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

+ W.P.(C) 10872/2017

KEDAR NATH BABBAR

..... Petitioner

Through: Mr. K. R. Manjani and Mr.Tarun,
Advocates

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 52 (1)

..... Respondent

Through: Mr. Puneet Rai, Advocate and
Ms.Adeeba Mujahid, Advocate

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Date of Decision: 25th April, 2022

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. By way of the present writ petition, the petitioner has challenged the notice issued under Section 148 of the Income Tax Act (hereinafter referred to as 'the Act') dated 28.03.2017.
2. The case of the petitioner is that he had filed return of income on 15.10.2010 for the assessment year 2010-11 showing income of Rs.5,94,850/-. On 27.02.2017 the petitioner received a notice under Section 133 (6) of the Act dated 20.02.2017 and for which the petitioner also received reminder on 02.03.2017 as petitioner could not

respond to the same being busy in organizing his stall in exhibition. However, the response in part was sent on 06.03.2017 and further on 21.03.2017 stating that there is no question of disallowance of interest on the amount paid to Sh.Gaurav. The petitioner received notice dated 28.03.2017 under Section 148 of the Act.

3. The petitioner vide letter 17.04.2021 informed the Assessing Officer about filing of return and requested to supply copy of reasons. The Assessing Officer supplied the reasons along with communication dated 09.08.2017.
4. The petitioner filed the objections dated 05.10.2017, which were disposed by Assessing officer vide order dated 30.10.2017. The petitioner stated that since complete material was not supplied, he was handicapped in submitting his proper objections. The petitioner has also stated that he was not given proper opportunity as the order was passed before the physical inspection of the record by the petitioner.
5. The grievance of the petitioner is that the money has been given to his son Sh. Gaurav Babbar which had mainly come from funds lying in the account of his mother Smt. Veena Babbar, which are to the tune of Rs.1,14,80,076. The petitioner has stated that he has contributed an amount of Rs. 39,96,043/- against the capital of the petitioner at Rs. 3,04,14,983/- as on 31.03.2010.
6. The petitioner has stated that since his capital was more than ten times Interest free loans to son, no interest can be disallowed as per the law laid down by the Supreme Court in *M/s Hero Cycle Pvt. Ltd vs. C.I.T.*,

379 ITR 347. The petitioner has further stated that where there is a common overdraft account in which interest free funds as well as income like rent, Interest, etc is also deposited in such cases interest is not to be disallowed, where the amount withdrawn is lesser than the capital and interest refund.

7. The department in the counter affidavit has stated that the Assessing Officer received a Tax Evasion Petition (TEP) folder in the case of the petitioner from the Investigation Wing, Delhi of the Income Tax Department. Upon perusal and examination of the same and enquiries there under, it was revealed that the petitioner had paid a significant sum of Rs.1.5 crores on behalf of his son Sh.Gaurav Babbar, as consideration towards the purchase of the property located at B-8/3, Okhla Industrial Area, Phase II, New Delhi on 03.11.2009. The above fact was admitted by the petitioner vide his submissions dated 31.07.2013 before the ADIT (Inv), Unit II (3), New Delhi. It has further been stated that the bank statement pertaining to bank account No.001702000003998 maintained with the Indian Overseas Bank, Daryaganj, New Delhi revealed that the account in question was an OD/CC account in the name of the petitioner's proprietorship concern and that significant sums were being incurred as interest expenses on sums drawn as OD. It was submitted that the assessment for the subject Assessment Year 2010-11 had not been previously subjected to scrutiny assessment at the relevant time. The petitioner's "balance sheet" for the subject assessment year also carried a sum of Rs.1,54,76,119/- as purported "loan & advance" to his son, Sh.Gaurav

Babbar. However, the petitioner's "profit & loss account" contained no interest income earned from such sums provided as purported loan despite the petitioner claiming significant "interest expenses" of about Rs.1 crore including an amount of Rs.22,80,083/- as Interest expenditure for the said loan, for the concerned Assessment Year.

8. The department has stated that the notice under Section 133 (6) of the Act was not complied with by the petitioner and the petitioner vide his letter dated 21.03.2017 objected to the proposed disallowance of interest expenses claimed on his purported business loans, which were transferred to his son, Sh.Gaurav Babbar as 'interest free' loans (the 'transferred sums') without any commercial or business justification and not at arm's length dealing.
9. The department has stated that the petitioner has never provided any independent or cogent proof that such purported funds actually belong to Smt.Veena Babbar and that the same was the direct source of the transferred sums.
10. In the counter affidavit it has further been stated that besides the business income which is nominal, the petitioner has sizeable rental income of Rs.90 lakhs received from its various properties which is being declared under a separate head of House property income. Much of the claimed sums from wife Smt.Veena Babbar and his own claimed capital of Rs.2,94,73,499/- are supposed to have been utilized to finance the huge rent yielding properties. Besides the above credits of self and those from wife, there are Secured Loans from the Banks and

other financial Institutions of the order of Rs.7 crores as per Schedule B to the Balance Sheet as on 31.03.2010.

