.104.66 crores, out of interest bearing funds of Rs.159.95 crores without any material or evidence in that regard.

22. In support of the above submissions insofar as the position in law is concerned, Mr. Thakkar has placed reliance on the decision of this Court in **Saraswat Cooperative Bank Ltd. vs. ACIT¹**, **ACIT vs. Marico Ltd.²**, **Tumkur Minerals (P) Ltd. vs. JCIT³** and **First Source Solutions Ltd. vs. ACT⁴** to submit that when there was no failure on the part of the petitioner to disclose fully and truly all material facts and for such reason, the proceedings cannot be initiated in view of the first Proviso to Section 147 of the I.T. Act, to support his contention that to reopen the assessment completed under Section 143(3), there ought to exist some new material.

23. Mr. Thakkar has also placed reliance on this decision of this Court in **GKN Sinter Metals Ltd. vs. ACIT⁵**, **Lalitha Chem Industries (P.) Ltd. vs. DCIT⁶** and **Sheo Nath Singh vs. ACIT⁷** to contend that reopening based on change of opinion would be illegal as also the reopening cannot be at the *ipsi dixit* of the Assessing Officer.

1 166 taxmann.com 360 (Bom.)

2 133 taxmann.com 122 (SC)

3 145 taxmann.com 397 (Bom.)

4 132 taxmann.com 121 (Bom)

5 55 taxmann.com 438 (Bom)

6 364 ITR 213 (Bom.)

7 82 ITR 147 (SC)

Submissions on behalf of the Revenue

24. On the other hand, Mr. Suresh Kumar, learned counsel for the revenue has opposed this petition relying on the reply affidavit of Shri Sandip Mandip, Deputy Commissioner of Income-tax-6(1)(2). It is his primary submission that reopening was correctly undertaken, as interest-free loans were granted by the petitioner to its sister concern. Mr. Suresh Kumar has drawn the Court's attention to the Statement of Profit & Loss Account for the year ending 31 March, 2013 to contend that this was a clear case where the petitioner had not utilized the funds for its own business and had diverted the funds to give interest free advances to related parties. It is submitted that the petitioner had claimed finance cost, as interest on borrowed funds amounting to Rs.16,03,93,495/-. It is submitted that interest expenses on borrowed capital was allowable under Section 36(1)(iii), if the borrowed funds were used for the purpose of business. He would submit that the proportionate interest expenses therefore were not allowable expenses, which were required to be disallowed and added back in the computation of income, as opined by the Assessing Officer as set out in the reasons which were set out to reopen the assessment.

25. Mr. Suresh Kumar would next submit that the reasons for reopening would clearly indicate that there was failure on the part of the petitioner to fully and truly disclose all material facts, hence the proceedings would fall

within the purview of Explanation 1 to Section 147 of the IT Act. In supporting such submission, Mr. Suresh Kumar submits that the petitioner did not disclose that advances to the related parties were without interest. This according to him, is something which would purely fall within the purview of Explanation 1 to Section 147 permitting reopening of the assessment. It is, hence, his submission that this is not a case of change of opinion as the assessment order does not contain any discussion in regard to the loan advance to the related party nor any query is raised by the Assessing Officer during assessment. It is also his submission that the loans which were advanced by the petitioner to the related parties were not the subject matter of appeal and thus, the proviso to Section 147 is not applicable. It is hence his submission that all jurisdictional requirements to reopen the petitioner's assessment in question were met. He would also submit that approval was granted by the Commissioner in compliance of the requirement of Section 151 of the IT Act. Mr. Suresh Kumar would accordingly submit that none of the contentions as urged on behalf of the petitioner ought not to be accepted by this Court. Mr. Suresh Kumar would next submit that the present case does not deserve any interference in exercising the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution also for the reason that the petitioner has an alternate remedy of filing an appeal against the reassessment order. He would accordingly submit that the petition ought to be dismissed.

Reasons and conclusion :-

26. We have heard learned counsel for the parties. With their assistance, we have perused the record.

27. At the outset, as the proceedings pertain to reopening of the petitioner's assessment, the relevant provision being Section 147 of the IT Act as it stood at the relevant time need to be noted which read thus:-

"Income escaping assessment.

