

(2014) 09 AHC CK 0250

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 1357 of 2003, 678 of 2007 and 330 of 2008

Neeraj Kanta Verma

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-09-2014

Acts Referred:

Income Tax Act, 1961 — Section 139, 142, 143, 143(1), 143(2)

Citation : (2014) 10 ADJ 437

Hon'ble Judges : Tarun Agarwala, J; Satish Chandra, J

Bench : Division Bench

Judgement

Tarun Agarwala, J.—In this group of writ petitions, the petitioner has challenged the validity and legality of the notices issued u/s 148 of the Income Tax Act for the assessment years 1997-98, 2000-01 and 2001-02.

2. The facts leading to the filing of the writ petition is, that the father of the petitioner was the original lessee of Nazul land (Site F) Civil Station at Allahabad since 1958 situate at 46, Lal Bahadur Shastri Marg, Allahabad. In the lease deed registered on 29th December, 1972, the lessee was permitted to transfer by succession, sale, assignment, etc. with the previous approval of the State Government. The father of the petitioner, Sri S.K. Verma retired as the Chief Justice of the Allahabad High Court and died on 9th May, 1988. Upon his death, a memorandum of partition was executed between Smt. Nirmala Verma, widow of Sri S.K. Verma and three sons. Based on this family partition, an application was filed before the Collector, Allahabad for the division of the lease deed. This application was forwarded to the State Government. The State Government granted permission for the execution of the lease deed in favour of the heirs of Sri S.K. Verma on the same terms and conditions. As a consequence thereof, fresh and separate lease deeds on the same terms and conditions were executed on 3rd February, 1996 in favour of the heirs of Sri S.K. Verma.

3. The State Government floated a policy for conversion of lease land into free

hold. The heirs applied for free hold. After paying conversion charges, the State Government converted the lease land into free hold land and a sale deed dated 20th November, 1996 was executed in favour of the petitioner. Free hold deed in favour of Smt. Nirmala Verma was also executed on 21st November, 1996. Thereafter, some portion of the land was sold by Smt. Nirmala Verma and the petitioner to different parties on different dates.

4. For the assessment year 1997-98, Smt. Nirmala Verma filed her return on 17th May, 1997 disclosing the premium paid for conversion of lease land into free hold and also disclosing the sale of land to a third party. Smt. Nirmala Verma also filed a chart showing the computation of capital gains tax liability upon the transfer of the land which is reflected in the return. The said return was accepted by the issuance of the acknowledgement of the return by the authorities on 19th February, 1997.

5. Smt. Nirmala Verma died on 17th March, 2001, leaving behind three sons and three daughters including the petitioner. The Assistant Commissioner of Income Tax, Range-I, Allahabad issued a letter dated 3rd June, 2002 to Smt. Nirmala Verma indicating therein that the department has received information that she had deposited a sum of Rs. 12,02,432/- for conversion of land into free hold land and, consequently, requested Smt. Nirmala Verma to furnish information as to when the return was filed. In response, the heirs through their Chartered Accountant submitted a reply informing the respondent about the death of Smt. Nirmala Verma and also furnished the return in which the details of the transaction was disclosed.

6. In spite of furnishing the desired information, the Assistant Commissioner of Income Tax, Range-I, Allahabad, respondent no. 3 issued a notice dated 22nd August, 2002 u/s 148 of the Act to Smt. Nirmala Verma care of the petitioner for reopening the assessment for the assessment year 1997-98. In response, the petitioner submitted a reply dated 18th October, 2002. The petitioner thereafter, received a notice dated 2nd November, 2003 wherein the Assessing Officer directed the petitioner to furnish certain information and documents. The petitioner supplied the desired information vide reply dated 22nd September, 2003.

7. The petitioner thereafter, approached the Assessing Officer to supply a copy of the reasons given by the Assessing Officer for reopening the assessment. The Assessing Officer did not supply the reasons and eventually, on the petitioner's insistence, was allowed to inspect the record. The petitioner noted down the reasons, which has been reproduced in paragraph 19 of the writ petition. The reasons recorded was that Smt. Nirmala Verma had deposited Rs. 12,02,432/- as free hold charges and had sold her property but no capital gains income had been shown in the return of income. Therefore, the Assessing Officer had reasons to believe that income chargeable to tax had escaped assessment. It is at this stage, the petitioner filed Writ Petition No. 1357 of 2003 praying for the quashing of the notice dated 22nd August, 2002 u/s 148 of the Act and notice

dated 2nd September, 2003 u/s 142 of the Act.

