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

WRIT PETITION NO. 2946 OF 2022

Lakshdeep Investments & Finance Pvt. Ltd.
3, Narayan Building, 23, L. N. Road,
Dadar (East), Mumbai 400 014. ... **PETITIONER**

V E R S U S

1. Assistant Commissioner of Income-tax,
   Circle-7(1)(1), Mumbai,
   Room No 126, 1st Floor,
   Aayakar Bhavan, M. K. Road,
   Mumbai - 400020.

2. Additional Commissioner of Income-tax,
   Range-7(1), Mumbai,
   Room No 144D, 1st Floor,
   Aayakar Bhavan, M. K. Road,
   Mumbai - 400020.

3. Principal Commissioner of Income-tax,
   Mumbai - 8, Mumbai,
   Room No 611, 6th Floor,
   Aayakar Bhavan, M. K. Road,
   Mumbai - 400020.

4. National Faceless Assessment Centre,
   Delhi.

5. Union of India,
   Through the Joint Secretary & Legal Adviser,
   Branch Secretariat,
   Department of Legal Affairs,
   Ministry of Law and Justice,
   2nd Floor, Aayakar Bhavan, M. K. Marg,
   New Marine Lines,
   Mumbai - 400020. ... **RESPONDENTS**

Mr. Nitesh Joshi i/b Mr. Atul K. Jasani, Advocate for Petitioner.
Mr. Suresh Kumar with Ms. Swapna Gokhale, Advocate for Respondents.

CORAM:- DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.

PRONOUNCED ON : 13/03/2023.

JUDGMENT : (PER VALMIKI SA MENEZES, J.) :

1. **Rule**. Rule made returnable forthwith. Heard finally with the consent of learned counsel appearing for the parties.

2. This writ petition invokes our jurisdiction under Article 226 of the Constitution of India challenging the legality and validity of the notice dated 30/03/2021 issued by respondent No.1 under Section 148 of the Income Tax Act, 1961 ("the Act") and order dated 04/03/2022 rejecting the objections of the petitioner to the aforementioned notice. The impugned notice relates to Assessment Year 2015-2016 for the previous year ending on 31/03/2015.

The facts which have led to the filing of the present petition, as stated by the petitioner, are as under :-

a] The petitioner being engaged in investment business had initial share capital of Rs.47,69,000/- being 47,690 shares at face value of Rs.100/- each; against this share capital, the petitioner's Reserves and Surplus stood at Rs.64,00,87,789/- as on 30/09/2014 with securities held by it at the book value of

Rs.19,74,88,254/- and fair market value for the shares quoted was at Rs.30,11,66,00,359/-.

With a view to raise further share capital, the petitioner issued rights shares to its existing share holders in the proportion of 10 shares to every share held at face value of Rs.100/- each, had a issue price of Rs.5,75,000/- per share. It received during that year 5% of the value of rights share and the balance 95% of the issue price was to be received upon making subsequent of calls, thus, the petitioner received an aggregate share of Rs.2,74,16,98,100/-, which transaction was duly reflected in its financial statement with necessary disclosures made in its Director's Report contained in the Statutory Annual Report of the petitioner for the Financial Year 2014-2015.

b] The petitioner filed its return of income for the Financial Year 2015-2016 on 29/09/2015 declaring total income of Rs.1,36,07,94,510/- and since the transaction of issuance of rights shares and the receipt of the share premium was on its capital account, there was no requirement of bringing the said amount to tax; however, the revenue selected the petitioner's return for scrutiny under Section 143 (2) of the Act by its notice dated 29/03/2016 and in the course of assessment proceedings, it

issued further notice under Section 142(1) of the Act on 20/07/2017 asking for hard copy of the return of income along with computation thereof, financial statements and details of share premium received during the year along with amount, names and addresses of the persons from whom it was received amongst other documents.

In response to this notice, petitioner, on 21/08/2017 provided the required information disclosing details of all the subscribers to whom rights shares were allotted which included members of the promoters family and its Associate Concerns, along with details of their names, addresses, PAN Numbers and the premium / total consideration derived from the allotment of rights shares, along with a valuation report of the shares.

c] Not satisfied with the reply, respondent No.1 issued yet another notice under Section 142 (1) of the Act on 23/08/2017 requiring the petitioner to appear before the respondent No.1 on 28/08/2017 on which date it provided all the information as sought along with valuation report of its equity shares obtained from M/s Jignesh Goradiya & Associates who had valued the shares at Rs.69,062/- per share as per the valuation methodology prescribed in Rule 11 UA of the Income Tax Rules, 1962. The

explanation was submitted in terms of Explanation below Section 56(2)(viib).

d] On 09/11/2017, the respondent No.1 issued yet another notice under Section 142(1) of the Act seeking further details of share premium received during Finance Year 2014-2015 along with valuation report, which notice was replied by the petitioner by letter dated 23/11/2017 providing all the information required; by a further communication dated 28/11/2017, the petitioner also provided respondent No.1 with a Note on the issue of rights shares made during the year.