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not

necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;]

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

(emphasis supplied)

28. Having noted the provision, we may at the outset observe that the proceedings pertain to AY 2013-14. The impugned notice under Section 148

of the IT Act to reopen the petitioner's assessment was issued on 31 March 2021. Hence, this is a case which would fall within the purview of the first proviso to Section 147, as the period of four years from the end of the relevant assessment year expired on 31 March, 2018 which ordains that where an assessment under sub-section (3) of Section 143 or under Section 147 has been made for the relevant assessment year, no action shall be taken under the said provision after the expiry of "four years", from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment 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", the latter being relevant in the present case.

29. The question, therefore, would be whether any income of the petitioner chargeable to tax has escaped assessment for the assessment year in question, *inter alia* on any of the grounds falling under the first proviso to Section 147 and in the present case, primarily on the ground whether there was failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year. It would not require elaboration that in such circumstances only when any of the ingredients as falling under the first proviso stands satisfied, the Revenue would be within its jurisdiction to

take action to reopen assessment on the ground that there was income escaping assessment.

30. To consider such issue, some of the admitted facts are required to be noted:

For the assessment year in question, the petitioner had filed its return of income on 24 September, 2013 declaring loss of Rs.78,80,717/-. The case of the petitioner was selected for scrutiny by issuance of notice under Section 143(2) of the Act. The same was responded by the petitioner, when all the necessary details in regard to the petitioner's income were furnished to the Assessing Officer. After scrutiny of the return and the details and information submitted by the petitioner, the Assessing Officer completed assessment under Section 143(3) of the Act under an assessment order dated 23 March, 2016 determining income at Rs.2,75,26,250/-, after making certain disallowances, namely, disallowance under Section 14A of the Act of Rs.3,07,35,169/- and other disallowances including addition of mismatch of income in terms of Form 26AS. It is on such backdrop, the petitioner was issued a notice under Section 148 of the I.T. Act dated 31 March, 2021 to reopen the assessment whereunder the petitioner was called upon to file a return of income. In response to such notice, on 30 April, 2021, the petitioner filed a return of income. On 30 June, 2021, respondent no. 1 furnished following reasons,

which reads thus:

“Sir/Madam/M/s.

Subject : Reasons for reopening the case u/s. 147 of the I.T. Act, 1961.

Brief details of the case : The erstwhile company M/s. Essar Infrastructure Services Pvt. Ltd. has been merged in M/s. Imperial Consultants & Services Pvt. Ltd. The erstwhile company has e-filed return of income on 24.09.2013 offering loss of Rs.78,80,717/-. The case was selected for scrutiny and the scrutiny assessment order was passed u/s. 143(3) on 23.03.2016 assessing total income of Rs.2,75,26,248/-.

Brief Details of the information : Perusal of details and records, Balance Sheet and Profit & Loss A/c reveals that the assessee has given loans and advances to related parties amounting to Rs.104,66,89,883/- against which no interest income was offered. The amount of loan taken and outstanding as per the balance sheet is Rs.159,95,54,491/- and the reserves and surplus is in negative. Thus, it is clear that the assessee has not utilised the funds for its own business and has diverted the funds to non interest bearing transactions i.e. interest free advances to related parties. It is further seen that the assessee has claimed finance cost as interest on borrowed funds amounting to Rs. 16,03,93,495/- Interest expenses on borrowed capital is allowable u/s.36(1)(iii) if the said borrowed funds are used for the purpose of business. The proportionate interest expenses therefore are not allowable expenses. Accordingly, proportionate interest of Rs.10,49,55,629/- are not allowable expenses and those should had been disallowed and added back in the computation of income. By way of allowing and not adding has resulted into under assessment to this extent.

Basis of forming reasons to believe and details of escapement of income and applicability of Provisions of section 147: Therefore, I have reason to believe that by way of not adding the above stated interest expenses of Rs.10,49,55,629/- has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Satisfaction of the AO In view of the above, I have "reason to believe" that income chargeable to tax, to the tune of Rs. 10,49,55,629/- has escaped assessment for A.Y. 2013-14 within the meaning of Section 147 of the I.T. Act, 1961, on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.”