8. For the assessment year 2000-01, the petitioner, in his individual capacity, also sold a portion of the land. The petitioner filed his return of income on 18th September, 2000. A computation of the capital gains was also filed along with the return, which was processed u/s 143(1) of the Act. The Assessing Officer recorded his reasons for reopening the assessment on 23rd March, 2007. Approval was granted by the Additional Commissioner of Income Tax on the same date and, thereafter, a notice u/s 148 of the Act was issued on 23rd March, 2007. The reasons were supplied and the petitioner filed response to the notice indicating the Assessing Officer that his return filed on 18th September, 2000 may be treated as his reply in response to the notice u/s 148 of the Act. Subsequently, a notice u/s 143(2) of the Act was issued directing the petitioner to furnish certain information and documents. The petitioner, being aggrieved by the notice issued u/s 148 of the Act dated 23rd March, 2007 for the assessment year 2000-01, has filed Writ Petition No. 678 of 2007.

9. Similarly, for the assessment year 2001-02, the petitioner filed the return of income along with the computation of the capital gains on 31st July, 2001, which was processed u/s 143(1) of the Act. The Assessing Officer recorded the reasons for reopening of the assessment on 6th December, 2007 and, on the same date approval was granted by the Additional Commissioner of Income Tax. Notice u/s 148 of the Act was also issued on the same date i.e. 6th December, 2007. On demand, the reasons were supplied to the petitioner on 12th February, 2008. The petitioner filed Writ Petition No. 330 of 2008 for the quashing of the notice issued u/s 148 of the Act.

10. In this background, the Court has heard Sri V.K. Rastogi and Sri A.D. Saunders, the learned counsel for the petitioner and Sri Shambhu Chopra, Sri R.K. Upadhyaya and Sri Govind Krishna, the learned counsel for the department.

11. The learned counsel for the petitioner contended that the notice issued under 148 of the Act was without jurisdiction. The learned counsel further contended that the reasons to believe recorded by the Assessing Officer that the income of the petitioner had escaped assessment was patently erroneous as it was not based on any fresh material. It was contended that the reasons to believe was nothing else but a change of opinion, which was not permissible, especially when all the relevant material facts were fully and truly disclosed by the petitioner. The learned counsel contended that all the material and primary facts were before the Assessing Officer and, consequently, the action of the Assessing Officer in initiating proceedings for reassessment was wholly illegal. The learned counsel contended that the assessment notice was issued after more than four years and, consequently, it was imperative for the Assessing Officer to disclose in his reasons that the assessee had failed to disclose fully and truly all material facts, which is an essential requirement for initiating proceedings u/s 148 of the Act. The learned counsel submitted that in the reasons so recorded there is no allegation or even a whisper that the assessee had failed to disclose fully and

truly all material facts, which is sine qua non for initiating proceedings u/s 148 of the Act. The learned counsel contended that in the absence of any allegation that the assessee had failed to disclose fully and truly all material facts, no proceedings could be initiated under the proviso to Section 148 of the Act after the expiry of four years from the end of the relevant assessment year.

12. The learned counsel consequently submitted that the proceedings initiated u/s 148 of the Act was barred by limitation. It was further contended that the reasons to believe recorded by the Assessing Officer was nothing else but a change of opinion based on a decision of the Karnataka High Court in Commissioner of Income Tax Vs. Dr. V.V. Mody,

13. On the other hand, the learned counsel for the department contended that the Assessing Officer has wide powers to reopen the assessment, if he has reasons to believe that the income had escaped assessment. The learned counsel submitted that even after the expiry of four years, reassessment proceedings could be opened upon permission being granted by the competent authority, which in the instant case was taken and, therefore, the notice was not barred by limitation. The learned counsel submitted that in the instant case the petitioner disclosed the capital gains tax liability, whereas the petitioner was liable to pay short term capital gains tax. It was urged that the reasons disclosed by the Assessing Officer justified his action in issuing notice u/s 148 of the Act.

14. Before proceeding further, it would be appropriate to peruse Section 147 and 148 of the Act which existed at the relevant moment of time and which is extracted hereunder:-

"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 subsection (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 u/s 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 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;

(c) Where an assessment has been made, but-

(i) Income chargeable to tax has been under assessed; 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."

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.

"Issue of notice where income has escaped assessment.

148. (1) Before making the assessment, reassessment or recomputation u/s 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act

shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139.

Provided that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) Subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to subsection (2) of section 143, as it stood immediately before the amendment of said subsection by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case-

(a) where a return has been furnished during period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) Subsequently a notice has been served under sub-clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.-For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.]

