IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 4817 OF 2022

The Shri Saibaba Sansthan Trust (Shirdi))
a Trust, constituted under the provisions)
of the Shri Saibaba Sansthan (Shirdi))
Act, 2004 having its registered office at)
Sai Niketan, 804-B, Dr. Ambedkar Road,)
Dadar (East), Mumbai – 400 014.) ..Petitioner

Versus

1. The Union of India)

2. The Commissioner of Income Tax)
(Exemptions), Mumbai)
having his office at 6th floor, Piramal)
Chamber, Lalbaug, Parel, Mumbai 400 012)

3. Additional Commissioner of Income Tax)
Exemption (2)(1) Mumbai)
having his office at 5th floor, Piramal)
Chambers, Lalbaug, Parel, Mumbai 400 012)

4. Deputy Commissioner of Income Tax)
(Exemption) 2(1) Mumbai)
having his office at Room No. 519)
5th Floor, Piramal Chambers, Lalbaug,)
Parel, Mumbai 400 012.) ..Respondents

Mr. S. Ganesh, Senior Advocate with Mr. Ashwin Shete and Ms. Anvi Vasani i/b. Jayakar & Partners for Petitioner.
Mr. Akhileshwar Sharma for Respondents.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
RESERVED ON: 08 OCTOBER 2024.
PRONOUNCED ON: 20 DECEMBER 2024.

Judgment (per G. S. Kulkarni, J.):

1. This petition under Article 226 of the Constitution of India challenges the validity of notice dated 31 March 2019 issued by respondent no.4/Deputy Commissioner of Income Tax (Exemption) Circle 2(1)-Mumbai, under Section 148 of the Income Tax Act, 1961 (for short, "the **IT Act**") to reopen the assessment of the petitioner for Assessment Year 2014-15, as also an order dated 28 June 2022 passed by respondent no.4 rejecting the petitioner's objection to the reopening of the assessment. The impugned reopening is within a period of four years.

2. The relevant facts need to be noted:-

The petitioner is a Public Trust deemed to be constituted and governed under the State Legislation namely under the provisions of the "Shri Saibaba Sansthan Trust (Shirdi) Act, 2004" (for short, "**2004 Act**"). It is the petitioner's case that the petitioner manages and administers the "Sai Baba Temple", at Shirdi which is worshiped by millions of devotees from all over the world. Also, the petitioner is stated to be involved in religious and charitable activities. The petitioner has described the history in relation to Shirdi temple and the faith, which the people have in

worshiping "Shri Sai Baba" who departed from the mortal world on 15 October 1918.

3. The formation of the petitioner trust and its aims, objectives were *inter alia* to spread the universal religion of Saibaba. It is the case of the petitioner that the devotees of Saibaba started worshiping the 'Samadhi' from 27 October 1918 being the "Bhandara Day". They also started a fund known as the "Samarth Sainath Kothi" for continuing the worship at the Samadhi Mandir where his worldly remains were interred and consequently, the Samadhi Mandir as well as the Shirdi town has become a place of pilgrimage of national and international importance to the millions of devotees of Saibaba.

4. The petitioner has contended that earlier in the year 1953, a Public Trust under the name of "Shirdi Sansthan of Shri Saibaba" was constituted and the same was registered under the provisions of the Public Trust Act, 1950 under Registration No.E-69, Ahmednagar, which is a classification given to the Trusts whose objects are both religious and charitable. The trust also obtained the registration under the provisions of Section 12A of the IT Act from the Jurisdictional Commissioner of Income Tax, Mumbai, as a Trust for charitable and religious purposes being Registration No. TR/3033 dated 24 August 1977. Recently, by an order dated 17 March

2008 passed by the Chief Commissioner of Income Tax, Mumbai in exercise of the powers conferred by sub-clause (v) of Clause 23C of Section 10 of the IT Act, an approval was granted to the petitioner for the purposes of the said provision subject to the conditions as mentioned in the said order. Also on 25 March 2009, the Director of Income Tax (Exemption) issued a Certificate under Section 80G of the IT Act *inter alia* on the conditions as contained in the said certificate.

5. It is the petitioner's case that by a letter dated 27 January 2012, the Director of Income Tax (Exemptions) while referring to the amendment which was made to Section 80G(5)(vi) by the Finance Act (No.2) of 2009, it was stated that there was no need to seek a renewal of the Certificate already issued under Section 80G and that the said certificate, which was valid upto 31 March 2012, was held to be valid from 01 April 2012 onwards till it was rescinded. Such extension of the validity was subject to the same terms and conditions as contained in the original Certificate under Section 80G. It is stated that Certificate issued under Section 80G of the IT Act was basically to enable the devotees who intended to avail tax exemption, provided that the donations by devotees were received by cheque or by cash upto Rs.2,000/- as specified in Section 80G(5D) of the IT Act. The petitioner contends that the administration

of the public trust was thereafter regulated by a scheme framed by the City Civil Court, Mumbai in Charity Suit No. 3457 of 1969 whereby, vide an order dated 18 October 1982 (as confirmed by this Court in First Appeal No.320 of 1982 decided on 23 July 1984), the management of the trust was vested in the Board of Management constituted by the Charity Commissioner of Maharashtra. It is stated that under such scheme, several Trustees of the Board of Management were appointed. The Board of Trustees were appointed for a period of five years i.e. from 1984-89, 1989-94, 1994-99 and 1999-2004.

6. The petitioner has contended that with a view to provide for better management, administration and control of the Saibaba Trust and to enable it to undertake wider welfare activities for the benefit of the public, the Maharashtra Legislature passed the 2004 Act (supra). It is stated that on account of the promulgation of the said Act, the existing public trust was reconstituted and the Shri Saibaba Sansthan Management Committee, under the Trust Act, was appointed under the provisions and control of the Government of Maharashtra, to enable the trust to carry out its activities more effectively and efficiently. It is stated that Sections 19 and 21 of the 2004 Act specify the manner of the utilization and/or expenditure to be made of the Trust funds by the Managing Committee.

The petitioner makes a reference *inter alia* of Section 19 referring to Bhakta Mandal and to Section 21 of the 2004 Act on the utilization of the Trust Fund.

