Jyoti Bhatia vs Assistant Commissioner Of Income Tax ... on 5 March, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 10073/2023
JYOTI BHATIA
Through:
versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE
25(1) NEW DELHI & ORS. ....Respo
Through: Mr. Ruchir Bhatia, SSC, Mr
Anant Mann and Pratyuksh
Gupta, JSCs and Ms. Adit
Sabharwal, Adv.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN
SHANKAR
ORDER

% 05.03.2025

1. The writ petitioner impugns a reassessment action as commenced by the respondents under Section 148 of the Income Tax Act, 19611 and pertaining to Assessment Year2 2018-19.

2. The proceedings themselves were commenced on the basis of a notice referable to Section 148A(b) and where the following allegation came to be laid: -

> "As per information available with this office, you have claimed fictitious losses of Rs. 2,53,45,154/- in equity/derivatives trading during the year under consideration. In this regard a letter has sent to M/s J M Financial Asset Management Ltd. and reply received on 16/03/2022. Therefore, you are required to submit your comments with documentary evidences in support of your claim. You are also show cause as to why notice u/s 148 of the Act should not be issued on the basis of information received, either by email or through speed post. If you fail to submit reply within time allowed, it will be presumed that you have nothing to say in this regard and Act AY This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC

> Server on 12/03/2025 at 21:16:51 necessary proceedings as Income Tax Act, 1961 shall be initiated."

3. As is evident from the above, the formation of opinion of income having escaped assessment was based on what the respondents sought to describe as "claimed fictitious losses" in the course of trading of equity and derivatives. The petitioner, responding to the same, filed a detailed reply. However, and ultimately when the final order under Section 148A(d) came to be passed, the respondents have observed as follows:-

> "It is replied by the assessee on 28.03.2022 that investment of Rs. 3,50,00,000/- made on 23.03.2018 in JM Equity Hybrid Fund and same day earned dividend of Rs. 1,41,87,139/- and further invested Rs. 2,80,00,000/- on 28.03.2018 and earned dividend of Rs. 1, 11,58,015/- on the same day. The assessee has submitted copy of bank statement and a/c statement of JM Financial Mutual Fund and requested to drop the proceedings.
>
> The contention of the assessee considered and not found acceptable. In the case of the assessee under reference, the dividend received is from sham transactions generated using colorable devices. The dividend received is not on account of appreciation of the investment and as such, it can't qualify as dividend. Therefore, dividend received of Rs. 2,53,45,154/- should be taxed in the hands of the assessee."

4. We find from the record that the petitioner had while responding to the notice under Section 148A(b), alluded to the investments that had been made in JM Equity Hybrid Fund and of the dividend earned therefrom. It had also made appropriate disclosures with respect to investments made on 28 March 2018 and the consequential dividends which had accrued on those investments.

5. However, the respondent has clearly changed course while passing the final order under Section 148A(d) by now alleging that the dividend has been received from "sham transactions generated using colourable devices". It is further alleged by the respondent that the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/03/2025 at 21:16:51 dividend as received is not on account of appreciation of investments and would thus not qualify as such.

6. It is thus ex facie apparent that the reasoning assigned in the order under Section 148A(d) is de hors the allegations which had come to be originally laid against the writ petitioner while issuing notice under Section 148A(b). It is this which constrains us to observe that the formation of opinion cannot be based on a set of reasons which are of changing hues. We bear in consideration the following observations that we had rendered in ATS Infrastructure Limited v. Assistant Commissioner of Income Tax Circle 1 (1) & Ors.3 in this regard: -

> "6. Our Court in Commissioner of Income Tax-II v. Living Media India Ltd. had pertinently observed that additional reasons cannot be provided or recorded by the Assessing Officer subsequent to the issuance of a notice under Section 148 of the Act. We deem it apposite to quote the following passage from that decision:--
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> "13. With regard to the additional reasons which were recorded subsequent to the issuance of notice under section 148 of the said Act, we have already observed that this could not have been done by the Assessing Officer. The validity of the proceedings initiated upon a notice under section 148 of the said Act would have to be judged from the stand point of the reasons which existed at the point of time when the section 148 notice was issued. The additional reasons cannot be provided or recorded subsequent to the issuance of notice under section 148. It is, of course, open to the Assessing Officer, if some other information comes within his knowledge to issue another notice under section 148 for different reasons. But that is not the case here. On the basis of the very same notice issued under section 148, the Assessing Officer has recorded additional reasons subsequent to the issuance of notice and this is impermissible in law."

7. It becomes pertinent to observe that the validity of the proceedings initiated upon a notice under Section 148 of the Act would have to be adjudged from the stand point of the reasons 2024 SCC OnLine Del 5048 This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/03/2025 at 21:16:52 which formed the basis for the formation of opinion with respect to escapement of income. That opinion cannot be one of changing hues or sought to be shored upon fresh reasoning or a felt need to make further enquiries or undertake an exercise of verification. Ultimately, the Court would be primarily concerned with whether the reasons which formed the bedrock for formation of the requisite opinion are tenable and sufficient to warrant invocation of Section 148 of the Act.

8. We in this regard find the following pertinent observations which appear in a decision of the Bombay High Court in Indivest Pe. Ltd. v. Additional Director of Income-tax5.