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

15. A perusal of the aforesaid provisions indicates that the Assessing Officer has wide powers to reopen the assessment if he has reasons to believe that the income chargeable to tax has escaped assessment. However, this wide power is circumscribed and does not give jurisdiction to the Assessing Officer to reopen a completed assessment on a mere change of opinion. Further, the proviso indicates that if more than four years have elapsed from the end of the relevant assessment year, in addition to the satisfaction of the Assessing Officer that he has reasons to believe, must also indicate, that the assessee has failed to disclose fully and truly all material facts necessary for his assessment for that assessment year.

16. In Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, the

Supreme Court held :

"It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice u/s 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words u/s 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice u/s 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid."

17. In *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*, the Supreme Court held:-

"From a combined review of the judgments of this Court, it follows that an income tax Officer acquires jurisdiction to reopen assessment u/s 147(a) read with Section 148 of the Income Tax 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the income tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact

existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and nonspecific information. To that limited extent, the Court may look into the conclusion arrived at by the income tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the income tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the income tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the income tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment.

18. In *McDermott International Inc. Vs. Additional Commissioner of Income Tax and Another*, it was held that the reasons recorded by the Assessing Officer did not disclose the fact that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The Court held that it is the failure or omission on the part of the assessing authority, which does not lead in any manner to constitute failure or omission on the part of the assessee entitling them to invoke Section 147 of the Act, after the prescribed period of four years. It was further held by the Court that:-

"The submission of the learned counsel is devoid of merit for this reason that the reason or ground for reopening of assessment in terms of the proviso to Section 147 are totally non-existent. According to our reasoning, we have addressed only the absence of ground and not the sufficiency.

Learned counsel for the respondents could not satisfy that there was any failure on the part of the assessee as envisaged by the proviso to Section 147 or in any manner by suppression or omission, he took advantage and escaped the assessment."

19. In *Commissioner of Income Tax and Another Vs. Saipem Spa and Atlas Offshore Services*, it was held that if there was no fault on the part of the assessee, the delay could not be condoned and the limitation for initiating the proceedings would come to an end after four years. The High Court held:-

"From the perusal of the facts it is clear that there was no fault of the assessee. Therefore, the income tax Appellate Tribunal and the Commissioner of income tax (Appeals) were right on the application of Explanation 2(c)(ii) of Section 147 of the income tax Act. Even it is deemed to be the escaped assessment within the meaning of Explanation 2(c)(ii) of Section 147, then in view of the undisputed fact that there was no fault of the assessee, the delay could not be condoned. Limitation comes to an end even under the proviso appended to section 147. Limitation of four years had already been expired. Therefore, the

amendment in the original assessment order was time-barred. We agree with the view taken by the income tax Appellate Tribunal."

20. In *Foramer Vs. Commissioner of Income Tax and Another*, a Division Bench of this Court held that there was no failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for the assessment and, consequently, since notices were issued after a lapse of more than seven years, the proviso to Section 147 of the Act was squarely applicable and that the impugned notices were barred by limitation. The said decision was affirmed by the Supreme Court in *Commissioner of Income Tax and Another Vs. Foramer France* (through constituted attorneys),

21. In *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, the Supreme Court held :

"The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under assessment", that would be sufficient to give jurisdiction to the income tax Officer to issue the notices u/s 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the income tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts."

22. From the aforesaid, it is clear that two distinct conditions must be satisfied before the Assessing Officer can assume jurisdiction to issue a notice u/s 148 of the Act, namely, that he must have reasons to believe that the income of the assessee had escaped assessment and, that he must have reasons to believe that such escapement was by reasons of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions are not fulfilled, the notice issued by the Assessing Officer would be without jurisdiction.

23. Consequently, before taking any action, the Assessing Officer is required to substantiate his satisfaction in the reasons recorded by him. If the conditions mentioned are not satisfied, then the issuance of notice would be invalid.

24. In the light of the aforesaid, one will have to consider the reasons so recorded by the Assessing Officer. For the assessment year 1997-98, the reasons recorded is, that the assessee has sold her property but no capital gains income had been shown in the return of income and, therefore, there was reasons to believe that capital gains income had escaped assessment for the assessment year 1997-98. For the assessment year 2000-01, the reasons recorded is, that the assessee had sold the property within three years from the conversion from lease hold to free hold resulting into short term capital gains in view of the judgment in *Dr. V.V. Mody* (supra) and that the assessee had not filed the return

showing the short term capital gains income. Similar reasons has been recorded for the assessment year 2001-02.