7. On 27 September 2014, the petitioner filed its return of income with the income tax authorities for the assessment year 2014-15 and subject matter of the present proceedings. A notice under Section 143(2) of the IT Act was issued to the petitioner on 31 August 2015 *inter alia* informing the petitioner that there were certain issues in connection with the return of income submitted for the said assessment year on which certain information was required. The petitioner replied to the said notice. Also personal hearing was granted, when the petitioner's representative was heard on information as sought, as also satisfactory explanation was offered. In pursuance thereto, on 17 June 2016, respondent no.2, referring to the notice under Section 143(2) dated 31 August 2015, issued a further notice under Section 142(1) of the IT Act calling upon the petitioner to furnish further details/explanation as set out in such notice. A hearing on such notice was fixed on 07 July 2016. The petitioner submitted its reply to the said notice by its letter dated 07 July 2016 wherein all documents and the information was submitted which included the income and expenditure account along with the balance sheet which disclosed the

income from other sources as well as in Schedule "R" thereto which included donations received in the charity boxes, the general donation and donation in kind.

8. On 12 August 2016, hearing of the case was held wherein the Chartered Accountant represented the petitioner and submitted the petitioner's reply to the notice. The petitioner was again called upon on 20 September 2016 and submitted further documents on 21 September 2016. Again a hearing was held on 20 October 2016 when the petitioner was represented before the Assessing Officer and submitted several documents, the details of which are set out in the petition. Further hearings were held on 01 November 2016 and 24 November 2016 when further documents as described in paragraph 14(w) of the petition were submitted.

9. On the aforesaid backdrop, on 24 November 2016, the Deputy Commissioner of Income Tax (Exemptions) passed an assessment order, which determined the income of the petitioner trust and computed the same after taking into consideration all the accumulations under Section 11(1)(a) and 11(2) of the IT Act as 'Nil'. The total income of the petitioner as assessed under Section 143(3) was shown as 'Nil' in the said

original assessment order. In such order, the Assessing Officer also recorded that the petitioner had submitted all the details which were called for, which were examined and discussed during the course of the proceedings, when it was held that the exemption claimed by the petitioner under Section 11 of the IT Act was found to be correct and the same was allowed.

10. The petitioner thereafter had continued to file its return for the subsequent assessment years. The petitioner was continued to be assessed pursuant to scrutiny under Section 143(3) of the IT Act on similar basis. However, for AY 2015-16, a notice under Section 142(1) of the IT Act was issued to the petitioner. The same was duly replied. There were also further notices issued and information/documents with respect to the assessment provided by the petitioner. Despite past assessments, namely for the AY 2014-15, the petitioner was issued a show cause notice as to why the income of the petitioner received by way of anonymous donations in the Hundi Boxes, should not be taxed under the provisions of Section 115BBC of the IT Act. The petitioner in its reply to the show cause notice *inter alia* contended that Section 115BBC of the IT Act was not applicable to a mixed purpose trust i.e. charitable as well as religious and therefore, the petitioner was exempted under sub-section 2(b) of Section 115BBC.

However, in the assessment order passed for the assessment year 2015-16, Assessing Officer included the anonymous donations received by the petitioner as the taxable income of the petitioner. Consequent to such assessment order, a demand notice came to be issued to the petitioner for payment of tax and recovery proceedings were also initiated.

11. In the aforesaid circumstances, the petitioner contends that the petitioner approached this Court by filing Writ Petition No. 395 of 2018 challenging the assessment order passed for the assessment year 2015-16. An order dated 09 February 2018 came to be passed on such writ petition whereby this Court directed the Commissioner of Income Tax (Appeals) [for short, "**CIT (Appeals)"**] to entertain the petitioner's appeal, if filed and that the grounds taken in the writ petition could be taken before the CIT (Appeals).

12. In pursuance of such orders passed by this Court, the petitioner filed an appeal before the CIT (Appeals). Also, a stay application was filed by the petitioner. It is the petitioner's case that although the petitioner was heard on the appeal, there was an order passed on the stay application that a lump-sum amount be deposited by the petitioner. In these circumstances, the petitioner filed another writ petition being Writ Petition No. 939 of 2018. On such writ petition, an order dated 27 March

2018 was passed by this Court whereby the writ petition was disposed of with a direction to the Revenue officers not to initiate any recovery proceedings against the petitioner until the CIT (Appeals) disposed of the petitioner's appeal and thereafter for a period of two weeks after the communication of the order to the petitioner.

13. The petitioner contends that coincidentally on the very day i.e. on 27 March 2018, the petitioner was served with a notice dated 23 March 2018 under Sections 147 and 148 of the IT Act for the assessment year 2013-14. By such notice, respondent no.4/Deputy Commissioner of Income Tax (Exemption) 2(1) sought to re-open assessment for the AY 2013-14. The petitioner replied to the said notice as also requested respondent no.4 to furnish to the petitioner the reasons for reopening of the assessment. The request as made by the petitioner was complied by respondent no. 4. The only reason as furnished to the petitioner for reopening of the assessment was that the anonymous donations received by the petitioner had escaped assessment.

14. The petitioner filed its objections to the reasons as furnished to it to reopen the assessment. Such objections filed by the petitioner were dismissed by respondent no.4. Hence, the petitioner again approached this Court in the proceedings of writ petition being Writ Petition (L.) No.

3278 of 2018 being aggrieved by the rejection of its objections. An order dated 24 October 2018 came to be passed on such writ petition disposing of the said writ petition, clarifying that the Court has kept open the challenge as raised by the petitioner to be raised in the appropriate legal proceedings. The petitioner being aggrieved by the order dated 24 October 2018 passed by this Court, approached the Supreme Court in the proceedings of Special Leave Petition No. 30475 of 2018. The Supreme Court while granting leave to appeal on the said proceedings, disposed of the civil appeal (Civil Appeal No. 1070 of 2019) in terms of the following directions:-

> "i) The Assessing Officer shall complete the assessment for Assessment Year 2013-14 pursuant to the notice for reassessment which has been issued on 23 March 2018, in accordance with law;
>
> ii) The issue as to whether the notice under Section 148 for reopening the assessment for Assessment Year 2013-14 is valid is kept open to be urged in appropriate proceedings after the assessment order is passed;
>
> iii) Upon the passing of the order of assessment for Assessment Year 2013-14 and in order to enable the Assessee to pursue its remedies before the Commissioner of Income Tax (Appeals) there shall be an interim protection in terms of the order dated 27 March 2018 that was passed by the Division Bench of the Bombay High Court in Writ Petition No. 939 of 2018;
>
> iv) Both the appeals for the Assessment Years 2013-14 and 2015-16 shall be heard together by the Commissioner of Income Tax (Appeals).
>
> v) The appellant shall be at liberty to pursue its remedies in accordance with law."

15. After the aforesaid orders were passed by the Supreme Court, respondent no.1 addressed various letters/notices to the petitioner from time to time seeking information and documents from the petitioner. Such notices were complied by the petitioner.

16. It is the petitioner's case that for another assessment year namely AY 2015-16, an appeal was filed by the petitioner before the CIT(Appeals), Exemption (2). The said appeal filed by the petitioner was fixed a hearing. The petitioner informed the appellate authority that as per the order passed by the Supreme Court, the appeals for the AY 2015-16 and AY 2013-14 have to be heard together as the petitioner contended that the issue as involved was similar, on the applicability of Section 115BBC of the IT Act to the petitioner Trust. The petitioner therefore requested that hearing of the appeal be deferred till an assessment order for AY 2013-14 was passed.

17. The petitioner has contended that thereafter on 19 March 2019, respondent no.4 passed an assessment order for AY 2013-14, whereby it was held that a sum of Rs. 175,53,26,649/- (anonymous donations) was taxable under Section 115BBC of the IT Act and that on such amount, tax payable was determined.

18. The petitioner being aggrieved by the assessment order dated 19 March 2019 passed by respondent no.4 for the assessment year 2013-14, filed an appeal before the CIT (Appeals). It is contended by the petitioner that in the meantime, respondent no.4 initiated recovery proceedings against the petitioner for the recovery of tax payable under order dated 19 March 2019. The petitioner responding to these proceedings, addressed a letter dated 18 January 2019 *inter alia* recording that under the orders passed by the Supreme Court, the recovery proceedings were stayed, till the appeal filed by the petitioner before the CIT (Appeals) for AY 2013-14 was decided.

19. The petitioner contends that both the appeals filed by the petitioner i.e. for the AY 2013-14 and AY 2015-16 were pending and no dates for hearing were granted. It is on such backdrop, although when the proceedings were pending, for the assessment year in question an assessment order dated 24 November 2016 was passed. On such backdrop, on 31 March 2019, the petitioner was issued the impugned notice under Section 148 of the IT Act proposing to reopen its assessment for the AY 2014-15 and calling upon the petitioner to file its revised return. In pursuance thereto, on 26 April, 2017 the petitioner filed its revised return of income, which was a NIL return whereby the petitioner

had claimed a refund of tax of Rs. 12382780/-.

20. On 30 April 2019 the petitioner addressed a letter to the Assessing Officer/respondent no.4 requesting respondent no.4 to provide the petitioner with reasons for reopening of the assessment for AY 2014-15. The reasons were supplied to the petitioner under respondent no.4's letter dated 13 September 2019 along with approval granted to it by respondent no.3.

21. The petitioner contends that although the reasons were furnished to the petitioner, some correspondence ensued between the parties i.e. petitioner addressing two letters dated 16 November 2019 and 19 November 2019 to respondent no.4. On 03 December 2019 the petitioner filed its objections to the reopening of the assessment for AY 2014-15.

22. The petitioner contends that although the objections to the reasons for reopening raised by the petitioner were pending consideration, on 08 December 2019 respondent no.4 issued a notice to the petitioner under Section 142(1) of the IT Act calling upon the petitioner to provide certain information on or before 11 December 2019. Such information included a confirmation of hospital receipts of Rs.75,63,16,395/- and receipt from

educational activity of Rs. 1,32,26,364/- which had not been included in Income and Expenditure Account, as also to provide along with AIR reconciliation statement. Although such information was called for, on the same day (i.e. on 08 December 2019) respondent no.4 passed an order rejecting the objections as raised by the petitioner against reopening of the assessment.

23. The petitioner being aggrieved by the order dated 08 December 2019, approached this Court by filing Writ Petition No. 627 of 2020. By an order dated 19 December 2019 passed on the said writ petition, further proceedings in connection with the reassessment proceedings for the AY 2014-15 were stayed. Such writ petition was ultimately disposed of by an order dated 28 March 2022, whereby the impugned order rejecting the petitioner's objections dated 08 December 2019 was set aside and the matter was remanded for *de novo* consideration keeping open all rights of the petitioner. The said order reads thus:-

> "1 Heard the counsel and also perused the reasons recorded for re-opening, objections filed by petitioner to reopening and order on objections dated 8th December 2019 rejecting petitioner's objections, which, alongwith the notice dated 31st March 2019 issued under Section 148 of the Income Tax Act 1961 (the said Act), is impugned in this petition.
>
> 2 Mr. Ganesh pointed out that the entire reopening is based on change of opinion and all the points have been scrutinized and discussed in detail during the assessment proceedings. Mr. Ganesh also submitted that the stand of petitioner in the order on

objections have not been denied in toto but the Assessing Officer simply states what is submitted by petitioner is not discernible from return of income.

3 Having considered the order on objections, in our view, the concerned officer has not been able to really appreciate the submissions of petitioner and it would have helped, had a personal hearing been granted. The advantage of giving a personal hearing is, this doubt that the concerned officer had that he was unable to discern from return of income what petitioner has submitted, would not have arisen. Therefore, we, without making any observations on merits of the case set aside the order dated 8th December 2019 which is impugned in the petition. The matter is remanded for denovo consideration and all rights and contentions of petitioner are kept open.

4 Jurisdictional Assessing Officer (JAO) shall also give a personal hearing to petitioner with atleast 7 working days advance notice. JAO shall permit petitioner to also make written submissions following the personal hearing. If in the order, the JAO proposes to rely on any judgments or order passed by any Court or Tribunal, he shall provide a list thereof to petitioner alongwith the notice for personal hearing and give them an opportunity to deal with those judgments or distinguish those judgments and those submissions during the personal hearing.

5 JAO shall pass a well reasoned order by 30th June 2022 dealing with every submissions of petitioner and give complete reasons for the conclusions that he will be arriving at. The assessment proceedings will not be proceeded with for at least 30 days after passing the order on objections. The time spent from the date of filing the writ petition till disposal and the time granted for disposal of objections is to be excluded while computing the period of limitation for completion of the assessment proceeding.

6 Petition disposed. No order as to costs."

24. Respondent no.4, in pursuance of the aforesaid order passed by this Court, issued a notice to the petitioner under Section 142(1) dated 21 April 2022 calling upon the petitioner to remain present for hearing on 06 May 2022. Thereafter on subsequent dates, the Chartered Accountant of

the petitioner was heard, as also submitted documents. A list of documents as submitted by the petitioner is set out in paragraph 48 of the petition. In furtherance thereto, by the impugned order dated 28 June 2022, the petitioner's objections for reopening were partially allowed, however, respondent no.4 permitted reopening of the assessment for the AY 2014-15 under two heads, firstly on cash deposits (anonymous donations) and secondly, investment in jewellery/ornaments in regard to items received in donations. It is on the aforesaid backdrop, the proceedings are before the Court.

25. Reply affidavit on behalf of the respondents is placed on record opposing the petition *inter alia* contending that the petitioner's case has been reopened on two issues i.e. on the issue of the petitioner-trust being a charitable institution and hence the anonymous donations required to be taxed as per the provisions of Section 115BBC, and on the issue of donations being received of ornaments and jewellery in regard to which the petitioner not investing in the prescribed modes of investment as mandated by the provisions of Section 11(5) of the IT Act. There are other grounds of opposition to the writ petition including to contend that the petition is premature.

Submissions on behalf of the petitioner :-

26. On behalf of the petitioner, Mr. Ganesh, learned senior counsel would submit that the impugned notice issued to the petitioner under Section 148 as also the impugned order dated 28 June 2022 rejecting the objections of the petitioner against reopening of the assessment are issued/passed on the basis of material which was already available with the Assessing Officer at the time of the assessment and not on any new tangible material as derived by respondent no.4. It is hence submitted that the impugned reopening of the assessment by respondent no.4 is without forming any 'reason to believe' that the income has escaped assessment. It is submitted that the impugned order has been passed merely on a change of opinion. In supporting such contention, it is submitted that it is settled position in law that the notice under Sections 147 and 148 can be issued only on fresh tangible material being gathered, failing which the reopening would be bad and illegal.

27. It is submitted that the impugned order dated 28 June 2022 in so far as it rejects the petitioner's objections on the reassessment, is on two basic grounds i.e. (i) disallowance under Section 115BBC in respect of the anonymous Hundi donations received by the petitioner and (ii) non-compliance with the investment requirement laid down by Section 11(5)

read with proviso (iia) to Section 13(1)(d). It is submitted that in so far as disallowance under Section 115BBC is concerned, the impugned order relied on the AIR return regarding cash deposit in the petitioner's bank accounts. It is submitted that however the AIR return was not only available in the original proceedings but the same was also specifically raised in the department's queries and specifically answered in the petitioner's letter dated 12 August 2016 (page 265-266 of the paper-book). It is hence submitted that after considering the petitioner's explanation, the Assessing Officer in the assessment order passed under Section 143(3) of the IT Act did not make any addition under Section 115BBC. It is hence submitted that such ground to reopen the assessment is therefore on a mere change of opinion and in fact amounting to a review of the original assessment, which is expressly forbidden by law. In supporting such submissions, reliance is placed on the decision of the Supreme Court in **CIT vs. Kelvinator of India Ltd.**[1] and several other decisions. It is submitted that apart from the AIR report, the fact of cash deposit in the hundis is expressly referred at a number of places in the petitioner's audited balance sheets, which were materials before the Assessing Officer. Our attention in this regard is drawn to such documents which were before the Assessing Officer by referring to pages

1 (2010) 320 ITR 561

198, 199 and 219 of the paper-book.

28. Insofar as the second ground namely of non-compliance with the investment requirements laid down by Section 11(5) of the IT Act that the petitioner had obtained donations in kind which were not converted into the investments, prescribed and required by Section 11(5) i.e. donations of gold, silver, other valuables, it is submitted that the receipt of these donations in kind was expressly set out/revealed in the petitioner's balance-sheet, a copy of which is placed on record. It is submitted that after considering the audited balance sheets, the Assessing Officer did not apply Section 11(5) read with Section 13(1)(d) to these donations and no query was raised to the petitioner in this issue. Mr. Ganesh would submit that if such a query was to be raised by the Assessing Officer, then the petitioner would have certainly placed reliance on such material already available, as also to point out an injunction order dated 16 October 2012 passed by this Court in the proceedings of Civil Application No. 12056 of 2012 by which the petitioner was restrained from selling any valuables received by it in kind. It is submitted that therefore it was not possible for the petitioner to sell these valuables, and to convert the same into the investments required by Section 11(5) of the IT Act as this would lead to the petitioner acting contrary to the orders passed by this Court. In

supporting such contention, Mr. Ganesh has placed reliance on the decisions in case of **Shipra Srivastava & Anr. vs. Assistant Commissioner of Income Tax**[2], **Bapalal & Co. Exports vs. Joint Commissioner of Income Tax (OSD)**[3], **Commissioner of Income Tax-V vs. Orient Craft Ltd.**[4] and **Inductotherm (India) Pvt. Ltd. vs. M. Gopalan, Dy. Commissioner of Income Tax or his Successor**[5] as also the decision in **The Pr. Commissioner of Income Tax, Bengaluru & Ors. vs. Fibres and Fabrics International Pvt. Ltd.**[6] of the Karnataka High Court and the orders dated 25 April 2022 of the Supreme Court rejecting Special Leave Petition to Appeal No. 6016 of 2022 arising from such order.

