

\$~

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

12.

+

**W.P.(C) 1569/2015 & CM No.2800/2015**

DUSHYANT KUMAR JAIN

..... Petitioner

Through: Mr S. Krishnan, Advocate.

versus

DEPUTY COMMISSIONER OF INCOME TAX  
& ANR.

..... Respondents

Through: None.

**CORAM:**

**JUSTICE S.MURALIDHAR**

**JUSTICE VIBHU BAKHRU**

**ORDER**

% **15.01.2016**

**Dr. S. Muralidhar, J.:**

1. This is a writ petition under Article 226/227 of the Constitution of India praying for issuance of a writ of certiorari and quashing of the notices dated 14<sup>th</sup> March, 2014 and 23<sup>rd</sup> June, 2014 issued by the Income Tax Officer ('ITO'), Ward 39(2), New Delhi and the Assistant Commissioner of Income Tax ('ACIT'), Circle 39(1), New Delhi respectively under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the assessment for Assessment Year ('AY') 2007-08.

2. Notice was issued in this petition on 20<sup>th</sup> February, 2015 and stay was granted for further proceedings. Pursuant to the notice, a counter affidavit was filed by the Respondent. Today, despite a pass over, none has appeared for the Respondent. The Court is, accordingly, proceeding in the case after hearing learned counsel for the Petitioner, Mr Krishnan, and after examining

the counter affidavit filed by the Respondent.

3. The Assessee filed a return of income for AY 2007-08 on 18<sup>th</sup> September, 2007 declaring an income of Rs. 38,76,580. The Deputy Commissioner of Income Tax ('DCIT'), Circle 39(1), who is the Assessing Officer ('AO') of the Assessee, issued a notice to the Assessee under Section 142(1) of the Act on 10<sup>th</sup> October, 2008 raising certain queries and calling for records. These were furnished by the Assessee on 3<sup>rd</sup> November, 2008. On 13<sup>th</sup> April 2009, an assessment order was passed by the AO under Section 143(3) of the Act.

4. In terms of the provisions to Section 147 of the Act, the limitation for reopening the assessment expired on 31<sup>st</sup> March, 2012. The extended period of limitation in terms of Section 149(1)(b) of the Act expired on 31<sup>st</sup> March, 2014.

5. On 14<sup>th</sup> March, 2014, the first impugned notice was issued to the Assessee under Section 148 of the Act by the ITO, Ward 39(2) recording the reasons for reopening of the assessment. A copy of the said reasons has been placed on record. It states that a letter dated 26<sup>th</sup> March, 2013 was received from the office of the Chief Commissioner of Income Tax, Delhi-1 (CCIT) forwarding a letter dated 19<sup>th</sup> March, 2013 received from the Commissioner of Income Tax ('CIT'), Central-II, New Delhi along with a CD containing the details of certain accommodation entries provided by Shri Rakesh Gupta, Shri Vishesh Gupta, Shri Navneet Jain and Shri Vaibhav Jain "directing this office to take necessary action as per Section 148 in respect of entries pertaining to AY 2007-08, which is time barring on 31<sup>st</sup> March, 2014". The reasons then proceeded to set out the contents of the information provided

by the CIT by the letter dated 19<sup>th</sup> March, 2013. Thereafter, the reasons recorded by the ITO, Ward 39(2) were: “In view of the above I have reasons to believe that income chargeable to tax amounting to Rs.53,97,053/- pertaining to FY 2006-07 relevant to AY 2007-08 has escaped assessment and it is a fit case for initiation of proceedings under Section 147 of the Act”.

6. Immediately, on receipt of the above reasons, the Petitioner addressed a letter dated 9<sup>th</sup> April, 2014 to the ITO, Ward 39(2) *inter alia*, pointing out that he does not have any jurisdiction over a case which was completed by the AO who was the DCIT, Circle 39(1). A copy of the return filed for AY 2007-08 was enclosed. Accordingly, the ITO Ward 39 (2) was requested to drop the proceedings under Section 148 of the Act.

7. This was followed by another notice dated 23<sup>rd</sup> June 2014, again under Section 148 of the Act, issued this time by the ACIT, Circle 39(1), the AO of the Assessee stating that she had reasons to believe that the Assessee's income of Rs. 53,97,053/- for AY 2007-08 had escaped assessment. The said notice dated 23<sup>rd</sup> June, 2014 was beyond the deadline of 31st March, 2014 in terms of Section 149(1)(b) of the Act.

8. The Assessee, in response to the above notice, addressed a letter dated 27<sup>th</sup> June, 2014 to the ACIT drawing attention to the above facts and pointing out that the notice was invalid and void as it was issued beyond four years (in terms of Section 147) and six years (in terms of Section 149 of the Act).

9. On 7<sup>th</sup> November, 2014 a notice was received under Section 143(2) of the Act from the DCIT, Circle 39(1) requiring the petitioner to attend his office on 11<sup>th</sup> November, 2014 at 4:30 pm.

10. On 12<sup>th</sup> November 2014, the Petitioner replied to the above notice pointing out that objections had already been filed in response to the notice under Section 148 of the Act. Another copy of the income tax return filed by the Assessee for AY 2007-08 was enclosed. The DCIT, Circle 63(1) issued a notice on 1<sup>st</sup> December, 2014 under Section 142(1) of the Act alleging non compliance of the Show Cause Notice issued to the Petitioner. This was for AY 2012-13. On 8<sup>th</sup> December, 2014, the Assessee wrote to the said DCIT pointing out that no notice relevant to AY 2012-13 had ever been served under Section 142(1) of the Act and, therefore, the question of non compliance did not arise. This was followed by final Show Cause Notice issued by the DCIT, Circle 63(1) on 28<sup>th</sup> January, 2015, this time for AY 2007-08, but referring *inter alia* to the notice dated 1<sup>st</sup> December, 2014.