Thereafter, respondent No.1 passed an assessment order dated 19/12/2017 under Section 143(3) of the Act accepting the income returned by the petitioner. It is the petitioner's contention that though there was no discussion in the assessment order on the question of rights shares issued at premium, the issue had been thoroughly examined by the Assessment Officer and had been accepted.

e] Since the assessment order contained certain mistakes apparent on the face of record, the petitioner filed an application under Section 154 of the Act on 15/01/2018 requesting corrections, which were allowed on 07/02/2018.

f] Thereafter, the petitioner received the impugned notice dated 30/03/2021 under Section 148 of the Act alleging therein that the reasons to be recorded, the petitioner's income chargeable to tax for assessment year 2015-2016 had escaped assessment and required the petitioner to deliver to the respondent No.2 an income return in the prescribed form; the petitioner filed its return of income tax in reply to the notice on 26/04/2021 declaring a total income of Rs.1,36,07,94,512/-.

The respondent No.1 provided the petitioner with a copy of the reasons recorded by the Officer on 25/11/2021, purporting to substantiate the reopening of its assessment; the approval obtained under Section 151 for issuance of the said notice was also sent to the petitioner.

g] Relying on the Judgment of **GKN Driveshafts India Ltd. Vrs. ITO** reported in **259 ITR 19,** the petitioner filed its objections to the notice of reopening on 30/12/2021 taking a specific defence therein that the reasons cited in the reopening notice showing that the respondent No.1 has taken Fair Market Value of rights shares at Rs.69,062/- per share as determined under Rule 11UA and taken the premium received in excess of such fair value to be treated as income chargeable to tax, amounted to a change

of opinion, which was not permissible under proviso to Section 147 of the Act, which barred the reopening of assessment, beyond four years after the relevant date.

In its objections, the petitioner also requested for copies of all the correspondence with the Revenue Audit Department, which may have formed the basis for the opinion recorded by the Assessment Officer in its reopening notice. The petitioner alleges that till date, copies of the correspondence with the Revenue Audit Department had not been furnished to it.

3. Thereafter, respondent No.4 has issued a notice under Section 143(2) and Section 142(1) of the Act dated 08/02/2022 asking for various details including explanation for the applicability of Section 56(2) (viib) to which the petitioner responded by its letter dated 18/02/2022 urging that the respondent No.4 was required to first furnish to the petitioner, the correspondence that it had with the Revenue Audit Department. Thereafter, the respondent No.4 passed the impugned order dated 04/03/2022 rejecting the petitioner's objections. In the meanwhile, the petitioner has filed the present petition under Article 226 of the Constitution of India contending that the impugned orders dated 30/03/2021 issued under Section 148 and

order rejecting the objections dated 04/03/2022 are illegal, contrary to law and suffer from arbitrariness, the reopening of assessment being without jurisdiction and contrary to the provisions of Sections 147 and 148 of the Act.

4. Heard Shri Nitesh Joshi, learned counsel for the petitioner and Shri Suresh Kumar, learned counsel for the respondents. Also, perused the material on record of the case.

5. It is submitted by the learned counsel for the petitioner that the Assessing Officer would assume jurisdiction under Section 147 of the Act, only if he had reason to believe that the assessee's income chargeable to tax for the relevant year had escaped assessment, it is submitted that in the present case, the Assessment Officer had previously accepted the method of determining the Fair Market Value of the rights shares issued which was based upon the methods provided under the Act; The Assessing Officer had recorded satisfaction in its assessment order dated 19/12/2017 passed under Section 143 (3) of the Act, and thus, there was no ground available at law to reopen the assessment.