11. The department has further stated that the facts as revealed leads to only reasonable and logical conclusions that such loan sums sourced from the OD/CC bank account were being siphoned off by the petitioner to his son interest-free and fraudulent claims of interest expenses was being claimed to reduce the petitioner's taxable income and unlawfully evade income tax due under the Act.
12. The department has stated that the accounts reveal a *modus operandi* of use of false/colourable loan transactions with the petitioner to claim interest expenses as false revenue expenses against taxable business income to evade taxes under the Act.
13. The department has stated that on the basis of the said material facts and evidence, a notice under Section 148 of the Act dated 28.03.2017 was lawfully sent to the petitioner for the subject Assessment Year which was followed by a notice under Section 142 (1) of the Act. The reasons for issue of notice under Section 148 of the Act as recorded prior to the same, was also sent to the petitioner vide letter dated 09.08.2017 and thereafter the petitioner was provided with an opportunity on 12.09.2017 to inspect the relevant file containing the petitioner's records and the same was duly availed of. The objections as raised by the petitioner were disposed of by a well-reasoned order dated 30.10.2017. It has been submitted that at this stage, Assessing officer is only required to see the *prima facie* material on the basis of which the re-assessment should have been re-opened. It has further

been stated that all the questions raised by the petitioner are basically the questions of fact which are to be decided by the Assessing Officer at the time of framing of assessment. The department has relied upon *Raymonds Woolen Mills Ltd. vs. Income Tax Officer and Ors.* (1999) 236 ITR 34 (SC) and *Commissioner of Income Tax vs. Chhabil Dass Agarwal* (2014) 1 SCC 603.

14. The petitioner has filed rejoinder to the counter affidavit and reiterated the averments made in the writ petition. The petitioner has stated that the notice under Section 148 of the Act was sent without any application of mind. The sanction was granted on wrong facts. The objections filed by the petitioner were not at all considered. The petitioner has admitted that the amount given to Sh.Gaurav Babbar was not for business purpose but it was given because Smt.Veena Babbar, mother of Sh.Gaurav Babbar had given interest free funds to the petitioner which she wanted to be given to Sh.Gaurav Babbar.
15. The petitioner stated that it is settled proposition of law that one cannot make profit from oneself as per Supreme Court's judgment in the case of *Sir Kikabhai Premchand Kt., Bombay vs. Commissioner of Income Tax (Central) Bombay*, (1953) 24 ITR 506 (Supreme court).
16. The plea taken by the petitioner is that where the assessee wants funds for own use, even though these are from O.D. account, interest cannot be disallowed because the amount given is far lesser than own capital, interest free funds available in the business, which amounts to Rs.4.42 crores. It was stated that it is a settled preposition that where there is one O.D. account, amount taken for own use, cannot be disallowed.

17. We have considered the submissions of learned counsel for the parties.
18. The notice under Section 148 of the Act dated 28.03.2017 was issued, which was responded by the petitioner vide his communication dated 17.04.2017. The respondent thereafter served a notice under Section 142 (1) of the Act dated 12.07.2017 whereby certain information was called from the petitioner. The respondent vide communication dated 17.07.2017 asked the petitioner for the supply of reason for filing the objections. The Assessing officer vide communication dated 09.08.2017 provided the petitioner with the copy of the reasons as recorded by the Assessing officer for reopening of the case. The reasons being recorded by the Assessing officer were quite detailed and self-explanatory. It was mentioned in the reasons that the entire amount given to his son by the petitioner, the interest has not been charged whereas the cash credit bank account from which amount was transferred to his son, the assessee had paid interest @ 14.33 per annum. The interest has been claimed by the assessee as revenue expenses which reduced taxable income of assessee for the year under consideration.
19. As on 01.04.2009, the assessee had shown loan outstanding to his son at Rs.3,64,519/- and during the year under consideration, the assessee had given amount of Rs.1,64,51,600/- to his son out of which amount of Rs.13,40,000/- was received back with the remaining closing balance of Rs.1,54,76,119/-.
20. The objections were filed by the petitioner in which the case of the petitioner as discussed hereinabove was reiterated. The objections

were duly disposed of by the Assessing officer vide order dated 30.10.2017. The order disposing of the objections is also detailed one. It was stated that notice dated 28.03.2017 was issued after obtaining sanction from the competent authority. The judgment cited by the assessee was also duly discussed and considered by the Assessing officer. Vide communication dated 06.11.2017, the petitioner was asked for certain enclosures referred to in the order dated 30.10.2017 and the same were duly supplied.

21. It is the settled proposition that the writ jurisdiction of the court is to be exercised under certain well established principles. The courts should exercise their writ jurisdiction very sparingly if there is 'alternative efficacious remedy'. The petitioner cannot be allowed to short circuit the procedure merely out of convenience. If a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
22. In *Raymond Woolen Mills Ltd. (supra)*, it was *inter alia* held that at the time of initiating the proceedings under Section 147 of the Act, the assessing officer has to only examine whether there is *prima facie* material on the basis of which the assessment should have been reopened. The Supreme court has held that at this stage the court is only required to see whether there was *prima facie* some material on the basis of which the department could reopen the case. The sufficiency of the correctness of the material is not a thing to be considered at the stage.

23. We consider that there was sufficient material on the record for re-opening/re-assessment of the case of the petitioner for the concerned assessment year. This court is not making any comment on the merits of the case. The assessee will have complete right to put up his case before the assessing officer. We consider that there is no violation of the principles of the natural justice. The revenue department has followed the procedure prescribed by the law. We consider there is no ground to interfere at this stage. Hence the petition is dismissed.

DINESH KUMAR SHARMA, J

MANMOHAN, J

APRIL 25, 2022

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