Submissions on behalf of the Revenue :-

29. On the other hand, Mr. Sharma, learned counsel for the Revenue has submitted that in the present case as the reopening is within a period of four years, the requirements as per the first proviso to Section 147 (as on 31 March 2021) namely of a failure on the part of the petitioner to disclose fully and truly all material facts as a pre-condition to issue notice under Section 148 is not applicable. It is submitted that the assessment order does not disclose that the Assessing Officer has applied his mind and

2 (2009) 319 ITR 0221 (Delhi HC)
3 (2007) 289 ITR 37 (Mad HC)
4 (2013) 354 ITR 536 (Delhi HC)
5 (2013) 356 ITR 0481 (Guj HC)
6 (2022) 139 taxmann.com 561 (Kar.)

it is on such issue reassessment is initiated. It is submitted that as the reopening itself is within 4 years, the Assessing Officer may find tangible materials from the records which are already made available by the petitioner so as to reopen the assessment. It is submitted that the tangible material need not always be new tangible material, hence, to say that tangible material to be new or fresh material would amount to reading the first proviso below Section 147, as it stood on 31 March 2021 for cases, which are re-opened within four years. In supporting such contention, reliance is placed on the decision of this Court in case of **Export Credit Guarantee Corporation of India Ltd. vs. Additional Commissioner of Income-tax**[7]. The relevant observations made in the said decision read thus :-

> "8. To hold that the Assessing Officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible. When an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction."

7 (2013) 30 taxmann.com 211 (Bom)

Reasons and Conclusion :-

30. As seen from the facts to which we have made a reference in some detail, it appears to be clearly not in dispute that the assessment order under Section 143(3) of the IT Act was passed by the Assessing Officer on 24 November 2016 and after such assessment was completed, the petitioner was issued with the impugned notice dated 31 March 2019 under Section 148 of the IT Act, whereby respondent no.4 sought to open assessment for the AY 2014-15. The petitioner had requested respondent no.4 by its letter dated 30 April 2019 that the reasons for reopening of the assessment for AY 2014-15 be furnished to it and the same were furnished to the petitioner by respondent no.4 under his letter dated 13 September 2019. It is seen that the reasons are purely on the basis of material which was available with the Assessing Officer during the course of the assessment proceedings. The primary reason to reopen the petitoner's assessment is in relation to the donations received by the petitioner in cash or in kind, for the Assessing Officer to form an opinon/reason to believe that the cash donations in box falls within the definition of "anonymous donations" under Section 115BBC(3) of the IT Act, hence, such donations were taxable under Section 115BBC(1) of the IT Act, unless exempted under sub-section (2) of Section 115BBC. The other reason as recorded by

respondent no.4 was to the effect that the income received by the petitioner in the form of ornaments and jewellery has not been disclosed in the income and expenditure account, which *prima-facie* shows failure on the part of the assessee to comply with the provisions of Section 13(1)(d)(iia) of the IT Act. The relevant extract of the reasons as annexed to the petition is required to be noted which reads thus:-

> "3. During assessment proceedings, the source of cash deposit, information and explanation about the Bank AIR return about the cash deposited of over Rs. 10 lacs, was asked. In respect of the huge cash deposits of Rs.360,28,44,424/-, the only explanation submitted by the assessee vide their reply dated 12.08.2016, is that many devotees of Shree Sai Baba are coming and they give donation in cash or kind. The entire donations deposited in the Bank are cash dropped in the Box or donation given in Counter. All the records are kept updated and correctly and the funds are fully deposited in cash in the Bank.
>
> The cash donation in box clearly fall within the definition of anonymous donation u/s. 115BBC(3) of the I. T. Act, the same is taxable u/s. 115BBC(1) of the I.T. Act; unless it is excluded under sub-section (2) of the same Section. It is important to note that in the explanation dated 12/08/2016, it is clearly stated that the assessee trust is mainly incorporated for the charitable objects started by Shree Sai Baba in his lifetime, which prima facie shows that the assessee is a charitable trust on which exclusion u/s.115BBC(2) does not apply. Importantly, even in the earlier reply dated 07/07/2016 also, it has been clearly stated that Shree Sai Baba Sansthan Trust is registered 'Charitable Trust' having the objects of charity to poor, to support, to education, to give free and concessional facility of medical to poor and needy people. As per these two letters, the assessee is admittedly a charitable Trust which is not covered by exclusion of sub-section (2) of Section 115BBC. Therefore, the above donation should have been disclosed by the assessee in its Return of Income, which it has failed to do, leading to escapement of income of assessee from assessment. The records also show that the AO did not apply mind to the issue.
>
> 4. In the Return of Income in Col. 8, the voluntary contribution forming part of corpus as per section 11(1)(d), has

been claimed at Rs. 20,63,12,494/-. However, the Balance Sheet of assessee shows the trust-corpus fund same as it was in the previous year at Rs. 48,82,52,868/-. No accretion to corpus fund in Balance Sheet shows that the claim of corpus donation of Rs.20.63 crores u/s. 11(1)(d) is not correct and to this extent income has escaped assessment. Further, even in Schedule J in the Return of Income which is having a statement showing the investment of all funds as on the last day of previous year is shown at Nil, which prima facie shows that otherwise also, there is a violation of provisions of section 11(5).

5. In the Return of Income, the assessee has claimed deduction u/s.21(2) of the I. T. Act at Rs. 343,91,42,425/-. The only detail submitted by the assessee in respect of this is Form No.10. However, on perusal of Form No. 10, it is seen that no amount which is accumulated is specified in the form. Further, as per provisions of the Act, such accumulation has to be for specific purposes, which need to be specified in Form No.10, However, the purpose specified in Form No.10 is shown s "As per Resolution enclosed". No copy of Resolution was filed by the assessee where it could have been ascertained as to the conditions prescribed in Section 11(2) for allowing the above claim, is specified or not. Importantly, in Schedule J of the Return of Income, which shows statements showing an investment of all funds on the last day of previous year, the details of investment or deposits made u/s. 11(5) is shown at Nil. The claim of exemption u/s. 11(2) therefore, is not proper as it can be inferred from the assessment records.

6. As per Balance Sheet, the total value of ornaments and jewellery shown at cost has increased from Rs. 63.32 crores to Rs. 74.31 crores. The amount of surplus from sale of gold, silver coins etc. forming part of other income is Rs.1.87 crores. Further, even the donation in kind reflected in the financials merely Rs. 7.85 crores. This prima facie shows that the income received in the form of ornaments and jewellery has not been disclosed in the Income and Expenditure Account. It also prima facie shows the failure of assessee to comply with the provisions of Section 13(1)(d)(iia) of the I. T. Act.

7. On the basis of the above facts and discussion, I am satisfied that income of assessee has escaped assessment and it is a fit case for re-opening of assessment u/s. 147 of the I. T. Act by issue of notice u/s.148 of the I. T. Act."

31. The petitioner had objected to the aforesaid reasons by its detailed

letter dated 03 December 2019 addressed to respondent no.4 *inter alia* contending that the basis on which such satisfaction was derived by respondent no.4 as seen from the reasons as furnished to the petitioner was nothing more but from the records of the original assessment in the proceedings under Section 143(3) which stood concluded vide an order dated 24 November 2016, which was passed by respondent no.4. In regard to all such reasons as informed to the petitioner, forming part of the decision to reopen the assessment, it was pointed out that there was complete absence of any fresh material that was received/ obtained by the Assessing Officer on the completion of the impugned assessment under Section 143(3). The petitioner stated that the assessment under Section 143(3) was completed accepting the view consistently adopted for the previous undisputed assessments. It was also pointed out that the power for reopening was not akin to having a review and that the existence of true, complete and tangible new material received after completion of the assessment, was necessary to ensure against an arbitrary exercise of power. The decision supporting such proposition was also placed for consideration in the objections. Such objections as raised by the petitioner were rejected by the impugned order dated 08 December 2019.

32. Thus, the question which arises for consideration in the facts and

circumstances of the case, whether it was permissible for the Assessing Officer to issue the impugned notice under Section 148 and to reject the objections as raised by the petitioner to the reasons for reopening of the assessment by the impugned order dated 08 December 2019.

33. At the outset, we find substance in the contention as urged on behalf of the petitioner that the reasons as furnished to the petitioner to which we have made a detailed reference are not based on any fresh/new tangible material but on a new opinon being formed on the legal provisions. In fact, the reasons point out that such notice has been issued on the basis of materials which were already part of the assessment proceedings and which were furnished by the petitioner and which formed basis of the assessment order passed under Section 143 dated 24 November 2016, as also conceded in the reply affidavit, that the reopening is based on two issues namely on the issue of trust being a charitable institution and hence the anonymous donations being required to be taxed, as per the provisions of Section 115BBC, and on the issue of accepting the donations in the form of ornaments and jewellery and not investing the same in the prescribed modes of investment as mandated by the provisions of Section 11(5) of the IT Act.

34. The reply affidavit does not point out that the reopening of the

assessment for the assessment year in question is on the basis of fresh tangible materials, which later on had come to the knowledge of the Assessing Officer and which did not form part of the assessment proceedings. However, case of the respondents is on the basis that as the reassessment which is reopened within a period of four years, the materials which were already available before the Assessing Officer and which ultimately were considered in passing an assessment order under Section 143(3) of the IT Act, can form the basis of reopening of the assessment on the ground that such materials were ignored in finalizing the assessment. In our opinion, such proposition cannot be accepted in view of the settled position in law as seen from catena of judgments. We discuss the legal position hereafter.

35. At the outset we need to extract the provisions of Section 147 of the IT Act as applicable to the assessment year in question and as it stood on the date of notice i.e. 31 March 2019, which read thus:

> "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 sub-section (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 under section 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 nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also 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 exces- sive loss, deduction, allowance or relief in the return;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required

under section 92E:

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

(i) income chargeable to tax has been underassessed; 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;

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maxi- mum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

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.

Explanation 4.-For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

(emphasis supplied)

36. The present case would fall under Section 147 of the IT Act in the part preceding the first proviso which ordains that 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 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 the said provision. Insofar as the applicability of the provision for a period within four years as falling under Section 147 as it reads prior to the proviso, it appears to be a well settled position in law that unless there was fresh material which was available with the Assessing Officer to disturb the reasoning which had gone into in finalising the assessment under Section 143(3), the Assessing Officer would not have jurisdiction to reopen the assessment. We refer to the relevant decisions in this regard which reads thus.

37. In **Shipra Srivastava & Anr. Vs. Assistant Commissioner of Income Tax** (supra) the return of income of the petitioner was duly processed under Section 143(1) of the IT Act and thereafter, notices were issued within four years under Section 147/148 of the IT Act, not on the basis of any fresh material. In such context, the Division Bench of the Delhi High Court held that the reasons which were recorded seeking reopening of the assessment showed that there was no application of mind by the Assessing Officer which could be said to be the mind of a reasonable person, to arrive at a conclusion on the reasons recorded. It was observed that the

reasons did not refer to any material which had come to the notice of the officer subsequent to the finalization of the assessment under Section 143(1), and also it was not the case that the assessee had concealed any material particulars or any facts from the department. The Court observed that the conclusions which have been arrived at by the officer in seeking reopening of the assessment, were in fact wholly without basis.

38. In **Bapalal & Co. Exports Vs. Joint Commissioner of Income Tax (OSD)** (supra) the Division Bench of the Madras High Court was concerned with the case of reopening of the assessment after expiry of about three years and in such context it was observed that it was a settled legal proposition from the decision of the Supreme Court, that once an opinion is given in an assessment, it cannot be reopened by any other authority except on fresh material, and as the notice was issued in the "absence of any new material", the Assessing Officer was not empowered to reopen an assessment irrespective of the fact whether it is made under section 143(1) or 143(3) of the Act.

39. In the **Commissioner of Income-tax-V vs. Orient Craft Ltd.** (supra) a Division Bench of the Delhi High Court was dealing with the question whether reopening of the assessment made under Section 143(1) is

without jurisdiction in the absence of any tangible material available with the Assessing Officer so as to form the requisite belief regarding escapement of income. It was observed that in the absence of any new tangible material with the Assessing Officer, there was no ground for reopening of the assessment.

40. The Division Bench of the Karnataka High Court in **The Pr. Commissioner of Income Tax, Bengaluru & Ors. Vs. Fibres and Fabrics International Pvt. Ltd.** (supra), in an appeal under Section 260A of the IT Act was dealing with the question whether the Tribunal was right in law to hold that the re-assessment order passed in the case of assessee was null and void, on the ground that the said proceedings are initiated based on the "same set of information" as was available at the time of original assessment proceedings and therefore, it amounts to mere change of opinion. The Court observed that during the course of original assessment proceedings, the details in regard to the expenditure incurred by the assessee towards sales commission were furnished by the assessee and formed part of the assessment proceedings. Thus, the assessee had furnished all primary facts before the Assessing Officer and on such basis/ facts available with the Assessing Officer, an original order of assessment was passed without making any disallowance of the expenditure in

question. The Court in such context, observed that the re-assessment proceedings were on the basis of the "same information", which was available with the Assessing Officer at the time when the original order of assessment was passed and the inferences being drawn by the Assessing Officer were on the same set of facts, cannot be said to be tangible material. It was also observed that the mere fact that expenses were huge in the opinion of the Assessing Officer cannot be a ground for re-opening the assessment and necessity of incurring expenditure cannot be gone into by the Assessing Officer. The aforesaid observations of the Division Bench of the Karnataka High Court found concurrence of the Supreme Court in the Supreme Court dismissing the revenue's appeal by an order dated 25 April 2022 passed on Special Leave to Appeal (C) No.6016/2022. The said order reads thus:

> " Having heard Mr. N. Venkataramn, learned ASG, appearing for the petitioner(s) and considering the impugned judgment and order passed by the High Court and it is found that there was no further tangible material available with the A.P. which warranted the re-assessment and/or re-opening of the concluded assessment, no interference of this Court is called for.
>
> The Special Leave Petition stands dismissed."

41. In **Income Tax Officer, Ward No.16(2) vs. Techspan India Pvt. Ltd. & Anr.**[8], the Supreme Court interpreting the provisions of Section 147 has

8 (2018)6 SCC 685

held that the power to reopen assessment is conditional upon the fact that the Assessing Officer has reason to believe that the income has escaped assessment. It was observed that use of the words “reason to believe” in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequece of conferring arbitrary power on the Assessing Officer who may initiate such reassessment proceeding merely on the change of opinion on the basis of the same facts and circumstances which have already been considered by him during the original assessment proceedings. It was held that such could not be the intention of the legislature, as, the said provision was incorporated in the scheme of the IT Act so as to empower the assessing authorities to reassess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge and the said fact would have material bearing on the outcome of the relevant assessment order. It was further held that Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the Assessing Officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. The Court observed that doing so would have the effect of giving the Assessing Officer the power to review and Section 147

confers the power to reassess and not the power to review.

42. The Division Bench of this Court in **Plus Paper Food Pac Ltd. Vs. Income-tax Officer and Anr.**[9] was dealing with the case of reopening of assessment within the period of four years, initiated against the assessee under Section 148 of the Act and rejecting the objections of the petitioner. The primary contention as urged on behalf of the assessee was to the effect that the Assessing Officer had no occasion to pass the impugned order in rejecting the objections as raised by the petitioner for the reason that the assessee had disclosed all material facts fully and truly in the course of the assessment proceedings, and hence, there was no occasion for the Assessing Officer to believe that the income has escaped assessment. In upholding such contention as urged on behalf of the assessee as also referring to the decision of this Court in the Division Bench in **Export Credit Guarantee Corporation of India Ltd. Vs. Additional Commissioner of Income Tax and Others**[10] the Court held that it was a case where the notice under section 148 had not been issued after the expiry of four years, but within four years and in these circumstances, it was necessary that there ought to have been a reason to believe that income chargeable to tax has escaped assessment and which alone would enable the Assessing

9 2015 SCC OnLine Bom 4230
10 (2013)30 taxmann.com 211 (Bom)

Officer to assess or re-assess such income. It is in such context the Court observed that the Court did not agree with the reasoning of the Assessing Officer for the reason that the assessment order had taken into consideration all relevant documents and that there was "no new tangible material". The relevant observations of the Court are required to be noted which read thus:-

> 18. We are unable to agree with the reasoning of the Assessing Officer. In our view, the entire approach of the Assessing Officer in the facts of the present case is misconceived. The assessment order in the present case has obviously taken into account the aspect of depreciation. Perusal of the assessment order reveals that all relevant documents and details as called for were filed. It is further recorded in paragraph 3 of the assessment order that the details of the assessee-company along with the return of income and those which were called for assessment proceedings were scrutinized. There does not appear to be the tangible material/reason for the Assessing Officer to reopen the assessment proceedings in the facts of the present case. The reasons offered by the Assessing Officer while rejecting the objection that the issues involved in reassessment proceedings were never examined by the Assessing Officer are not tenable. No particulars whatsoever has been relied upon by the Assessing Officer while rejecting the objections.
>
> 19. The facts reveal and we are satisfied that in the present case, the order of reopening of the assessment will not be justified. The decision to reopen assessment is not based on proper reasons but obviously is a result of change of opinion. This is impermissible. In the case of ECGC, there was specific finding that there existed tangible material and reason to reopen the assessment and that was evident from the record in that case. It is not the case of the Revenue that in this case any new material was forwarded to the Assessing Officer. In any event we are not called upon to decide on the merits of the case and the proposed reopening is not justifiable in the facts and circumstances of the present case. Accordingly, the petition must succeed. We, therefore, pass the following order:

> The impugned notice dated November 18, 2013, being exhibit "H" to the petition issued under section 148 of the Income-tax Act, 1961, in respect of the assessment year 2009-10 and the order dated February 4, 2015, rejecting the objections of the petitioner passed by respondent no. 1 are hereby set aside. There will be no order as to costs."