25. From the aforesaid reasons so recorded by the Assessing Officer, it is clear is that the assessee was required to pay short term capital gains tax instead of long term capital gains tax and, therefore, the Assessing Officer had reasons to believe that the income had escaped assessment.

26. In the instant case, admittedly, the notice was issued after four years but before six years. In our opinion, the reasons so recorded by the Assessing Officer was not sufficient to initiate proceedings u/s 148 of the Act. The first proviso to Section 147 of the Act clearly indicates that no action could be taken under this section after the expiry of four years from the end of the relevant assessment year unless the assessee had failed to disclose fully and truly all material facts necessary for his assessment for that assessment year. In *Ganga Saran* (supra) it was held that if the two conditions are not fulfilled, namely, the Assessing Officer must have reasons to believe that the income of the assessee had escaped assessment and secondly, he must have reasons to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, in which case, the notice issued by the Assessing Officer would be without jurisdiction. In the instant case, we find that no satisfaction has been recorded by the Assessing Officer in his "reasons to believe", namely, that there was omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

27. On the other hand, we find that the petitioner had disclosed fully and truly all material facts necessary for his assessment. The petitioner had submitted a chart along with his return showing the computation of capital gains tax liability. The fact that the petitioner claimed long term capital gains is immaterial at this stage. We are only concerned as to whether the petitioner had disclosed fully and truly all material facts necessary for the assessment, which we find that the petitioner had disclosed all the material facts necessary for his assessment.

28. The fact that short term capital gains tax is to be paid or long term capital gains tax is to be paid is a different issue and for this purpose, reassessment proceedings, if any, ought to have been drawn within four years which, in the instant case, had not been done. After the expiry of four years, the essential ingredient for the issuance of a notice is, that there was omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, which in the instant case is lacking in the reason so recorded by the Assessing Officer. Even otherwise, we are of the opinion that the petitioner had disclosed fully and truly all material facts necessary for his assessment.

29. There is another aspect of the matter. Section 149 provides a time limit for issuance of a notice u/s 148 of the Act and, if a notice after four years but before six years is issued, the same could only be issued if the income chargeable to tax

has escaped assessment amounts to or is likely to amount to Rs. 1 lac or more for that year. For facility, Section 149(1(b) of the Act is extracted hereunder:-

"Time limit for notice.

149. (1) No notice u/s 148 shall be issued for the relevant assessment year-

(a)

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year."

30. From a perusal of the aforesaid provision, it is imperative that the Assessing Officer, in his reasons, should state that the escaped income is likely to be Rs. 1 lac or more, which is an essential ingredient for seeking the approval and satisfaction that is to be recorded by the Competent Authority u/s 151 of the Act. We find from the reasons recorded by the Assessing Officer that no such reasons has been recorded to the effect that the escaped income is likely to be Rs. 1 lac or more except for the assessment year 2001-02.

31. In Mahesh Kumar Gupta, Smt. Rukhmani Devi and Yogesh Kumar Gupta Vs. Commissioner of Income Tax and Another, a coordinate Bench of this Court held that it is imperative for the Assessing Officer to record in his reasons that the escaped income is likely to be Rs. 1 lac or more so that the Chief Commissioner or Commissioner may record his satisfaction u/s 151 of the Act. The Court further held that if the said reason has not been recorded by the Assessing Officer, the initiation of the reassessment proceedings after more than four years would be clearly barred by time.

32. A similar provision, namely, Section 34(1A)(ii) existed under the Income Tax Act, 1922. A Full Bench of this Court in Jai Kishan Srivastava Vs. Income Tax Officer, Kanpur and Another, held that non-recording of the reason by the Assessing Officer that the escaped income was likely to be Rs. 1 lac or more was fatal to the issuance of the notice for reassessment.

33. In K.S. RASHID AND SON AND OTHERS Vs. Income Tax OFFICER., a Constitutional Bench of the Supreme Court held:

"The second point which is very important is that in regard to the cases falling u/s 34(1A), action can be taken only where the income which has escaped assessment is likely to amount to Rs. 1 lakh or more. In other words, it is only in regard to cases where the escaped income is of a high magnitude that the restriction of the period of limitation has been removed."

34. Consequently, in the light of the aforesaid, it is clear that where a notice is issued after four years the jurisdiction of the Assessing Officer is conferred where he has reasons to believe that income chargeable to tax has escaped assessment and that such under assessment has occurred by reason of omission or failure on

the part of the assessee to make a return of his income or omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment in that year. In Ganga Saran (supra) both the conditions are essential and must be recorded by the Assessing Officer in his reasons to believe. In addition to the aforesaid, the Assessing Officer is also required to record reasons as per Section 149 of the Act that the escaped income is likely to be Rs. 1 lac or more so that the Chief Commissioner or Commissioner may record his satisfaction.