It is further argued that the belief formed by the Assessing Officer should not be based on Audit objections, which is the case as demonstrated herein; it is further submitted that the

respondents have failed to produce the relevant information, namely, the correspondence with the Audit Department, since it would obviously favour the petitioner's case; that observations made in the impugned order that the petitioner did not suggest the formation of remedial measures for auditing or coming to a correct valuation were irrelevant and could not form the basis for the formation of the belief by the Assessing Officer for reopening. It is also argued that no specific reason having been cited, it is obvious that the officer has formed his belief as to the escapement of income only on the basis of audit objections and without any independent application of mind.

6. It is further contended by the petitioner that the assessment order having been earlier passed on 19/12/2017 for the relevant year, the assessment cannot be reopened after four years from the end of the relevant assessment year i.e. beyond 31/03/2020, unless there was failure on the part of assessee to disclose fully and truly any material facts necessary for the purposes of his assessment. There being no default on the part of petitioner to disclose fully and truly the facts necessary for assessment, the notice was beyond the period of limitation and without jurisdiction.

7. Shri Suresh Kumar, learned counsel appearing for the Revenue in support of the impugned orders, has taken us through the affidavit-in-reply dated 19/04/2022 filed by the Assistant Commissioner of Income Tax contending that the petitioner has valued shares at Rs.69,060/- under Rule 11UA as per the valuation report of M/s. Jignesh Goradiya & Associates, Chartered Accountant and claimed that the issue of process of the shares is much above the Fair Market Value of the shares resulting in escapement of income. He contends that the provisions of Section 151 to obtain approval for the reopening has been complied with and that the reasons cited in the notice dated 25/11/2021 for reopening assessment under Section 148 is based upon the fact that the wrong valuation had been assigned by the petitioner in its earlier assessment to the rights shares; that the reasons stated in the application were legal and justified for the reopening. On perusal of the affidavit of the respondents, though the petitioners have specifically averred that it has requested for copies of correspondence between the respondent No.1 and the Revenue Audit Department, which had not been provided to the petitioner, the respondents have refused to produce the same in this Court claiming the Revenue Audit to be an internal document which cannot be provided to the petitioner.

In Paragraph No.22 of the petition, the petitioner has specifically averred that in response to its submission that the Revenue Audit objections were never given to the petitioner and the same could not be the basis on which a notice for reopening could be issued, it is the contention of the revenue that the petitioner had never given any suggestion regarding the methodology of remedial measures and that in the present case, the Assessing Officer has applied his mind and formed his own opinion on the basis of material available before him. However, there does not appear to be any documents or material referred to in the impugned notice under Section 148 or even a discussion by the Assessing Officer to lead us to believe that such material was considered, or that there was application of mind to such material before proceedings to reopen the assessment.

8. A perusal of the impugned order dated 25/11/2021 would reveal that in Paragraph No.2, the respondent No.1 has only reproduced the figures which had already been considered in the earlier assessment order passed on 19/12/2017 after scrutiny and after notices were issued under Section 143(2) and under Section 142(1). In that scrutiny proceedings, a questionnaire had been issued and duly answered by the petitioner with a detailed note on the conversion of the investment into Stock in Trade, with a

valuation report of M/s.Jignesh Goradiya & Associates, which was duly considered in assessment and accepted. Thereafter, the petitioner has submitted on 15/10/2019 a reply to the report of the Deputy Commissioner of Income Tax, titled "Incorrect computation of business income", wherein it reiterates all its earlier factual stand that the working adopted towards arriving at Fair Market Value of the shares under Section 56(2) (viib) was determined at Rs.6,96,511/- and issue price of the shares was less than the Fair Market Value determined in terms of those provisions. It had also contended by the petitioner even in the earlier assessment that the capitalization of reserves does not amount to receipt of consideration for the purposes of Section 56(2) (viib) and full disclosures had been made at that relevant time. That pursuant to the rights issue, the petitioner had received 5% of the issue price and the balance amount of 95% of the price was capitalized out of its balance capital reserves. It had thus contended even before the previous assessment order and made all disclosures which were accepted by the Assessment Officer when the order dated 19/12/2017 was passed.

9. Paragraph No.2 of the reasons for the reopening has referred to the terms of the rights issue being 5% of the issue price per share and the balance unpaid amount of 95% of the issue price

amounting to Rs.5,46,250/- per share being capitalized. However, this time around, the respondent No.1 claimed that on the very same transaction and valuation, which was earlier accepted, the excess of the issue price of the share over the Fair Market Value would attract the provisions of Section 56(2) (viib) and excess price or share for the Fair Market Value would be taxable under that provision. The notice does not refer to any other information forming the basis for the reasons for reopening. This is, therefore, a clear case of a change of opinion on the very same material which was before the earlier Assessment Officer and on which basis, the first assessment order was passed after scrutiny. This line of action is impermissible under Section 147 of the Act.

10. Even otherwise, the impugned notice under Section 148 appears to suffer from total non-application of mind, in that, respondent No.1 has not considered all the documents furnished by the petitioner along with its reply / objections to the reopening notice, wherein its valuation report of all the details of calculation and disclosures made in the earlier scrutiny proceedings had been produced. The impugned notice does not even deal with a single line of the objections of the petitioner to conclude that there was some element of suppression of material by the petitioner in the previous scrutiny assessment, or that, there was any material facts,

which the assessee had failed to disclose in the earlier assessment, which had now come to the knowledge of the Assessing Officer to conclude that there was escapement of income which was assessable to tax. In **ITO Vrs. Lakhmani Mewal Das**, reported in (**1976) 103 ITR 437,** the Hon'ble Supreme Court interpreted the provisions of Section 147 of the Act and held as under :-

> " ..... the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words 'definite information' which were there in Section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in Section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence."

In **Ankita A. Choksey Vrs. ITO (Bom),** reported in (**2019) 411 ITR 207 (Bom),** this Court, while dealing with the requirements of a notice under Section 148 of the Act and the compliance with the provisions of Section 147 has held as under :-

"6. It is a settled position in law that the Assessing Officer acquires jurisdiction to issue a reopening notice only when he has reason to believe that income chargeable to tax has escaped assessment. This basic condition precedent is applicable whether the return of income was processed under section 143(1) of the Act by intimation or assessed by scrutiny under section 143(3) of the Act. (See Asst. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 291 ITR 500 (SC) and Principal CIT v. Shodiman Investments P. Ltd. [2018] 93 taxmann.com 153 (Bom)). Further, the reasons to believe that income chargeable to tax has escaped assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and prima facie, establish that the facts stated by it in its reasons as recorded are correct. In the absence of the order of objections dealing with the assertion of the assessee that the correct facts are not as recorded in the reason, it would be safe to draw an adverse inference against the Revenue.

7. Thus, we are of the view that even in cases where the return of income has been accepted by processing under section 143(1) of the Act, reopening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under section 143(1) of the Act, does not give the Assessing Officer a carte blanche to issue a reopening notice. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the reopening notice. In the present case, the Assessing Officer has proceeded on fundamentally wrong facts to come to the reasonable belief/conclusion that income chargeable to tax has escaped assessment. Further, even when the same is pointed out by the petitioner, the Assessing Officer in his order disposing of the objection does not deal with factual position asserted by the petitioner. Thus, it would be safe to conclude that the Revenue does not dispute the facts stated by the petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment."

In **Ankita A. Choksey** (supra), this Court has made specific reference to the fact that the Assessing Officer must deal with the specific objections of the petitioner when the same is pointed out in its reply, while disposing of the objections. It further holds that when the Assessing Officer in its order disposed of objections does not deal with the factual position asserted by the petitioner, it would be safe to conclude that the revenue does not dispute the fact stated by the petitioner and thus, there could be no reason for the Assessing Officer to believe that the income chargeable to tax has escaped assessment. In the present case, a perusal of the impugned order dated 04/03/2022 quotes a large number of Judgments and Case Laws numbering 10 pages out of total of 13 pages, however, it does not deal with a single contention raised by the petitioner in its objection, nor does it even refer to any of the facts or documents referred to in the objections. In fact, the order rejecting the objections has not even once adverted to the valuation report submitted by the petitioner during the earlier assessment proceedings after scrutiny, nor does it refer to the method used by the petitioner for valuation. It therefore appears that the only reason and purpose for issuing the impugned notice under Section 148 appears to be that the Assessing Officer has come to a different opinion on the question

of valuation from one adopted by the petitioner, which has been accepted in the earlier assessment order dated 19/12/2017.

11. For the reasons stated above, we are of the opinion that the impugned notice dated 30/03/2021 issued under Section 148 of the Act is without jurisdiction and is barred by limitation; consequently, the impugned order dated 04/03/2022 which dismisses the objections of the petitioner, is also quashed and set aside.

12. Rule is made absolute in terms of Prayer Clause (A) of the petition. No costs.

[VALMIKI SA MENEZES, J.] [DHIRAJ SINGH THAKUR, J.]

Choulwar