

Lykos India Private Limited vs Deputy Commissioner Of Income Tax ... on 13 January, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 16813/2022

LYKOS INDIA PRIVATE LIMITEDPetitioner

Through: Mr. V. Lakshmikumaran, Mr.

Karanjot Singh Khurana, Mr.

Tanmay Bhatnagar, Mr. Sneha

Shukla & Mr. Avar Lamba,

Adv.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE

13(1), DELHIRespondent

Through: Mr. Abhishek Maratha, SSC

with Mr. Apoorv Agarwal,

Parth Samwal, JSCs, Ms. N

Sharma, Mr. Gaurav Singh,

Bhanukaran Singh Jodha, M

Himanshu Gaur, Ms. Muskaa

Goel & Mr. Kamakshraj Sin

Adv.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE HARISH VAIDYANATHAN

SHANKAR

ORDER

% 13.01.2025

1. The writ petitioner impugns the reassessment action initiated by the respondent pertaining to Assessment Year 2018-19. As would be evident from a perusal of the material placed before us, the proceedings had commenced pursuant to the issuance of a notice dated 12 March 2022 purporting to be under Section 148A(b) of the Income Tax Act, 1961.

2. The allegation which stood levelled in that notice was that on AY 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 31/01/2025 at 22:33:35. Inquiries made by the Investigation Wing, the respondent had formed the opinion that the same indicated that the petitioner was involved in the practice of "availing/ issuing bogus sales/ purchase

bills". Basis the above, the petitioner was called upon to furnish a reply along with a copy of the ledger account of the party in question, namely, RCI Industries & Technologies Ltd.3.

3. In reply to the original notice under Section 148A(b), the petitioner furnished a detailed response, a copy of which has been placed before us and forms part of the record as Annexure P-6. Since some of the disclosures made therein would have a material bearing on the view that we ultimately propose to express, we deem it apposite to extract the same hereinbelow:

"1. M/s Lykos India Pvt Ltd was incorporated in December, 2013. LIPL is a subsidiary of M/s Trafigura Pte Limited, Singapore and is engaged in the business of commodities trading of refined metals. LIPL does not perform any manufacturing activity in India. LIPL traded in refined metals like Aluminium, Copper, Nickel and Zinc etc. LIPL imports/domestic purchase metals and sells them in the India market.

2. Additionally, LIPL launched India's first online refined metal retail platform. LIPL supplied its customers guaranteed metal stocks, with assurance of high quality and transparent market pricing. The online platform will cater to small and medium sized manufacturers with metals consignments in small quantities. Customers have access to index-linked prices for a range of metals

-Aluminium, