IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

WRIT PETITION NO. 3177/2022

Gandhibag Sahakari Bank Limited, Having its registered Office at 357, Gandhibag Sahakari Bank Limited, Ruikar Road, Mahal, Nagpur – 440 002, Maharashtra, India. Through its Chief Executive Officer/Authorized Representative, Bhanudas Pandurangji Vyawahare, Aged about 56 years, Residing at : Row House No.14, Nirmal Nagari, Umrer Road, Near Shitla Mata Mandir, Hanuman Nagpur, Nagpur – 440 009, Maharashtra, India. PETITIONER

.....VERSUS.....

1. Deputy Commissioner of Income Tax/Assistant Commissioner of Income Tax, Circle – 4, Nagpur, Income Tax Office, Saraf Chambers, Sadar, Nagpur - 440 001, Maharashtra – 440 001, India. Email: nagpur.dcit4@incometax.gov.in
2. Additional/Joint/Deputy/Assistant Commissioner of Income Tax/Income-tax Officer, National Faceless Assessment Centre, Delhi.
3. Additional/Joint Commissioner of Income Tax, Range-4, Nagpur, Aayakar Bhawan, Civil Lines, Nagpur.
4. Principal Commissioner of Income Tax, Nagpur-1, Aayakar Bhawan, Civil Lines, Nagpur.
5. The Union of India, through its Secretary, Department of Revenue, Ministry of Finance, Government of India, New Delhi – 110 002. RESPONDENTS

Shri Kapil Hirani, S.C. Thakar, R.S. Thakar, counsel for the petitioner.
Shri Anand Parchure with Bhushan Mohata, counsel for the respondent nos.1 to 4.
Ms Ashwini Athalye, counsel for the respondent no.5.

CORAM : A. S. CHANDURKAR AND MRS VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : JULY 25, 2023

DATE ON WHICH JUDGMENT IS PRONOUNCED : SEPTEMBER 25, 2023

JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Rule made returnable forthwith and the learned counsel for the parties have been heard at length.

2. The challenge raised in the present writ petition is to the notice dated 31.03.2021 issued by the Assistant Commissioner of Income Tax under Section 148 of the Income Tax Act, 1961 (for short, 'the Act of 1961'). By the said notice it was proposed to re-assess the income/loss of the petitioner – a Co-operative Bank for the assessment year 2017-18.

3. The facts relevant for considering the challenge raised in the writ petition are that on 24.10.2017 the petitioner filed its return declaring its income for the assessment year 2017-18. The said return was selected for limited scrutiny by the Income Tax Officer. Accordingly on 26.09.2018, notice under Section 143(2) of the Act of 1961 came to be issued stating that the cash deposits made during the period of de-monetization were sought to be examined. The petitioner replied to the aforesaid notice on 25.06.2019 and stated that since the petitioner was in the business of banking it was accepting cash in old currency during the relevant period and was depositing the same with the Reserve Bank of India. It was further stated that the information of customers who had deposited cash in their accounts was submitted in AIR Information File. The details of the accounts maintained with other commercial banks was furnished alongwith copy of the bank statements during the period of de-monetization, Tax Audit Report as well as Balance-Sheet alongwith Profit & Loss account. During the course of said enquiry, notice under Section 142(1) of the Act of 1961 came to be issued to the petitioner seeking details with regard to deposit of cash during

the period of de-monetization including the details of the persons/entities who had undertaken such deposits. This notice was followed by another notice dated 20.10.2019 seeking details of cash deposits made during the financial year 2016-17. In response thereto the petitioner issued a communication on 02.11.2019 stating therein that all relevant information had been supplied and that with regard to certain other transactions the data was sought to be retrieved. Another response was submitted on 15.11.2019 and the details with regard to deposit of cash in various banks and accounts were furnished alongwith copies of bank statements. For the period from 10.11.2016 to 30.12.2016 list of 5772 customers came to be provided with necessary details. On this basis the Assistant Commissioner of Income Tax passed an assessment order under Section 143(3) of the Act of 1961 on 22.12.2019 and after making certain additions assessed the income of the petitioner at Rs.1,25,16,470/-.

4 Thereafter on 31.03.2021 notice under Section 148 of the Act of 1961 came to be issued proposing to undertake re-assessment by re-opening the earlier completed assessments. The petitioner was called upon to file a return in the prescribed form for the relevant assessment year. The said notice was issued after obtaining the sanction of the Additional/Joint Commissioner of Income Tax Range-4, Nagpur. According to the petitioner, its return could not be filed immediately on account of some technical glitches at the portal of the Income Tax Department. The return was

ultimately filed by the petitioner on 29.12.2021. On 30.12.2021 the petitioner sought copy of the reasons for re-opening the assessment from the Assistant Commissioner of Income Tax. This was followed by a reminder dated 20.02.2022. On 20.03.2022 reasons were provided for re-opening of the assessment by indicating that information was available on the Insight Portal-CRIR/VRU High Risk cases for an amount of Rs.17,99,97,000/-. Since the said transaction was not shown by the petitioner in its return for the assessment year 2017-18 it was stated that there was reason to believe that the said amount of income had escaped assessment. It was further stated that though the petitioner had filed its return of income no assessment as stipulated under Section 2(40) of the Act of 1961 had been made and that the return of income had been processed only under Section 143(1) of the Act of 1961. It was also stated that since the period of four years had not lapsed from the end of the assessment year under consideration the sanction to issue notice under Section 148 of the Act of 1961 had been obtained from the Additional Commissioner of Income Tax under Section 151 of the Act of 1961. The petitioner was then issued a show cause notice dated 28.03.2022 calling upon it to show cause why the proposed variation with regard to cash deposits to the tune of Rs.40,49,97,000/- should not be made. The show cause notice was signed by the issuing Authority at 10.34.35 IST on 28.03.2022 and the petitioner was directed to submit its response by 23.59 hours on 28.03.2022. It is thereafter that the Income Tax Office proceeded to pass its assessment order

on 29.03.2022 making an addition of the amounts indicated in the show cause notice to the amount of returned income of the petitioner. Consequential direction in the form of demand notice and challan also came to be issued. It is on this basis that a demand of the requisite amount came to be made from the petitioner. Being aggrieved by the issuance of the notice under Section 148 of the Act of 1961, the petitioner has approached this Court by filing the present writ petition.

5. Shri Kapil Hirani, learned counsel for the petitioner at the outset submitted that the challenge in the present writ petition was restricted to the issuance of notice under Section 148 of the Act of 1961 and that the challenge to the assessment order dated 29.03.2022 was not being pursued in the present proceedings. According to him, the notice issued under Section 148 of the Act of 1961 was liable to be quashed for the following reasons:-

(a) The issues on which the original assessment proceedings under Section 143(3) of the Act of 1961 had been concluded were sought to be re-opened on the very same grounds. The same was impermissible. In the original assessment proceedings various details had been sought from the petitioner pursuant to the notice dated 30.08.2019 and 20.10.2019. All information available with the petitioner was supplied and it is on that basis that the assessment order under Section 143(3) of the Act of 1961 came to be passed on 22.12.2019. Since the return of the petitioner's income had

been accepted at that stage it was not permissible to re-open the said proceedings merely on the basis of change in opinion of the Income Tax Officer. It ought to be assumed that during the course of original assessment proceedings all relevant information was available with the Assessing Officer but he had not chosen to utilize such material. It therefore could not be said that the petitioner had failed to disclose truly and fully all material facts so as to re-open the assessment. Reliance was placed on the decisions in *Gagan Omprakash Navani Versus Income Tax Officer* [**Writ Petition No. 1601 of 2022**], decided on 15.03.2022, *Assistant Commissioner of Income Tax Versus Marico Ltd.* [**(2020) 272 Taxman 179**], *Akshar Builders & Developers Versus Assistant Commissioner of Income Tax & Another* [**(2019) 411 ITR 602 (Bom)**], *Zoetis India Ltd. Versus Assistant Commissioner of Income Tax & Others* [**2022 Tax Pub (DT) 670 (Bom)**] and *Golden Tocacco Ltd. Versus Assistant Commissioner of Income Tax & Another* [**Writ Petition No. 2818 of 2008**] decided on 06.01.2022.

(b) The completed assessment was sought to be re-opened only on the basis of the information available on the Insight Portal. Without any independent verification and application of mind such re-opening was not permissible. The reasons supplied for re-opening of the assessment did not indicate any satisfaction, even *prima-facie*, being recorded by the Assessing Officer that the petitioner had failed to make a true and correct disclosure of its income. On the basis of borrowed satisfaction it was not permissible to re-open the assessment under Section 148 of the Act of 1961. The re-

opening had been done in a mechanical manner without due application of mind. Reliance was placed on the decision in *Principal Commissioner of Income Tax Versus Shodiman Investments (P) Ltd.* [**(2020) 422 ITR 337 (Bom)**].

(c) The re-opening of the proceedings by issuing notice under Section 148 of the Act of 1961 that too with gross incorrect facts was impermissible. While supplying the reasons for re-opening of the assessment it had been stated that the return of income filed by the petitioner had been processed only under Section 143(1) of the Act of 1961 while infact the assessment order dated 29.03.2022 had been passed under Section 143(3) of the Act of 1961. This indicated that there was no basis whatsoever for the re-opening of the proceedings on such incorrect facts. Moreover, it was not permissible for the Assessing Officer to make roving enquiry into the return already filed and accepted. The assessment order under Section 143(3) of the Act of 1961 could not be treated merely a scrap of paper and the Assessing Officer was expected to have duly applied his mind while accepting the return. Reliance was placed on the decisions in *Ankita A. Choksey Versus Income Tax Officer & Others* [**(2019) 411 ITR 207**] and *Nivi Trading Ltd. Versus Union of India & Another* [**(2015) 375 ITR 308 (Bom)**].

On the aforesaid basis, it was submitted that the notice issued under Section 148 of the Act of 1961 was liable to be quashed.

6. Shri Anand Parchure, learned counsel for the respondent-Department opposed the aforesaid submissions. At the outset it was submitted that since the order of assessment had been passed pursuant to the notice issued under Section 148 of the Act of 1961 a statutory remedy of filing an appeal was available to be petitioner. All legal issues including the validity of the notice issued under Section 148 of the Act of 1961 could be raised in such appeal. Since an efficacious remedy was available to the petitioner it was not necessary to entertain the writ petition. In that regard, the learned counsel placed reliance on the decisions in *M/s Jain Sewa Bahuuddeshiya Samiti, Yashodham Versus Income Tax Officer, Ward-1, Khamgaon & Another* [**Writ Petition No. 4124 of 2022**], decided on 19.01.2023, *Gian Castings (P) Ltd. Versus Central Board of Direct Taxes* [**(2022) 140 taxmann.com 319(SC)**], *Gopal Tukaram Bitode Versus Income Tax Officer, Ward-1, Akola & Others* [**Writ Petition No. 4141 of 2022 alongwith connected writ petitions**], decided on 10.11.2022, *The State of Maharashtra & Others Versus Greatship (India) Limited* [**Civil Appeal No. 4956 of 2022**] dated 20.09.2022, *Assistant Commissioner of (CT) LTU, Kakinada & Others Versus Glaxo Smith Kline Consumer Health Care Limited* [**(2020) 19 SCC 681**], *Commissioner of Income Tax & Others Versus Chhabil Dass Agarwal* [**(2014) 1 SCC 603**], *Authorized Officer, State Bank of Travanore & Another Versus Mathew K.C.* [**(2018) 3 SCC 85**], *Assistant Commissioner of State Tax & Others Commercial Steel Limited* [**2021 SCC OnLine SC 884**], *Genpact India Private Limited Versus Deputy*

Commissioner of Income Tax & Another [**2019 SCC OnLine SC 1500**], *United Bank of India Versus Satyawati Tondon & Others* [**(2010) 8 SCC 110**] and *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Versus Dunlop India Ltd. & Others* [**(1985) 1 SCC 260**] and submitted that the writ petition did not deserve to be entertained.

Without prejudice to the aforesaid, it was submitted that the notice under Section 148 of the Act of 1961 had been issued after due application of mind and in accordance with law. The petitioner intended to avoid the enquiry into its income and hence a challenge was raised to the notice seeking to re-open the proceedings. On the basis of the information received on the Insight Portal the assessment was proposed to be re-opened. It could not be said that such re-opening was either on borrowed satisfaction or without recording due satisfaction in that regard. It was thus submitted that since the procedure prescribed by the Act of 1961 had been duly followed there was no reason to interfere in extraordinary jurisdiction. The writ petition therefore did not deserve to be interfered with and instead the petitioner could be directed to avail the alternate remedy.

7. We have heard the learned counsel for the parties at length and with their assistance we have perused the documents placed on record. At the outset we may consider the preliminary objection raised by the learned counsel for the respondent-Department to the entertainability of the writ petition on the ground that the petitioner can avail the alternate statutory

remedy under the Act of 1961 for challenging the order of assessment dated 29.03.2022 and in those proceedings the aspect of re-opening of the assessment pursuant to notice dated 31.03.2021 under Section 148 of the Act of 1961 could also be raised. The difference between entertainability and maintainability of a proceeding has been succinctly explained by the Hon'ble Supreme Court in *M/s Godrej Sara Lee Limited Versus The Excise and Taxation Officer-cum-Assessing Authority & Others* [**Civil Appeal No.5393 of 2010, decided on 01.02.2023**]. While the objection to 'maintainability' goes to the root of the matter and if such objection is found to be of substance, the Court would be rendered incapable of receiving the *lis* for adjudication. On the other hand, the question of 'maintainability' is within the realm of discretion of the High Court since writ remedy is discretionary in nature. It has been further observed that dismissal of writ petition on the ground that the petitioner has not availed the alternate remedy without examining as to whether an exceptional case has been made out for such entertainment would not be proper. After referring to various earlier decisions, the exceptions on the basis of which a writ Court would be justified in entertaining a writ petition notwithstanding the availability of an alternate remedy were indicated which includes the aspect where the proceedings are without jurisdiction or the order in that regard is without jurisdiction. If a jurisdictional issue is raised and the controversy is purely a legal one that does not involve any disputed question of fact, then the writ petition does not deserve to be thrown out at the threshold.

In *Chhabil Das Agarwal* (supra) challenge to the order of assessment was entertained by the High Court. In that context the Hon'ble Supreme Court held that when an equally efficacious alternate remedy was available to the petitioner, the High Court ought not to have entertained the writ petition. In the present case, challenge is to the notice under Section 148 of the Act of 1961 against which a statutory remedy for challenging the same is not available.

8. In the context of entertaining a challenge to notice issued under Section 148 of the Act of 1961 in a writ petition filed under Article 226 of the Constitution of India we may refer to paragraph 15 of the decision in *Oracle Financial Services Software Ltd. Versus Deputy Commissioner of Income Tax & Others* [**(2022) 442 ITR 160**], which reads as under :-

> "*15. The principles which emerge from the aforesaid pronouncements and a plethora of decisions of this Court and the Supreme Court, can be summarized as under :*
> *Existence of the reason to believe that income chargeable to tax has escaped assessment is a jurisdictional condition for invoking the power under Section 147 of the IT Act, 1961, both within and beyond a period of four years from the end of relevant assessment year. The AO is enjoined to record reasons before a notice to reopen the assessment year. The AO is enjoined to record reasons before a notice to reopen the assessment under Section 148 of the Act is issued. In case, the assessment was completed under Section 143(3) of the Act, an additional condition that the income must have escaped assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment is required to be fulfilled. The existence of reason to believe is further qualified by the fact that it should*

> *be based on tangible material. Firstly, it cannot be the product of mere ipse dixit of the AO. Secondly, it should not partake the character of a mere change in opinion as regards the same material and facts, which were considered at the time of original assessment. For the power is of reassessment and not review. Once the primary facts necessary for assessment are fully and truly disclosed and the AO takes a conclusive view thereon, it is not permissible to reopen the assessment based on the very same material on the premise that it is susceptible to a different opinion favourable to the Revenue.*"

In *Gian Castings (P) Ltd.* (supra), the Hon'ble Supreme Court refused to interfere with the order passed by the High Court of Punjab and Haryana whereby the High Court declined to entertain a challenge to notice issued under Section 148 of the Act of 1961 after noting the difference between a jurisdictional error and error within jurisdiction. In *Gopal Tukaram Bitode* (supra) the fact that the petitioner did not challenge the re-opening notice on the premise that it had to be only under Section 153C of the Act of 1961 was the reason not to interfere in writ jurisdiction. In *Greatship (India) Ltd.* (supra), challenge was raised to the assessment order in writ petition which was entertained on merits. The Hon'ble Supreme Court held that such challenge to the order of assessment ought not to have been entertained by the High Court. The ratio of the decisions relied upon by the learned counsel for the respondents cannot be applied to the facts of the present case.

9. Having found that it would be permissible for entertaining a challenge to the notice issued under Section 148 of the Act of 1961 on jurisdictional aspects we would proceed to adjudicate such challenge. Re-opening of the assessment is sought to be assailed on the ground that during the course of the original assessment proceedings various details had been sought from the petitioner by issuing notices dated 30.08.2019 and 21.10.2019. The details sought were duly supplied to the respondents including the details of the bank statements of various customers. It was thereafter that the assessment order under Section 143(3) of the Act of 1961 came to be passed on 22.12.2019. It was thus urged that in these facts issuance of notice under Section 148 of the Act of 1961 was not warranted.

On perusal of the notice dated 31.03.2021 issued under Section 148(1) of the Act of 1961 coupled with the reasons assigned by the respondents for seeking to re-open the proceedings it becomes clear that it is on the basis of the information shared on the Insight Portal with regard to high value cash deposits that has prompted the Assessing Officer to have a "reason to believe" that the said amount in the hands of the petitioner had escaped assessment. Except for stating that such information was available on the Insight Portal it has not been indicated in the said reasons as to how there was formation of belief by the Assessing Officer that income had escaped assessment. The reasons supplied do not indicate that any exercise of independent verification thereafter was undertaken resulting in consideration of the same with due application of mind by the Assessing

Officer so as to re-open the completed assessment. Only by stating that information was available on the Insight Portal, belief has been formed by the Assessing Officer that the stated amount had escaped assessment at the hands of the petitioner. In *Shodiman Investments (P) Limited* (supra) it has been held that the words "reason to believe" would mean cause or justification. It can only be the basis of forming such belief. However, the belief must be independently formed in the context of the material obtained that there was escapement of income. The facts in the said decision indicate that the reasons made available to the assessee indicate that the information was received from the Director of Income Tax (Investigation) about a particular entity entering into suspicious transactions. The said material however was not further linked by any reason to come to the conclusion that the assessee had indulged in any activity that could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax had escaped assessment. Further there was absence of application of mind to the information received and the re-opening notice was issued merely on the basis of such information received. It was held that such action was in breach of the settled position of law that the re-opening notice was required to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction. We find that in the present case except for referring to the information available on the Insight Portal, the Assessing Officer has proceeded to re-open the assessment without indicating any independent application of mind to the said information that was available on the Insight

Portal for satisfaction to be recorded. It would thus be a case of issuing the re-opening notice on borrowed satisfaction.

10. Another pertinent aspect that can be noted in the reasons for re-opening is that it has been stated that the return of the income as submitted had been processed only under Section 143(1) of the Act of 1961 when infact the said return had been processed under Section 143(3) of the Act of 1961 on 22.12.2019. It has also been stated that no assessment as stipulated under Section 2(40) of the Act of 1961 had been undertaken. This reason as assigned is factually incorrect. Section 2(40) of the Act of 1961 defines 'regular assessment' to mean the assessment made under Section 143(3) or Section 144 of the Act of 1961. Admittedly the assessment undertaken on 22.12.2019 was a regular assessment as defined by Section 2(40) of the Act of 1961 having been made under Section 143(3) of the Act of 1961. It is thus obvious that on the basis of incorrect facts, completed assessment was sought to be re-opened by the Assessing Officer. In *Ankita A. Choksey* (supra) notice of re-opening of the assessment came to be set aside after noting that the Assessing Officer had proceeded on fundamentally wrong facts to come to the reasonable belief that income chargeable to tax had escaped assessment. Though it is true that the assessment completed under Section 143(3) of the Act of 1961 could be re-opened by issuing notice under Section 148 of the Act of 1961, the same can be done by referring to the correct facts that are available with the Assessing

Officer. The reasons supplied indicate that the Assessing Officer has proceeded to re-open the proceedings on the premise that the return of income had been processed only under Section 143(1) of the Act of 1961 and hence there was no assessment as defined by Section 2(40) of the Act of 1961.

11. Yet another aspect that is evident from the record is the attempt to re-examine the issues that were the subject matter of the original assessment proceedings. A perusal of the information sought by the Assessing Officer on 30.08.2019 and 18.12.2019 by way of questionnaire alongwith notice under Section 142(1) of the Act of 1961 would indicate that the details of every single entry as well as the details of the persons/entities that had deposited cash during the period from 08.11.2016 to 31.12.2016 had been sought on both the occasions. The information available with the petitioner was accordingly supplied and it is thereafter that the assessment order under Section 143(3) of the Act of 1961 came to be passed.

In *Marico Ltd.* (supra), the Hon'ble Supreme Court found that during the course of assessment proceedings the queries raised by the Assessing Officer had been responded to. The explanation furnished by the assesse was not rejected and an assessment order was thereafter passed which thus indicated that the Assessing Officer had accepted the stand of the assesse. Seeking to re-open the proceedings therefore merely on the basis of change of opinion was held to be without jurisdiction. Similar view has been taken in *Zoetis India Ltd.* (supra) that though it would not be

necessary that the assessment order should contain reference and/or discussion so as to disclose the satisfaction in respect of the query raised, change of opinion would not constitute a justification and/or reason to believe that the income chargeable to tax had escaped assessment. In *Golden Tobacco Limited* (supra), a similar view has been taken that on a query being raised and it being answered resulting in passing an assessment order, re-opening of the assessment merely on the basis of change of opinion would not be permissible. We find in the facts of the present case that on the basis of the information supplied by the petitioner pursuant to the questionnaire issued under Section 142(1) of the Act of 1961 vide notices dated 30.08.2019 and 18.12.2019, re-opening of the completed assessment only on the basis of information on the Insight Portal would amount to seeking to re-open such assessment due to change of opinion.

12. For aforesaid reasons, we find that the Assessing Officer in absence of any independent verification of the information available on the Insight Portal has proceeded to re-open the completed assessment without indicating the basis for having a reason to believe that the information in the hands of the petitioner had escaped assessment. Further re-opening is on the basis of gross incorrect facts that the assessment had been completed under Section 143(1) of the Act of 1961 and was hence no assessment under Section 2(40) of the Act of 1961 when infact the assessment had

been completed under Section 143(3) of the Act of 1961. The re-opening was thus merely an outcome of change of opinion of the Assessing Officer. The notice issued on 31.03.2021 under Section 148 of the Act of 1961 is thus liable to be quashed. It is accordingly quashed having been issued in absence of statutory jurisdiction in that regard. Consequentially, steps taken pursuant to the said notice issued under Section 148 of the Act of 1961 would not survive. The writ petition is allowed in aforesaid terms. Rule is made absolute with no order as to costs.

(MRS. VRUSHALI V. JOSHI, J.) (A.S. CHANDURKAR, J.)

APTE