Asad Farooqi vs Income Tax Officer Ward 28 (1) New Delhi on 13 September, 2024

Author: Yashwant Varma

Bench: Yashwant Varma

$~24 to 26
* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 16332/2022
ASAD FAROOQI
Through:

versus

INCOME TAX OFFICER WARD 28 (1) NEW DELHI
.....Respo
Through: Mr. Abhishek Maratha, SSC
with Mr. Apoorv Agarwal and
Mr. Parth Samwal, JSCs with
Ms. Nupur Sharma, Mr. Gaura
Singh, Mr. Bhanukaran Singh
Jodha, Ms. Muskaan Gel, Mr.
Himanshu and Mr. Kamalesh
Raj Singh, Advs.
25
+ W.P.(C) 115/2023
ZEENAT PARVEEN
Through:

versus

INCOME TAX OFFICER WARD 28 1 NEW DELHI
.....Respo
Through: Mr. Gaurav Gupta, SSC with
Mr.Shivendra Singh and Mr.
Yojit Pareek, JSCs
26
+ W.P.(C) 196/2023
AYESHA FAROOQI
Through:

versus

INCOME TAX OFFICER WARD 28 (1) NEW DELHI

W.P.(C) 16332/2022 & Connected Matters
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Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

ORDER

% 13.09.2024

1. The instant writ petitions have been preferred against the notices referable to Section 148 of the Income Tax Act, 1961 1 and which have been issued pursuant to the decision of the Supreme Court in Union of India and Ors. vs. Ashish Agarwal 2 for AY 2013-14.

2. We note that the original notices referable to Section 148 came to be issued on 15 June 2021. Pursuant to the judgment of the Supreme Court in Ashish Agarwal, the aforenoted 148 notices were deemed to be notices under Section 148A(b) as introduced by Finance Act, 2021. Show Cause Notices under Section 148A(b) were issued to the petitioners on 23 May 2022 [W.P.(C) 16332/2022 and W.P.(C) 196/2023], and 28 May 2022 [W.P.(C) 115/2023].

3. Before us it is undisputed that the notices which were issued and were referable to the pre-amended provisions of Section 148 had not been assailed in any legal proceedings before any court. It was in this respect contended that the notices under Section 148A(b) dated 23 May 2022 and 28 May 2022 issued post the judgment in Ashish Agarwal cannot be said to be in continuance or substitution of the original notice under Section 148. It was thus argued that the initiation Act (2023) 1 SCC 617 This is a digitally signed order.

 of action by issuance of the impugned notices would constitute the initiation of action afresh and the same would be barred by limitation by virtue of First Proviso of Section 149(1) of the Act.

4. We note that this aspect has been considered by this Court in Genpact India Private Limited vs. Assistant Commissioner of Income Tax, Range 10, OSD, New Delhi & Anr 3. wherein we had observed as follows:-

> "28. It becomes pertinent to note at the outset that Ashish Agarwal was principally concerned with the correctness of judgments rendered by various High Courts on challenges raised by assessees to the initiation of reassessment in accordance with the unamended procedure and which had existed prior to 01 April 2021. The directions ultimately framed were intended to be a curative measure in respect of challenges which had succeeded.

29. To put it differently, the directions which were ultimately framed by the Supreme Court in Ashish Agarwal were principally intended to modify judgments and orders passed by various High Courts. The Supreme Court, while ordaining that Ashish Agarwal would apply "PAN INDIA" had observed that it would be applicable to all similar judgments and orders passed by various High Courts irrespective of whether any appeal from those decisions had been preferred. It also appears to have borne in consideration the spectre of being deluged by as many as 9,000 further appeals which would have eventually travelled up to the Supreme Court and thus burdening its Roster.

30. It is thus manifest that the direction for notices being deemed to have been issued under section 148A was in respect of those which had been impugned either before the various High Courts or the Supreme Court itself. The directions in Ashish Agarwal were, as noted above, intended to resolve the impasse which ensued in light of the conflicting views expressed by different High Courts, the assessees being deprived of the salutary safeguards which Finance Act, 2021 had introduced in respect of reassessment as well as the element of public interest which warranted the Revenue being enabled to take curative action and thus saving the reassessment notices which had been struck down by High Courts.