11. On 28<sup>th</sup> January, 2015 an order was passed by the DCIT, Circle 63(1) rejecting the objections filed by the Assessee to the reopening of the Assessment. It was stated that "the Assessee has neither complied with the notice under Section 148 dated 14<sup>th</sup> March, 2014 nor filed any return in response." It was further stated: "In addition to the information provided in the mentioned letter it is further clarified that the notice under Section 148 dated 14<sup>th</sup> March, 2014 was issued after obtaining prior approval of the JCIT, Range-39 who had the authority over the jurisdiction of the case."

12. One of the main points urged in the present petition is that the reopening

of the assessment sought to be made under Section 148 of the Act is bad in law since the notice dated 14<sup>th</sup> March, 2014 for AY 2007-08 had been issued and the reasons for re-opening had been recorded by the ITO Ward 39(2), who was not the AO as far as the Petitioner was concerned for the AY in question. As far as the second impugned notice dated 23<sup>rd</sup> June, 2014 is concerned it was issued by the AO of the Petitioner but well beyond the period of limitation in terms of Section 149(1)(b) of the Act which expired on 31<sup>st</sup> March, 2014.

13. In the counter affidavit filed on behalf of the Respondent, the above objections are sought to be met by stating in para nos.7 and 8 as under:

“7. It is pertinent to mention that the notice u/s.148 of the Act was a valid notice and was issued as per the procedure laid down in the I.T. Act, 1961. The notice u/s 148 was issued by the ITO Ward No.39(2) New Delhi on 14.3.2014 who was the legitimate Assessing Officer as far as the jurisdiction is concerned. As per Section 2(7A) of the Act, the Assessing Officer means the Assistant Commissioner of Income Tax, Deputy Commissioner of Income Tax, Additional Commissioner of Income Tax or Deputy Director of Income Tax or the Income Tax Officer who is vested with the relevant jurisdiction by virtue of direction or orders issued under sub-section (1) or sub-section (2) of Section 120 or any other provision of the Income Tax Act, and the Additional Commissioner or Additional Director or Joint Commissioner or Joint Director who is directed under clause (b) of Sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an Assessing Officer under the Act. The ITO Ward No.39(2) New Delhi has issued the notice u/s 148 after recording the reasons for reopening. A copy of the said reasons was also sent to the Assessee along with the notice.

8. Subsequently the file was transferred to Assistant Commissioner of Income Tax Circle 39(1) New Delhi as the income was more than Rs.20 lakhs, and the Assistant Commissioner of Income Tax Ward 39(1) had again issued the notice dated 23.6.2014 under section 148.”

14. It is further averred in the counter affidavit that the grounds urged by the Assessee are ‘frivolous’ ‘untenable’ and ‘unsustainable’.

15. What is evident from the counter affidavit filed by the Respondent is a clear admission that the officer who issued the notice dated 14<sup>th</sup> March, 2014, and recorded the reasons for re-opening the assessment, i.e. the ITO Ward 39(2) was not the AO of the Assessee. That single fact in itself vitiates the reopening of the assessment. What is also evident is that, perhaps realising the error, a subsequent notice dated 23<sup>rd</sup> June 2014 under Section 148 was issued by the AO of the Assessee. However, it was beyond the deadline of 31<sup>st</sup> March, 2014 under Section 149(1)(b) of the Act.

16. The reasons given by the Department in its counter affidavit do not in any way explain the patent illegality in invoking the powers under Section 148 of the Act for reopening the assessment of the Assessee for AY 2007-08. The mere fact that the definition of an AO in terms of Section 2(7-A) of the Act includes a DCIT and other superior officers or an ITO of some other ward who may be vested with the relevant jurisdiction by virtue of orders issued under Section 120 (1) or Section 120 (2) of the Act will not make a difference to the above legal position. The reason is not far to seek. It is only the AO who has issued the original assessment order dated 13<sup>th</sup> April 2009 for AY 2007-08 under Section 143 (3) of the Act who is

empowered to exercise powers under Section 147/148 to re-open the assessment. This is because he alone would be in a position to form reasons to believe that some income of that particular AY has escaped assessment. This again cannot be based on a mere change of opinion. Further, in terms of Section 151 of the Act such a move will have to have the prior approval of the CIT. Under the scheme of the Act, if a superior officer forms an opinion that the original assessment order is prejudicial to the interests of the Revenue, recourse can be had to Section 263 of the Act. In any event the question of an ITO who is not the AO who passed the original assessment order under Section 143 (3) of the Act for particular AY, exercising the powers under Sections 147/148 of the Act to re-open that assessment does not arise.

17. Consequently, this Court quashes the notices dated 14<sup>th</sup> March 2014 and 23<sup>rd</sup> June 2014 as well as the order dated 28<sup>th</sup> January, 2015 passed by the DCIT rejecting the objections of the Petitioner. The writ petition is allowed and the application is disposed of in the above terms but, with no order as to costs.

**S.MURALIDHAR, J**

**VIBHU BAKHRU, J**

**JANUARY 15, 2016/MK**