

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1246 OF 2012

Shri. Ghanshyam K. Khabrani.

..Petitioner.

Vs.

**Assistant Commissioner of Income Tax
Circle-1,Thane and ors.**

..Respondents.

**Mr. J.D. Mistri, Sr. Advocate with Mr. Madhur Agarwal and Mr.
Atul K. Jasani for the Petitioner.**

Mr. Suresh Kumar for the Respondent.

**CORAM : DR.D.Y.CHANDRACHUD &
M.S. SANKLECHA. JJ.
March 12, 2012.**

ORAL JUDGMENT : (Per Dr. D.Y. Chandrachud, J.)

Rule; with the consent of learned Counsel for the parties returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2 In this proceeding under Article 226 of the Constitution, the petitioner has questioned the legality of a notice issued on 30 March 2011 under Section 148 of the Income Tax Act, 1961 proposing to reopen an assessment for Assessment Year 2004-05. The Assessee is an Advocate. For Assessment Year 2003-04, he filed a return of income on 17 November 2003 declaring an income of Rs. 1.99 crores. A notice was issued under Section 143(2) since the case

was selected for scrutiny and an order was passed on 26 December 2005 accepting the return of income submitted by the Assessee. The assessment for Assessment Year 2003-04 was reopened and a notice was issued under Section 148 on 25 March 2010. Pursuant thereto, a fresh order of assessment was passed on 27 December 2010 by which the Assessing Officer made an addition in the amount of Rs.4.9 crores and determined the total assessed income at Rs.6.89 crores. The Assessing Officer, in his order of assessment noted that an N.R.I. by the name of C. K. Pithawalla had advanced an amount of U.S. Dollars 7.3 million in 1995 to M/s. Asian Broadcasting Network. A Criminal Proceeding appears to have been instituted under the Indian Penal Code. The dispute was settled and the criminal case was withdrawn on 19 April 2003. The Assessee in his original return had disclosed an amount of Rs.2.00 crores as having been received by him for professional services rendered in connection with the criminal complaint filed by the creditor above named. The Assessing Officer noted that the creditor had in a statement made before the Enforcement Directorate stated that an amount of Pound Sterling 6,050,000/- was received in repayment of the loan. According to the Assessing Officer, the record shows that the Assessee received an amount of Pound Sterling 6,50,000/- in his bank account at Zurich. The Assessing Officer held that these payments which were received by the Assessee abroad were on account of services rendered by him in connection with the settlement of the criminal case in India. The Assessee had sought to set up the case that during 2003-04 he was employed in Dubai as Vice President (Legal) for a company and had received a consideration of Pound Sterling 6,50,000/- on account of his employment. The Assessee claimed that his total stay during

2003-04 abroad was 220 days and for the purpose of income tax he was an N.R.I. during that year. The Assessing Officer rejected the case of the Assessee noting that the so called employer had no establishment at Dubai; that it had not sponsored any visa for the Assessee for his employment and the Assessee had resided out of India only by availing of a visitor's visa. On this count, the Assessing Officer held that the Assessee had received an amount of Pound Sterling 6,50,000/- on account of professional services rendered in India, the value of which as on 31 March 2003 was Rs.4.9 crores. The Assessee had contended that the amount was not liable to tax in Assessment Year 2003-04 since it was received in the succeeding financial year. The Assessing Officer held that as a matter of fact the amounts were deposited in the bank account of the assessee outside in India in the financial year 2003-04 but the Assessee had intentionally received the amount in a foreign country in the next financial year to evade the payment of tax. Hence, the entire receipt corresponding to Pound Sterling 6,50,000 was taxed for Assessment Year 2003-04.

The Assessee filed his return of income for Assessment Year 2004-05 on 2 September 2004. An intimation was issued under Section 143(1). On 30 March 2011, a notice was issued under Section 148 purporting to reopen the assessment for Assessment Year 2004-05. The reasons which have been disclosed to the Assessee in reopening the assessment are as follows:

“A letter being No.KYN/Addl. DIT (Inv.)/TEP/2009-10/284 dated 11 March 2010 is received from Additional D.I.T. (Investigation), Kalyan. On going through the letter it is gathered that one Mr. Ghanshyam Khushaldas Khabrani residing at C/o Dyal K. Khabrani, 5th floor, Ghanshyam Nagar, Thane (E) having PAN AAKPK 4580 D has received roughly Rs.10 crores during F. Y. 2002-03 i. e. A.Y. 2003-04. On verification of record, it is observed that the Assessee has not offered this amount for taxation in R/I for A.Y. 2003-04.

2 Order u/s. 143(3) read with Section 147 has been passed on 27 December 2010, it is clearly mentioned by the AO that in F.Y. 2003-4 an amount of 6,50,000/- GBP was received by Mr. Khabrani in his foreign bank account i.e. Lloyd-TSB at Zurich. The assessee has filed his return of income for A.Y. 2004-05 by claiming the status of NRI. The assessee claimed that his stay outside India during F.Y. 2003-04 was 202 days and he was an NRI. As such his income earned abroad was not liable for taxation in India. The A.O. observed that the Assessee stayed outside India not wholly on account of employment purpose as his substantial stay during this period was by availing the visitor's visa.

3 The A.O. has passed assessment order u/s. 143(3) read with Section 147 for A.Y. 2003-04 by making an addition of Rs. 4.9 crores. Since, the income of Rs.5.1 crores is remained to be taxed for A.Y. 2004-05 as mentioned in para-1 above and therefore, I have a reason to believe that the income of Rs. 5.1 crores chargeable to tax has escaped assessment for A.Y. 2004-05.

4 Since the period to issue a notice is beyond 4 years, proposal u/s. 151 of the I.T. Act to re-open the assessment is put up to the CIT-I, Thane through proper channel and in the prescribed format.”

3 Learned Senior Counsel appearing on behalf of the Assessee submitted that:

i) The reasons which have been disclosed would indicate that the basis of the reopening is a letter dated 11 March 2010 of the Additional DIT (Investigation) to the effect that an amount approximately of Rs.10 crores was received by the Assessee during the financial year 2002-03 corresponding to Assessment Year 2003-04. The reasons disclosed that in the relevant year of assessment under Section 143(3) read with Section 147 for Assessment Year 2003-04, an addition of Rs.4.9 crores was made. Since, however, an amount of Rs.5.1 crores remained to be taxed, this amount is sought to be taxed as income having escaped assessment for Assessment Year 2004-05 which is the next Assessment Year.

According to the Assessee, ex-facie, this will indicate that the Assessing Officer could not have any reason to believe that there was escapement of income for Assessment Year 2004-05, since even according to the Revenue, income which has been received in Assessment Year 2003-04 has escaped assessment;

ii) There is no tangible material on record on the basis of which the assessment can be reopened beyond a period of four years of the end of the relevant Assessment Year. The letter of the Additional DIT dated 11 March 2010 was available when the order of assessment for Assessment Year 2003-04 was passed, over 9 months thereafter on 27 December 2010. The order of assessment brought an additional amount of Rs.4.9 crores to tax for Assessment Year 2003-04. Hence, there is absolutely no fresh or tangible material on the basis of which the assessment is sought to be reopened for Assessment Year 2004-05;

iii) The DCIT issued a notice for reopening on 30 March 2011 when as a matter of fact approval was received with reference to the provisions of Section-151 from the Commissioner of Income Tax on 31 March 2011. Hence, on the date on which the notice of reopening was issued, the Assessing Officer was not in receipt of the approval which is required under Section 151;

(iv) Under Section 151(2) the approval was required to be issued by the Additional Commissioner of Income Tax. In the present case, the Additional Commissioner has not granted approval. The Additional Commissioner of Income Tax forwarded the proposal

submitted by the Assessing Officer to the CIT. Since the reopening of the assessment has not been effected with the approval of the authority having jurisdiction in the matter, the reopening of assessment is contrary to law.

4 On the other hand, it has been urged on behalf of the Revenue that:

(i) The reopening of the assessment is based on the circumstance that information was received in a tax evasion report to indicate that the Assessee was in receipt of an amount of Rs.10 crores of which only amount of Rs.4.9 crores was brought to tax in the assessment for Assessment Year 2003-04. Consequently, the balance of Rs.5.1 crores is sought to be taxed for Assessment Year 2004-05;

ii) The authority required to grant its approval to the reopening of the assessment was the Additional CIT and the approval has been granted as a matter of fact by the Commissioner of Income Tax as communicated on 29 March 2011. But, the forwarding letter of the Additional CIT would indicate that he was satisfied of the circumstances which warranted grant of an approval;

(iii) Though the approval of the CIT was received in the office of the Assessing Officer on 31 March 2011, the Assessing Officer when he issued a notice of reopening on 30 March 2011, should be regarded as being aware of the fact that the CIT had remitted his communication dated 29 March 2011 recording the grant of approval.

5 These submissions now fall for examination.

The assessment for Assessment Year 2004-05 is sought to be reopened by issuing a notice dated 30 March 2011 beyond a period of 4 years of the end of the relevant Assessment Year. Earlier, the Assessment for Assessment Year 2003-04 was reopened by issuing a notice under Section 148. The reopening of the Assessment for Assessment Year 2003-4 culminated in an order of assessment dated 27 December 2010 by which the Assessing officer made an addition of Rs.4.9 crores to the returned income of the assessee. The Assessing Officer noted that though the amount had been received by the Assessee in his bank account during financial year 2003-04 (which would correspond to Assessment Year 2004-05) the assessee had intentionally received that amount in the next year to evade the payment of tax. The receipt of Rs.4.9 crores was hence brought to tax for Assessment Year 2003-04. The reasons on the basis of which the assessment for Assessment Year 2004-05 is now sought to be reopened are founded on a letter dated 11 March 2010 received from the Additional Director of Income Tax (Investigation). A gist of the letter is contained in the first paragraph of the reasons disclosed to the Assessee. A copy of the letter has been handed over to the Court during the course of hearing by learned Counsel for the Revenue. In the letter dated 11 March 2010, the Additional DIT (Investigation) addressed the following communication to the Additional CIT, Range I, Thane:

“1 Kindly find enclosed herewith tax evasion petition dated 15 February 2010 categorised as X in the case of Ghanshyam Khushaldas Kharbani residing at C/o Dyal K. Khabrani, 5th floor, Ghanshyam Nagar, Thane (E) having PAN AAKPK4580D. The TEP is being forwarded to you as the jurisdiction over the case rests with Range-1 Thane.

2 As per Para 2 of Page No.2 of the TEP, it is seen that the concerned assessee received roughly Rs.10 crores on which he had not paid taxes. The transaction pertains to A.Y. 2003-04 for which corrective action requires to be taken urgently as the case is getting time barred on 31 March 2010.

3 You are requested to kindly have it examined and take suitable action at your end.”

Ex-facie, it is clear from the letter and from the reasons recorded that the case of the Revenue is that an amount of Rs.10 crores was received by the Assessee in the previous year relevant to Assessment Year 2003-04. Moreover, the reasons note that the Assessing Officer passed an order, having reopened the assessment for Assessment Year 2003-04, by making an addition of Rs.4.9 crores. The balance of Rs. 5.1 crores which remained to be taxed for Assessment Year 2003-04 is brought to tax for Assessment Year 2004-05. It is evident on these admitted facts that no reasonable person duly informed in law could

have formed a reason to believe that there was an escapement of income in Assessment Year 2004-05. The case of the Revenue is that an amount of Rs.10 crores was received by the Assessee during the Financial Year corresponding to Assessment Year 2003-04 but has not been brought to tax. That being the position, it is impossible to comprehend as to how the Assessment for Assessment Year 2004-05 can be reopened. The proceedings for Assessment Year 2003-04 are pending in appeal. The Revenue is at liberty to seek recourse to its legitimate powers available in law in relation to Assessment Year 2003-04 where the appeal is pending. The mandatory requirement of Section 147 is that there must be a reason to believe that income has escaped assessment. Ex-facie the reasons which were disclosed to the Assessee cannot form the basis of a reason to believe that income has escaped assessment for Assessment Year 2004-05. Moreover, it is evident that even the letter dated 11 March 2010 of the Additional DIT (Investigation) was much prior to the finalization of the Assessment for Assessment Year 2003-04 on 27 December 2010. Therefore, this is not a case where there is any tangible material on the basis of which the assessment for Assessment Year 2004-05 can legitimately be opened.

6 The second ground upon which the reopening is sought to be challenged is that the mandatory requirement of Section 151(2) has not been fulfilled. Section 151 requires a sanction to be taken for the issuance of a notice under Section 148 in certain cases. In the present case, an assessment had not been made under Section 143(3) or Section 147 for A.Y. 2004-05. Hence, under sub section 2 of Section 151, no notice can be issued under Section 148 by an

Assessing officer who is below the rank of Joint Commissioner after the expiry of 4 years from the end of the relevant Assessment Year unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. The expression "Joint Commissioner" is defined in Section 2(28C) to mean a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under Section 117(1). In the present case, the record before the Court indicate that the Assessing Officer submitted a proposal on 28 March 2011 to the CIT(1) Thane through the Additional Commissioner of Income Tax Range (I) Thane. On 28 March 2011, the Additional CIT forwarded the proposal to the CIT and after recording a gist of the communication of the Assessing Officer stated that :

"As requested by the A.O. Necessary approval for issue of notice u/s. 148 may kindly be granted in the case, if approved."

On this a communication was issued on 29 March 2011 from the office of the CIT (1) conveying approval to the proposal submitted by the Assessing officer. There is merit in the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under Section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in Section 2(28C). The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C). In

the present case, the Additional Commissioner of Income Tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income Tax. The approval which has been granted is not by the Additional Commissioner of Income Tax but by the Commissioner of Income Tax. There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the **Delhi High Court in Commissioner of Income Tax Vs. SPL'S Siddhartha Ltd. (ITA No.836 of 2011** decided on 14 September 2011) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court.

7 In view of the findings which we have recorded on submissions (i), (ii) and (iv), it is not necessary for the Court to consider submission (iii) which has been urged on behalf of the Assessee. Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of Section 147 and 151(2), the notice reopening the assessment cannot be sustained in law.

8 For these reasons, we are of the view that the petitioner would be entitled to succeed. Rule is made accordingly absolute by

quashing and setting aside the impugned notice dated 30 march 2011. There shall be no order as to costs.

(DR. D.Y. CHANDRACHUD, J.)

(M. S. SANKLECHA. J.)