31. However, and undisputedly, the petitioner had not instituted any legal proceedings before any court to assail the notice dated 30 June 2021 nor was it a party to the batch of writ petition which came to be ultimately allowed by this Court in terms of its judgment in Man Mohan Kohli. There was thus no declaration of invalidity which came to be rendered in respect of the notice issued to the petitioner. There was in our case no judgment rendered inter partes which may have struck down the reassessment notice as being invalid or contrary to the statutory regime which came into effect from 01 April 2021. The notice of 30 June 2021 thus remained unscathed and unimpacted. Consequently, there arose no need for its revival or resuscitation. Ashish Agarwal had mandated a revival of notices which had been struck down by various High Courts and modified the judgments rendered in respect of those notices. Consequent to the decision of the Supreme Court, those judgments came to be modified with the notices being revived and ordained to be treated as having been issued under Section 148A(b). We are thus of the firm opinion that the said decision cannot be read as mandating a continuance or reinvention of notices which had not formed subject matter of challenge or a vacation of assessments which may have been made.

32. We also cannot possibly lose sight of the Supreme Court at more than one place in the judgment in Ashish Agarwal having preserved the rights of assessees to raise all defences and objections as were otherwise available to be adopted or taken in light of Sections 147 to 151 of the Act. The Supreme Court in paragraph 25.4 and again in 28.5 had specifically adverted to Section 149 and the defences and challenges which could be raised by assessees in light thereof. Their Lordships were clearly cognizant of the new time frames which came to be introduced by virtue of Section 149 as well as the First Proviso to Section 149(1) which governed all AYs' prior to 01 April 2021.

33. We consequently find ourselves unable to read Ashish Agarwal as a decision which deprived the assessee of the right to question the initiation of reassessment on grounds based on the First Proviso to Section 149(1). We also find ourselves unable to construe those directions as being intended to reinvent the wheel or reverse those proceedings in respect of which no challenge had ever been mounted. Viewed in light of the above, we find ourselves unable to recognise the notice dated 27 May 2022 as a continuation of the original Section 148 notice. Although the petitioner neither assailed the original notice nor obtained a declaration of invalidity, it was the respondents who chose to commence proceedings afresh by issuing the notice dated 27 May 2022.

34. Regard must also be had to the fact that once an assessee had chosen to flow along with a notice issued in accordance with the This is a digitally signed order.

 erstwhile regime, participate in those proceedings by filing a return or suffer an assessment, it would have been legally impermissible for it to assail the reassessment action subsequently on grounds which were taken note of in Man Mohan Kohli or Ashish Agarwal. The law would expect and require an objection along those lines being taken and raised at the outset and at the first available opportunity. This more so since that challenge would have been only in respect of the statutory obligation of the respondents to comply with the procedure prescribed by clauses (b) and (d) of Section 148A. The right to assail the reassessment on other grounds such as absence of material, change of opinion, a failure to form the requisite opinion would, in any case, survive. We consequently find ourselves unable to accept the submissions addressed by the respondents in this regard.

35. We note that while dealing with a similar challenge to a reassessment action which had been commenced post 01 April 2021 and where the assessee had failed to adopt or pursue a legal recourse to that action as well as the right of the respondents to recommence action on a purported reading of Ashish Agarwal had formed subject matter of our consideration in Anindita Sengupta v. Assistant Commissioner of Income Tax, Circle 61(1)8. The asserted right of the respondents to recommence proceedings with the issuance of a notice under Section 148A(b) in spite of no

challenge to the original action having been mounted by the assessee, we had in Anindita Sengupta observed as follows:--

"22. As is manifest from a reading of the aforesaid passages forming part of the decision in Ashish Agarwal, the Supreme Court was essentially concerned with the imperatives of striking a just balance between the right of the respondents to undertake and conclude a reassessment that may have been initiated while at the same time according due protection to the interest of the assessees. The Supreme Court held that although the High Courts were correct in taking the view that after the amendments in the Act, coming to be enforced with effect from 01 April 2021, notices could have been issued only in terms of the substituted provisions, the Department appeared to have proceeded under the mistaken yet bona fide belief that those amendments were yet to be enforced. It was in the aforesaid background that it found that the ends of justice would warrant the notices issued with reference to the erstwhile provisions being saved and being read as referable to Section 148A(b). It was to subserve the aforesaid primary objective that Ashish Agarwal proceeded to hold that the impugned Section 148 notices would be deemed to have been issued under section 148A and treated to be show cause notices referable to clause (b) thereof.