35. We had directed the counsels for the income tax department to produce the original record. The original record for the assessment year 1997-98 could not be produced but the original record for the assessment years 2000-01 and 2001-02 was produced, which the Court has perused. The reason so recorded in paragraph 19 of Writ Petition No. 1357 of 2003 and the reasons so recorded in the subsequent assessment years does not indicate the essential condition, namely, that there has been omission or failure on the part of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment in that year. Further, for the assessment year 1997-98 and 2000-01 the fact that the escaped income is likely to be Rs. 1 lac or more has also not been recorded. Consequently, we are of the opinion that the notice issued u/s 148 of the Act was without jurisdiction. In the absence of satisfaction being recorded, the notice, which has been issued after the expiry of four years was clearly barred by time.

36. There is yet another aspect of the matter. The reason so recorded by the Assessing Officer is, that the petitioner has indicated the computation of long term capital gains tax liability, whereas the petitioner was liable to pay short term capital gains tax since the petitioner had sold off a portion of the property within three years from the date of conversion of lease land into a free hold land.

37. Short term capital asset is defined u/s 2(42A), which is extracted hereunder:-

"2(42A) "short-term capital asset" means a capital asset held by an assessee for not more than thirty-six months immediately preceding the date of its transfer."

38. Section 2(29B) of the Act defines long term capital gains as under:

"2(29B). "long term capital gain" means capital gain arising from the transfer of a long-term capital asset."

39. The difference between "short term capital asset" and "long term capital asset" is the period over which the property has been held by the assessee. It has nothing to do with the nature of the title over the property. The petitioner already had rights as owner of the property subject to the covenant of the lease for all purposes such as transfer of the lease hold rights of the property with the previous consent of the lessor. The petitioner's father was the lessee since 1958. The conversion of the rights of the lessee in the property from lease hold to free hold was only an improvement of the rights over the property, which the

petitioner enjoyed and this would not have any effect on the taxability of capital gains from such property. Since the property was held by the petitioner for more than three years, short term capital gains would not be applicable. The conversion from lease hold to a free hold being an improvement of the title, does not have any effect on the taxability of profits as short term capital gains.

40. Reliance by the Assessing Officer in his reasons to believe on a decision of Karnataka High Court in Dr. V.V. Mody (supra) case is misplaced. In that case, the assessee was allotted a site by the Bangalore Development Authority. The assessee had no transferable right. Subsequently, a sale agreement was executed pursuant to which the assessee became the owner and landlord and thereafter, within a period of three years, the said assessee sold the land. In that scenario, the Assessing Officer held that it was a case of short term capital gains since the assessee had sold the same within three years from the date of becoming the owner. The order of the Assessing Officer was upheld by the Karnataka High Court. The said decision is clearly distinguishable and is not applicable in the instant case. Similarly, reliance by the department on the decision of the Bombay High Court in The Commissioner of Income Tax, Bombay City-II, Bombay Vs. Dr. D.A. Irani, is also misplaced and is clearly distinguishable, in as much as in the instant case, the petitioner continued to remain in possession of the property and only improved his title, when it converted its lease hold rights into free hold rights.

41. The contention of the learned counsel for the department that in the light of the decision of the Supreme Court in GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, the petitioner should file his objection before the Assessing Officer to the notice issued u/s 148 of the Act and, therefore, the writ petition should be dismissed on the ground of alternative remedy is misplaced.

42. No doubt, the Supreme Court had culled out a via media of attacking the notice u/s 148 of the Act by filing an objection before the Assessing Officer. We are, however, of the opinion that the petitioner cannot be non-suited on this ground at this stage, especially when the writ petition was entertained in the year 2003, 2007 and 2008 and since affidavits have been exchanged, it would be unfair at this stage to relegate the petitioner to avail an alternative remedy.

43. For the reasons stated aforesaid, we are of the opinion that the notices issued u/s 148 of the Act does not comply with the proviso to Section 147 and 149 of the Act. The reasons recorded does not indicate that the assessee has failed to disclose fully and truly all material facts necessary for his assessment and that the escaped income was likely to be Rs. 1 lac or more.

44. Consequently, the notices issued u/s 148 of the Act cannot be sustained and are quashed. All proceedings initiated in pursuance of the notices u/s 148 of the Act would be wholly illegal and without jurisdiction and are also quashed. All the writ petitions are allowed.

45. In the circumstances of the case, parties shall bear their own costs.