43. In this view of the matter, we cannot agree with the contentions as urged on behalf of the Revenue including on the reliance as placed on the decision of this Court in **Export Credit Guarantee Corporation of India Ltd.** (supra) which was dealt in the decision in **Plus Paper Food Pac Ltd.** (supra). Further, for similar reasons, the said decision would not be applicable in the facts of the present case. It is thus a settled position in law that once all materials which were furnished by the petitioner were subject matter of consideration in the assessment order being passed under Section 143(3) of the IT Act, in such event in the absence of any fresh tangible material, the Assessing Officer could not have issued a notice under Section 148 of the IT Act to reopen the petitioner's assessment for the reason that the Assessing Officer would not have jurisdiction under the garb of re-assessment under Section 147, to reopen the petitioner's assessment merely on the basis of change of opinion and/or review the assessment order passed against the assessee.

44. Mr. Sharma has also placed reliance on the decision of the Delhi

High Court in **Consolidated Photo & Finvest Ltd. Vs. Assistant Commissioner of Income-tax**[11] wherein the Assessing Officer had not applied his mind to the material placed on record. It is for such reason, the Division Bench had formed an opinion that it was not a case of mere change of opinion. Thus, this decision would not be applicable to the facts in hand.

45. In the light of the above discussion and as crystal clear from the reading of the reasons for reopening that the same have been issued on the materials already available and on the record of the Assessing Officer in the course of the assessment proceedings and to his knowledge. It was not a fresh discovery to the Assessing Officer that the petitioner was receiving anonymous donations in a cash and in kind. He also could not have been oblivious to the provisions of Section 115BBC and Section 11(5) or Section 13 of the IT Act, in finalizing the petitioner's assessment for the assessment year in question. On such backdrop, on a plain reading of the reasons for reopening as furnished to the petitioner, it is clear that the Assessing Officer has sought to reopen the assessment on a change of opinion in the application of the provisions of the IT Act or on interpretation of law differently, on facts which were abundantly within his knowledge at the time of original assessment. This is certainly not

11 (2006)151 Taxman 41 (Delhi)

permissible. Hence, such reopening of the assessment, being not on any fresh tangible material, the Assessing Officer would not have jurisdiction to proceed with the re-assessment, as this would be purely in the realm of a review and / or on a mere change of opinion. If such course of action is recognized, it would lead to arbitrary consequences and result in multiple assessment orders being passed on the same materials available with the Assessing Officer, which is not the legislative intention Section 147 would wield.

46. There is another significant aspect on which there appears to be a consensus that qua both the principal issues on the basis of which the assessment of the petitioner in the present case is being reopened by the impugned notice, itself stand addressed in view of the pronouncement of this Court in the assessee's own case in "**Commissioner of Income Tax (Exemptions), Mumbai Vs. Shree Saibaba Sansthan Trust- Shirdi**[12] wherein a co-ordinate Bench of this Court of which one of us (G. S. Kulkarni, J.) was a member, held that anonymous donations received by the petitioner in the hundi were not liable to be taxed under Section 115BBC(1) of the Act. The Court had rendered such decision in relation to the proceedings for the Assessment Year 2015-16, 2017-18 and 2018-19. The Court held that the petitioner was a religious charitable trust and

12 2024 SCC OnLine 3224

hence the assessee rightly and legitimately claimed an entitlement under sub-section 2(b) of Section 115BBC of the Act that the anonymous donations as received in hundi are not liable to be taxed.

47. We find that even the other ground for the Assessing Officer to reopen the assessment by applying the provisions of Section 13 on the issue of accepting donations in the form of ornaments and not investing in the prescribed form as mandated by Section 11(5) of the Act, is concerned, such ground also was of no consequence in view of the order dated 16 October 2012 passed by the Aurangabad Bench of this Court in **Rajendra Bhausaheb Gondkar & Anr. Vs. The State of Maharashtra and Ors.**[13]. In such order, the Division Bench specifically directed that the auction in respect of such precious items / articles stands stayed and suspended forthwith. The Court also injuncted and restrained the petitioner from converting precious metals in any form or melt it in any form. If this be so, as to how the Assessing Officer can reopen the assessment on such ground cannot be understood.

48. From the aforesaid discussion, it is quite clear to us that once tangible material during the course of assessment proceedings was available with the Assessing Officer and the same was considered in

13 Civil Application No.12056/2012 in PIL No.18/2011

passing the assessment order under Section 143(3) of the IT Act, the Assessing Officer, in the absence of any fresh material, could not have proceeded to reopen the petitioner's assessment on similar materials. Such exercise would tantamount to a review of the assessment order on a mere change of opinion. This is certainly not permissible. If such interpretation of the provisions as canvassed on behalf of the respondents is accepted, an assessment order would become vulnerable to be arbitrarily reopened, merely on the ground that the Assessing Officer on the very material intends to take a different view/opinion on the assessment order passed by him. This would lead to a regime of total uncertainty. In our opinion, this is neither the object nor the intention of the provisions of Section 147. The provision is a special power, so as to check, discern and recall concluded assessments, hence, such power cannot be exercised when it is not a case, where the assessee had not withheld any information and/or the Assessing Officer did not have any fresh tangible material. A second bite at the cherry is not what is contemplated under Section 147, on the basis of materials already available with the Assessing Officer, as the provision would become applicable in the present facts. Also, Section 147 certainly does not postulate a review jurisdiction so that the assessment can be reviewed, on the Assessing Officer intending to form a different and/or a

new opinion.

49. In the light of the above discussion, the petition needs to succeed. It is accordingly allowed in terms of prayer clause (a) which reads thus:

> "a) That this Hon'ble court be pleased to issue a Writ of Certiorari and Prohibition or any other similar/appropriate Writ, order or direction under Article 226 of the Constitution of India, 1950, calling for the record and proceedings in connection with the present proceedings and after considering the legality and validity of the Impugned Notice dated 31st March 2019 issued by the Respondent No.4 for reopening the assessment for the Assessment Year 2014-15 as well as the Impugned Order dated 28th June, 2022 passed by the Respondent No.4, thereby rejecting the Petitioner's objections to reopening, to quash and set aside the same and further restrain the Respondent No.4 from taking any steps in pursuance of the said Impugned Notice and Impugned Order."

50. Rule is made absolute in the aforesaid terms. No costs.

(FIRDOSH P. POONIWALLA, J.) (G. S. KULKARNI, J.)