(emphasis supplied)

31. In the objection as raised by the petitioner to the aforesaid reasons for reopening, the petitioner *inter alia* contended that reassessment notice was issued to the petitioner, beyond the period of four years, from the end of the relevant assessment year, hence, the Assessing Officer was required to have 'reason to believe' not only on escapement of income, but such escapement, having occurred for the reason of either omission or failure on the part of the assessee to disclose fully and truly all material facts, necessary for the assessment. It was contended that a mere suspicion on the part of the Assessing Officer in regard to the escapement of the income cannot justify any action under the said provision. It was submitted that the powers of the Assessing Officer were not unbridled but subject to restriction imposed by the provision itself. It was also submitted that in the present case the conditions prescribed under Section 148 of the I.T. Act conferring jurisdiction were not satisfied, hence the notice on such context was invalid. It was next submitted that for the original assessment, the petitioner had provided all information which was called by the Assessing officer, the details of which were set out and it was in the context of details of secured loans, including the sanction of secured loan from Yes Bank, details of short-term borrowings along with confirmations, details of deposits received, details of other loans & advances taken, ledger copies of secured loan from Yes Bank Ltd., break up of Interest and Borrowing costs, which were also disclosed in the Audited Statements, Finance Costs etc.

were on the record of the Assessing Officer. It was further pointed out that after considering all such information and submissions as made by the petitioner, the Assessing Officer had disallowed interest costs under Section 14A of the I.T. Act under rule 8D of the I.T. Rules amounting to Rs.3,07,35,169/-. It was also categorically pointed out that there was no failure on the part of the petitioner to disclose fully and truly the material facts necessary for completion of the assessment as alleged in the reasons for reopening. The petitioner stated that in fact the petitioner had duly complied with the directions issued by the Assessing Officer during the course of the scrutiny proceedings. In such context, the petitioner also pointed out the legal position as laid down in several decisions that in the circumstances in hand, the provisions of Section 148 cannot be invoked. The petitioner also contended that this was a clear case of change of opinion, as held in several decisions of the Courts.

32. The objections of the petitioner, however, were rejected by NFAC vide order dated 24 February, 2022 relying on the documents which were available with the Assessing Officer, which is clear from the following contents of the impugned order disposing of objections:

“.....

However, “on perusal of details and records, Balance Sheet and Profit & Loss A/c reveals that the assessee has given loans and advances to related parties amounting to Rs. 104,66,89,883/-against which no interest income was offered. The amount of loan taken and outstanding as per the balance

sheet is Rs.159,95,54,491/- and the reserves and surplus is in negative. Thus, it is clear that the assessee has not utilised the funds for its own business and has diverted the funds to non interest bearing transactions i.e. interest free advances to related parties. It is further seen that the assessee has claimed finance cost as interest on borrowed funds amounting to Rs. 16,03,93,495/-, Interest expenses on borrowed capital is allowable u/s.36(1)(iii) if the said borrowed funds are used for the purpose of business. The proportionate interest expenses therefore are not allowable expenses. Accordingly, proportionate interest of Rs.10,49,55,629/- are not allowable expenses and those should had been disallowed and added back in the computation of income".

Hence the amount of Rs. 10,49,55,629/- has escaped assessment in the hand of the assessee within the meaning of section 147 of the IT Act, 1961. During the assessment proceedings, the assessee had failed to disclose fully and truly all material facts necessary for assessment. So the reopening has been rightly made by the AO in this case.

Further for the purpose of initiation of reassessment proceedings what is required is "reason to believe" but not established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed the requisite belief. JACIT Vs Rajesh Jhaveri Stock Brokers Pvt Ltd. (2007) (SC)].

3. The assessee has raised objection that the case is pending before the Ld. CIT(A) but the issues for which the case was reopened are totally different from the issues pending before Ld.CIT(A).

4. It is evident from the above discussion that the reasons recorded were not specific and against the fact as alleged by the assessee. The A.O. rightly had formed reason to believe that an amount chargeable to tax at Rs. 10,49,55,629/- had escaped assessment. The proceedings under section 147/148 of the I.T. Act, 1961 have been initiated after recording proper & valid reasons on the basis of tangible material on record. The competent authority was also satisfied with the reasons so recorded. Hence, all the objections raised by the assessee are not acceptable being not tenable in the eyes of law. Therefore, all the objections of the assessee are treated as disposed off.

5. In view of the discussion and reasoning above, objections of the assessee to the re- opening of the assessment u/s 147 for AY 2013-14 on the above grounds are hereby rejected and therefore, treated as disposed of."