23. As we read the penultimate directions which came to be framed, the procedure laid out in Ashish Agarwal clearly stood confined to matters where although notices may have been issued, proceedings were yet to have attained finality. This clearly flows from the impugned notices being ordained to be treated as show cause notices under Section 148A(b) and the concomitant liberty being accorded to AOs' to proceed further in accordance with Section 148A(d). As we read that decision, we find ourselves unable to construe those directions as either warranting or mandating a reopening of proceedings which had come to be rendered a quietus in the meanwhile. The judgment was primarily concerned with the validity of various notices which had been promulgated and proceedings drawn in accordance with the statutory procedure which stood in place prior to 01 April 2021. It also becomes pertinent to note that the decision rendered by our Court in Man Mohan Kohliperhaps constituted the solitary exception in the sense of having left a window open to the respondents to draw proceedings afresh. A majority of the High Courts', however, do not appear to have made such a provision or provide the Revenue with a right of recourse. The Supreme Court was thus faced with a peculiar and an unprecedented situation where the Revenue was rendered remediless to assess escaped income even though material may have merited such an action being pursued solely on account of a misinterpretation of the correct legal position. It was these factors which clearly appear to have weighed upon the Supreme Court to mould and sculpt a procedure

which would strike a just balance between competing interests.

> 24. In order to carve out an equitable solution which would redress the deadlock, the Supreme Court invoked its powers conferred by Article 142 of the Constitution and ordained that all such notices would be treated as being under Section 148A(b) and for proceedings to be taken forward in accordance with law thereafter. The direction so framed thus enabled the assessee to question the assumption of jurisdiction under Section 148 and take advantage of the beneficial measures embodied in Section 148 A. The assessee thus derived a right to assail the initiation of reassessment proceedings on jurisdictional grounds by preferring objections which the AO was statutorily obliged to take into consideration 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 19/09/2024 at 06:32:01 before issuing notices under Section 148 of the Act. The Revenue on the other hand, and notwithstanding its folly of having erroneously proceeded under the erstwhile regime, was enabled to continue proceedings in accordance with the amended procedure as introduced by virtue of Finance Act, 2021 and thus avoid the specter of a fait accompli which it faced on account of some of the High Court decisions. This is apparent from the Supreme Court observing that the judgments rendered by some of the High Courts' had left the Revenue remediless and resulting in "no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted sections 147."

25. However, we are of the firm opinion that Ashish Agarwal neither intended nor mandated concluded assessments being reopened. The respondent clearly appears to have erred in proceedings along lines contrary to the above as would be evident from the reasons which follow. Firstly, Ashish Agarwal was principally concerned with judgments rendered by various High Courts' striking down Section 148 notices holding that the respondents had erred in proceeding on the basis of the unamended family of provisions relating to reassessment. They had essentially held that it was the procedure constructed in terms of the amendments introduced by Finance Act, 2021 which would apply. None of those judgments were primarily concerned with concluded assessments. It is this indubitable position which constrained the Supreme Court to frame directions requiring those notices to be treated as being under Section 148A(b) and for the AO proceeding thereafter to frame an order as contemplated by Section 148A(d) of the Act. The Supreme Court significantly observed that the High Courts' instead of quashing the impugned notices should have framed directions for those notices being construed and deemed to have been issued under Section 148A. Ashish Agarwal proceeded further to observe that the Revenue should have been "permitted to proceed further with the reassessment proceedings as per the substituted provisions.....". Our view of the judgment being confined to proceedings at the stage of notice is further fortified from the Supreme Court providing in para 8 of the report that "The respective impugned Section 148 notices issued to the respective assessees shall be deemed to have been issued under section 148A of the Income Tax Act as substituted by Finance Act, 2021 and treated to be show cause notices in terms of Section 148A(b)."

As would be manifest from the aforesaid extract, 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 19/09/2024 at 06:32:01 emphasis clearly was on the notices which formed the subject matter of challenge before various High Courts' and the aim of the Supreme Court being to salvage the process of reassessment. This is further evident from the Supreme Court observing that the AO would thereafter proceed to pass orders referable to Section 148A(d). We consequently find ourselves unable to construe Ashish Agarwal as an edict which required completed assessments to be invalidated and reopened. Ashish Agarwal cannot possibly be read as mandating the hands of the clock being rewound and reversing final decisions which may have come to be rendered in the interregnum.

26. Regard must also be had to the undisputed fact that the petitioner never questioned the validity of the original notices on grounds which were urged before the various High Courts and where assessees had questioned the invocation of the unamended provisions. The petitioner chose to contest the reassessment proceedings on merits. It is also admitted before us that the petitioner was also not a party to the Man Mohan Kohli batch of matters. There was therefore no justification for the respondent to have issued notices afresh seeking to reopen proceedings which had been rendered a closure prior to the judgment rendered in Ashish Agarwal. At the cost of being repetitive we deem it appropriate to observe that the Ashish Agarwal judgment neither spoke of completed assessments nor did it embody any direction that could be legitimately or justifiably construed as mandating completed assessments being reopened and more so where the assessee had raised no objection to the initiation of proceedings.