> "11. Reading the reasons of the Assessing Officer, it is evident that there is absolutely no tangible material on the basis of which the assessment for the assessment year 2006-2007 could have been reopened. Upon the return of income being filed by the assessee both in the electronic form and subsequently in the conventional mode, the assessee received an intimation under section 143(1). The Assessing Officer would have been legitimately entitled to issue a notice under section 143(2) within the statutory period. That period has expired. We must clarify that the non-issuance of a notice under section 143(2) does not preclude the Assessing Officer from reopening the assessment under section 147. For that matter, as has been held by the Supreme Court in Asst. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd., (2007) 291 ITR 500 (SC), the failure of the Assessing Officer to take steps under section 143(3) will not render

the Assessing Officer powerless to initiate reassessment proceedings even when an intimation under section 143(1) has been issued. But it is also a settled principle of law that when the Assessing Officer issues a notice under section 148, at that stage the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief (Rajesh Jhaveri (supra). At that stage, an established fact of the escapement of income does not have to be proved, since it is not necessary that the Assessing Officer should have finally ascertained that income has escaped assessment. The nature of the jurisdiction of the Assessing Officer which was dealt with by the judgment of the two learned judges of the Supreme Court in Rajesh Jhaveri's case was revisited in a decision of three learned judges in CIT v. Kelvinator of India Ltd., (2010) 320 ITR 561 (SC). The Supreme Court has held that though after April 1, 1989, a wider power has been conferred upon the Assessing Officer to reopen an assessment, the power cannot be exercised on the basis of a mere change of This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/03/2025 at 21:16:52 opinion nor is it in the nature of a review. The Supreme Court has laid down the test of whether there is tangible material on the basis of which the Assessing Officer has come to the conclusion that there is an escapement of income. The Supreme Court held thus (page 564):

"However, one needs to give a schematic interpretation to the words „reason to believe failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of „mere change of opinion , which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of „change of opinion is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of „change of opinion as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has power to reopen, provided there is „tangible material to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words „reason to believe but also inserted the word „opinion in section 147 of the Act. However, on receipt of representations from the companies against omission of the words „reason to believe , Parliament reintroduced the said expression and deleted the word „opinion on the ground that it would vest arbitrary powers in the Assessing Officer.

12. If the test of whether there exists any tangible material were to be applied in the present case, it would be evident that the Assessing Officer has not acted within his jurisdiction in purporting to reopen the assessment in exercising the powers conferred by section 148. There was a disclosure clearly by the assessee that it is a body corporate incorporated in Singapore, the principal business of which is to invest in Indian securities; that the assessee is a tax resident of Singapore and that the profits which the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 12/03/2025 at 21:16:52 assessee realised from its transactions in securities constituted its profits from business. The assessee stated that it had no permanent establishment in India as defined in article 5 of the DTAA and that based on the provisions of article 7 the profits of Rs. 131.70 crores from transactions in Indian securities were not liable to tax in India. The only basis on which the assessment is sought to be reopened is on the assumption that the provisions of section 115AD would stand attracted. That is on the assumption that the assessee is an FIL Though the attention of the Assessing Officer was drawn to the fact that the assessee is not an FII and that the provisions of section 115AD would not be attracted, the Assessing Officer persisted in rejecting the objections to the reopening of the assessment. In the order disposing of the objections which were raised by the assessee, the succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee. The validity of the notice reopening the assessment under section 148 has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently. While disposing of the objections of the assessee, the Assessing Officer has purported to state that the assessee had filed only sketchy details in its return filed in the electronic form. As we have noted earlier, the relevant provisions expressly make it clear that no document or report can be filed with the return of income in the electronic form. The assessee has an opportunity to do so during the course of the assessment proceedings if a notice is issued under section 143(2). The Assessing Officer was, in our view, not entitled, when he disposed of the objections to travel beyond the ambit of the reasons which were disclosed to the assessee. For all these reasons, we are of the view that the exercise of the jurisdiction under section 147 and section 148 in the present case is without any tangible material. The notice of reopening does not meet the requirements as elucidated in the judgment of the Supreme Court in Kelvinator of India Ltd., (2010) 320 ITR 561 (SC) For these reasons, we make the rule absolute by quashing and setting aside the notice dated March 16, 2011, and the order passed by the Assessing Officer on December 20, 2011."

xxxx xxxx xxxx This is a digitally signed order.

11. We also find merit in the submission of Mr. Kantoor who drew our attention to the First Proviso to Section 148 which reads as under:--

"148. Issue of notice where income has escaped assessment-Before making the assessment, reassessment or recomputation under Section 147, and subject to the provisions of Section 148A,-

xxxx xxxx xxxx Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice."

12. As is manifest from the above, the Proviso again ties the initiation of action to the existence of information which already exists or is in the possession of the AO and on the basis of which it comes to form the opinion that income liable to tax has escaped assessment. The provision thus fortifies our view that the foundational material alone would be relevant for the purposes of evaluating whether reassessment powers were justifiably invoked. Accordingly, and for all the aforesaid reasons we find ourselves unable to sustain the impugned reassessment action." We are thus of the considered opinion that the reassessment action would not sustain.

7. We, accordingly, allow the instant writ petition and quash the order referable to Section 148A(d) dated 07 April 2022 and notice under Section 148 of even date. We, however, leave it open to the respondents to draw proceedings afresh if otherwise permissible in law.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

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