33. It is in these circumstances and more particularly in the light of the reasons to reopen the assessment as furnished to the petitioner and the

aforesaid findings, as recorded by respondent no. 3/NFAC in rejecting the petitioner's objections to the reasons for reopening, we examine whether it was legal and valid for the Assessing Officer to issue the impugned notice so as to reopen the petitioner's assessment. In such context, obviously, the first consideration before the Court would be as to what can be clearly inferred from the requirements of Section 147 of the I.T. Act and when the reopening is beyond the period of four years. The first proviso to Section 147 being applicable is not in dispute, which clearly sets out that no action shall be taken under the said provisions 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 in not disclosing fully and truly all material facts necessary for assessment for the assessment year in question.

34. From the reasons for reopening of the petitioner's case under Section 147 of I.T. Act as furnished to the petitioner, it is very clear that the Assessing Officer has not stated that the petitioner has failed to disclose fully and truly all material facts necessary for assessment. In fact the reasons for reopening are clearly based on the records like Balance Sheet and Profit & Loss Account, which were already submitted by the petitioner in the course of assessment proceedings. There is not a whisper of allegations against the petitioner that income has escaped assessment attributable to the petitioner not disclosing

fully and truly all material facts necessary for assessment.

35. Perusal of the record indicates that during the assessment proceedings, there was a series of correspondence between the petitioner and the Assessing Officer to which we have made a detailed reference hereinabove. In response to such notices issued to the petitioner under the assessment proceedings, petitioner had filed detailed replies furnishing all the information which we have noted hereinabove, which would clearly go to show that there was a complete disclosure of all details in regard to the Long Term borrowings, Other long term liabilities, which included deposits received from related parties as also Short Term borrowings setting out loans repayable on demand as also on Loans and Advances from related parties, being shown in the Current Liabilities as reflected in the Statement of Profit & Loss Account. The relevant details in that regard are as under:

3. Long Term Borrowings

Particulars	As at March 31, 2013	As at March 31, 2012
	Rs.	Rs.
Debentures <u>Unsecured</u> Zero Interest Optionally convertible Debentures of Rs.100 each 20,451,157 (P.Y. 20,451,157) Zero Interest Optional Convertible Debentures of Rs.100 each	2,045,115,700	2,045,115,700
Zero Interest compulsorily fully convertible Debentures of Rs.100 each 16,978,842 (P.Y. 16,978,842) Zero Interest Compulsorily Fully Convertible Debentures of Rs.100 each	1,697,884,200	1,697,884,200
<u>Term Loan (Refer Note 4.2)</u>		

<u>Secured</u>		
From Banks	1,078,500,000	
From Others	271,054,491	281,665,167
	5,092,554,391	4,024,665,067

5. Other Long Term Liabilities

Particulars	As at March 31, 2013	As at March 31, 2012
	Rs.	Rs.
Deposits Received from Related Parties	1,269,575,600	75,000,000
Deposits from others	738,699,277	515,881,018
Total	2,008,274,877	590,881,018

7. Short-Term Borrowings

Particulars	As at March 31, 2013	As at March 31, 2012
	Rs.	Rs.
<u>Loans Repayable on Demand</u>		
<u>Unsecured</u>		
from others	250,000,000	
Total	250,000,000	

9. Other Current Liabilities

Particulars	As at March 31, 2013	As at March 31, 2012
	Rs.	Rs.
Current maturities of Long term Debts	12,057,584	5,787,636
Interest Accrued but not due on Borrowings	10,110,581	1,298,174
Interest Accrued and due on Borrowings	9,342,013	-
Statutory liabilities	21,820,285	26,392,588
Loans and Advances from Related Parties	17,204,806	477,196,932
Retention Money		16,057,255
Payable on Purchase of Fixed Assets	5,208,694	88,128,799
Other Loans & Advances	766,471,626	443,135,152
Book Overdraft	34,445,666	
Total	896,661,254	1,057,996,536

16. Short Terms Loans and Advances

(Unsecured and considered good unless otherwise stated)

Particulars	As at March 31, 2013	As at March 31, 2012
	Rs.	Rs.
Loans and Advances to Related Parties	1,046,699,883	755,646,605
Prepaid Expenses	427,243	577,045

Employee Loans & advances	1,235,616	1,967,374
Balances with Government Authorities	34,959,868	6,524,596
Others	112,417,460	87,659,867
Considered Doubtful	21,847,873	21,847,873
Less: Provision for doubtful advance	(21,847,873)	(21,847,873)
Total	1,95,730,071	852,375,486

21. Finance Costs

Particulars	For the Year ended March 31, 2013	For the Year ended March 31, 2012
	Rs.	Rs.
Interest Expenses on Borrowings	50,228,455	48,116,087
On – Service Tax	3,846,562	592,054
On – Profession Tax	3,586	-
Others	174,738	2,116,131
Other Borrowing Cost: Processing charges	106,000,000	2,893,820
Net (gain) / Loss on Foreign Currency Transactions and transaction	140,155	273,880
Total	160,393,495	53,991,972

36. It is thus clear that all such details were available with the Assessing Officer, during the course of assessment. Also in the reasons for reopening as furnished to the petitioner, the Assessing Officer had taken a clear position that from the reading of all these documents, which were on record of the assessment, an opinion was formed by him that the assessee, has not utilized the funds for its own business and had diverted the funds to non-interest bearing transactions, i.e., interest free advances to related parties. Also a further opinion that the assessee has claimed finance cost as interest on borrowed funds amounting to Rs.16,03,93,495/- and it is for such reason that proportionate interest expenses were not allowable expenses and accordingly, an amount of Rs.10,49,55,629/- was not allowable expenses, which should

have been disallowed and added back in the computation of income was formed on the basis of materials which were already on the record of the assessment proceedings. In our opinion, such statement as contained in the reasons for reopening not only breaches the mandate of the first proviso to Section 147, namely, that the assessment could be reopened only on the failure of the assessee to fully and truly disclose all material facts necessary for his assessment, but also, amounting to a clear change of opinion of the Assessing Officer. It is also a situation as good as the Assessing Officer reviewing the assessment order, so as to make additions as set out in the reasons for reopening of the assessment. This would be certainly not permissible considering the well-settled position in law as laid down in catena of judgments, which we discuss hereunder.

37. In **Andhra Bank Ltd. vs. CIT**⁸ when the Income-tax Officer knowingly allowed the change in the method of accounting during the relevant assessment years, the Supreme Court held that it was not a case of an inadvertent error or oversight and that without any new information comes from an extraneous source, the reopening of assessment under Section 147(b) of the I.T. Act was unjustified. The Court concluded that it was a case of change of information by the Income-tax Officer, which did not constitute any valid ground for reopening of assessment. The observations as made by the Court reads thus:

8 (1997) 225 ITR 447

“7. The facts stated above clearly disclose that the Income Tax Officer allowed the change in the method of accounting for the assessment years concerned herein knowingly. It was not a case of an inadvertent mistake which was discovered later on after completion of the assessment or oversight. Once it is found that the change in the method of accounting was knowingly allowed by the Income Tax Officer after taking into account all the relevant facts it is not permissible for the Income Tax Officer, or his successor, to reopen the assessment at a later point of time under Section 147(b) of the Income Tax Act unless any information comes from an extraneous source.

8. Further, we fail to see what is the "information" available to the Income Tax Officer in this case on the basis of which he is seeking to reopen the assessments under clause (b) of Section 147. We find none. Indeed, this appears to be a case of mere change of opinion. The principles enunciated in *Kalyanji Mavji & Co., case (1976)1SCC 985*, cannot save the impugned action of the Income Tax Officer.”

38. In **Siemens Information System Ltd. vs. Assistant Commissioner of Income-tax & Ors.**⁹, the Division Bench of this Court held that the Income-tax Officer does not possess the power of review, he cannot achieve that object by initiating a proceeding for reassessment or by way of rectification of mistake. The Court observed that a mere change of opinion on an interpretation of a provision by itself without anything more, cannot give rise to “reason to believe”. It was held that the power of reopening an assessment is conferred by the Legislature not with the object of enabling the Income-tax Officer to reopen the full declaration made by the assessee, in respect of questions raised that arose directly for consideration in the earlier proceedings, and that if this was not the legal position, it would result in placing unrestricted powers of review in the hands of the assessing authorities depending on their changing

9 2007 SCC OnLine Bom 1292

moods.