27. We are also of the firm opinion that even para 25.5 of Ashish Agarwal would not sustain the stand taken by the respondent since the same clearly confines itself to decisions or judgments rendered by a High Court invalidating a notice under Section 148 and the manifest intent of the Supreme Court being that its judgment would apply and govern irrespective of whether an appeal had been laid before it.

28. It is in the aforesaid context that we also bear in mind the pertinent observations rendered by the Constitution Bench in High Court Bar Association when it held that a direction under Article 142of the Constitution should not impact the substantive rights of those litigants who are not even parties to the lis. The Constitution Bench while acknowledging the amplitude of the Article 142 power 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 19/09/2024 at 06:32:01 placed a significant caveat when it observed that benefits derived by a litigant based on a judicial order validly passed cannot be annulled especially when they may not even have been parties to the cause. This too convinces us to hold in favour of the petitioner and come to the inevitable conclusion that the writ petition must succeed."

36. Although the said decision came to be rendered in the factual backdrop of an assessment which had already been completed prior to the issuance of a notice under Section 148A(b), in our considered opinion, the principles laid down in that decision would equally apply to those cases where the assessee may have chosen to desist from adopting or pursuing a legal recourse to assail the commencement of reassessment under the erstwhile regime.

37. The ambit of the First Proviso to Section 149(1) was an aspect which had arisen for our consideration in Manju Somani v. Income- tax Officer9 Dealing with a similar challenge based on the prescription of limitation, we had in Manju Somani held as under:--

> "12. As is manifest from the above, the proviso to section 149 clearly bids us to go back in point of time and examine whether a proposed reassessment pertaining to a period prior to April 1, 2021 would sustain based on the time frames as they existed prior to the promulgation of the Finance Act, 2021. The proviso embodies a negative command restraining the respondents from issuing a notice under section 148 in respect of an assessment year prior to April 1, 2021, if the period within which such a notice could have been issued in accordance with the provisions as they existed prior thereto had elapsed. This is manifest from the provision using the expression "no notice under section 148 shall be issued" if the time limit specified in the relevant provisions "... as they stood immediately prior to the commencement of the Finance Act, 2021" had expired. A reassessment which is sought to be commenced post April 1, 2021 would thus have to abide by the time limits prescribed by section 149(1)(b), 153A or 153B as may be applicable.
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> 13. Undisputedly, section 149(1)(b) as it stood prior to the introduction of the amendments by way of the Finance Act, 2021([2021] 432 ITR (St.) 52) prescribed that no notice under section 148 shall be issued if four years "but not more than six years" have elapsed from the end of the relevant assessment year. Thus the period of six years stood erected as the terminal point which when crossed 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 19/09/2024 at 06:32:01 would have rendered the initiation of reassessment impermissible in law.
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> 14. Viewed in the light of the above, the impugned notice when tested on the anvil of the pre-amendment section 149(1)(b) in order to be sustained would have to meet the prescription of six years. Undisputedly that period in respect of the assessment year 2016-2017 came to an end on March 31, 2023. We thus find ourselves unable to sustain the impugned action of reassessment and which was commenced pursuant to the notice dated April 29, 2024.

> 15. It would be important to note that the respondents also do not attempt to sustain the initiation of action on any other statutory provision and which could be read as extending the time limit that applied. We also find ourselves unable to read Twylight Infrastructure [Twylight Infrastructure Pvt. Ltd. v. ITO, (2024) 463 ITR 702 (Delhi); 2024 SCC OnLine Del 330.] as empowering them to reopen assessments contrary to the negative covenant which forms part of section 149 of the Act."

38. When tested on the aforesaid principles also, it becomes apparent that the impugned action of reassessment cannot be sustained. This in light of us having already found that the notice of 27 May 2022 cannot be viewed as being in continuation or substitution of the original notice dated 30 June 2021."

5. In view of the aforesaid decision, the impugned 148 notices will not sustain.

6. We, consequently, allow the present writ petitions and quash the impugned notices dated 31 July 2022 [W.P.(C) 16332/2022 and W.P.(C) 115/2023] and 30 July 2022 [W.P.(C) 196/2023] referable to Section 148 of the Act.

YASHWANT VARMA, J RAVINDER DUDEJA, J SEPTEMBER 13, 2024/ns This is a digitally signed order.