39. The Supreme Court in **Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd.**¹⁰ held that it was necessary to give a schematic interpretation to the words “reason to believe” failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be *per se* a reason to reopen. It was observed that it was necessary to keep in mind the conceptual difference between power to review and power to reassess. The Court held that the Assessing Officer has no power to review; he has the power to reassess, however, the reassessment has to be based on fulfillment of certain precondition, and if the concept of “change of opinion” is removed, as the department contended, then in the garb of reopening the assessment, review would take place. The relevant observations made by the Supreme Court are required to be noted, which reads thus:

“6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4- 1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the

10 (2010) 2 SCC 723

Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer."

40. In **NYK Line (India) Ltd. vs. Deputy Commissioner of Income-tax (No. 2)**¹¹ this Court held that in order to establish that the reopening of the assessment for the assessment year is not a mere change of opinion and for which the revenue must demonstrate before the Court that during the course of the assessment proceedings for the subsequent year, some new information or material had been brought on record which was not available when the assessment order was passed for the assessment year, which was not the case of the revenue. It was held that all the material which was relevant to the determination was available when the assessment was completed for the assessment year. It was held that consequently, mere formation of another view would not justify the revenue in reopening the assessment although in the said case the assessment had taken place within a period of four years. It was observed that the power to reopen assessments is structured by law. The Court held that the guiding principles which have been laid down by the Supreme Court in *Kelvinator* (supra) must be fulfilled. As there was no tangible material, no new information and no fresh material which had come before the Assessing Officer, it was held that reopening of the assessment was not

11 2012 SCC OnLine Bom 195

justified. The situation is similar to the case in hand.

41. In **Income Tax Officer, Ward No. 16(2) vs. Techspan India Private Ltd. & Anr.**¹², the Supreme Court held that the language of Section 147 of the I.T. Act makes it clear that the Assessing Officer certainly has the power to reassess any income which escaped assessment for any assessment year, subject to the provisions of Sections 148 to 153. It was further observed that the use of this power is conditional upon the fact, that the Assessing Officer has some reason to believe that the income has escaped assessment. The Court observed that the use of the words “reason to believe” in Section 147 were required to be interpreted schematically, as a liberal interpretation of the word would have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate such reassessment proceedings, merely on his change of opinion on the basis of same facts and circumstances, which were already considered by him during the original assessment proceedings. It was observed that this could not be the intention of the legislature. The Court held that the said provision was incorporated in the scheme of the I.T. Act so as to empower the assessing authorities to reassess any income on the ground, which was not brought on record during the original proceedings and escaped his knowledge, and the said fact would have material bearing on the outcome of the relevant assessment order. The Court further held that Section 147 of the I.T. Act does

12 (2018) 6 SCC 685

not allow the reassessment of an income, merely because of the fact that the Assessing Officer has a change of opinion, with regard to the interpretation of law differently on the facts which were well within the knowledge even at the time of assessment and doing so would have the effect of giving the assessing officer powers of review, as Section 147 confers power to reassess and not the power to review.

42. In **ACIT vs. Marico** (supra), the Supreme Court was considering a case where the Assessing officer had gathered the information and material from the record of the assessment and had sought to reopen the assessment after four years. It is in such context, the Court observed that it was well settled, that where the Assessing Officer exercises power of reassessment beyond the period of four years from the end of relevant assessment year, an essential requirement is that the escapement of income chargeable to tax is due to the failure on the part of the assessee to disclose truly and fully all material facts. The Court observed that this is part of Section 147 of the Act itself. It was observed that on number of occasions in various judgments of High Court and Supreme Court, this was held to be a mandatory requirement. Considering the settled principles of law, it was held that once the revenue was unable to bring to the notice of the Court any aspect or element which did not form part of the record and on the basis of which, reasons for reopening were recorded, it could be culled out that the Assessing Officer had formed a belief that income

chargeable to tax has escaped assessment purely on the basis of materials be possessed and not on new tangible materials. It was held that in clear terms, there was no failure on the part of the assessee to disclose truly and fully all material facts. It was thus held that once there was no failure on the part of the petitioner to disclose fully and truly all material facts, it was not open to the Assessing Officer to reopen the petitioner's assessment considering the clear provisions of the first proviso under Section 147 of the I.T. Act.

43. In **GKN Sinter Metals Ltd.** (supra), the Division Bench of this Court, of which one of us (Justice G.S. Kulkarni) was a member, observed that the law on re-opening of an assessment under the Act is fairly settled that the assessment once made is final. It was held that the Assessing Officer can reopen an assessment only in accordance with the express provisions provided under Section 147/148 of the Act, for the reason that there is a finality/sanctity attached to an assessment order and it is only on the Assessing Officer strictly satisfying the provisions of Section 147 of the Act, he would acquire jurisdiction to re-open an assessment. The Court held that on a mere change of opinion the impugned notice under Section 148 could not have been issued, having regard to the opinion formed in the assessment order passed under Section 143(3) of the I.T. Act. The Court observed that the Assessing Officer on the same material would cease to have any reason to believe, that income has escaped assessment in the absence of the assessee having failed to fully and

truly disclose all materials, relevant to the assessment, as held by the Supreme Court in *Kelvinator of India Ltd.* (supra). It was observed that the power to re-assess under Section 147/148 of the Act was not a power to review an order of assessment passed under Section 143(3) of the Act.

44. Adverting to the principles of law as the aforesaid decisions lay down to the facts of the present case, we may observe that the Assessing Officer in issuing the impugned notice under Section 148 of the IT Act has clearly acted without jurisdiction. This firstly for the reason that the Assessing Officer was reopening an assessment beyond the period of four years and in such context the first proviso to Section 147 was strictly applicable *inter alia* to the effect that when the petitioner/assessee had not defaulted in fully and truly disclosing all material facts necessary for his assessment for the assessment year in question, the Assessing Officer would not have jurisdiction to reopen the concluded assessment. Secondly, the reasons as furnished to the petitioner, in no manner whatsoever make out a case on the failure on the part of the petitioner to fully and truly disclose all the materials. This apart, the reasons demonstrate that the entire basis for such reopening is on the materials which was already available with the Assessing Officer, in finalizing the petitioner's assessment under Section 143(3) of the IT Act. If this be so, the Assessing Officer was acting on a complete change of opinion on the same material and / or intending to have a review of the assessment order passed by him. This was

certainly not permissible applying the settled principles of law as discussed by us hereinabove. Thus, on both the counts namely on failure of the Assessing Officer in adhering to the mandate as contained in the first proviso to Section 147, and on exceeding his jurisdiction as conferred by the said provision by forming an opinion on the same material, which was available with him in the course of assessment proceedings, was wholly an impermissible exercise of jurisdiction, to issue the impugned notice. This is writ large from the plain reading of the reasons for reopening as furnished to the petitioner. We have already observed that there was substantive correspondence between the petitioner and the Assessing Officer on all materials and subject matter of reopening and all such materials had formed part of the disclosure by the petitioner. It was, hence, clearly not permissible for the Assessing Officer to reopen the assessment on the very material on which the assessment order was passed. The law does not permit such course of action and if permitted, it would not only fall foul of the mandate of the first proviso below Section 147 but also it would amount to manifest arbitrariness and illegality resulting in drastic and unwarranted consequences being brought about to unsettle settled/concluded assessments, which the law would certainly not recognize.

45. Now coming to Mr. Suresh Kumar's contentions, we do not find ourselves in agreement with Mr. Suresh Kumar relying on "Explanation 1" below Section 147. We fail to understand as to how Explanation 1 would in any manner

dilute and/or dispense with the rigors of the specific compliance of the first proviso, when the assessment is being reopened after a period of four years. Explanation 1 merely explains that production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the preceding proviso. We may observe that this is certainly not a case where on the materials which are already produced before the Assessing Officer, the Assessing Officer has gathered or discovered further material evidence so as to construe that there was failure on the part of the assessee to make a disclosure of such materials. Moreover, there is no further tangible material which has been gathered on due diligence from the existing material and hence it is quite futile for the respondents to take recourse to this provision.

46. We are also not impressed with the contention as urged on behalf of the Revenue that the petition ought not to be entertained as the petitioner has an alternate remedy of filing an appeal. This for the reason that when the impugned reopening itself lacks compliance of the jurisdictional requirements, as ordained by the provisions of Section 147 of the IT Act, considering the settled principles of law, such Writ Petition under Article 226 of the Constitution certainly needs to be entertained and adjudicated. In plethora of decisions including those we have discussed hereinabove, the Courts have

exercised its power of judicial review, to interfere in the cases of reopening of assessment. We accordingly reject such contention as urged on behalf of the revenue.

47. In the light of the above discussion, Writ Petition needs to succeed. It is accordingly allowed in terms of prayer clause (a). No costs.

(ADVAIT M. SETHNA, J.)

(G. S. KULKARNI, J.)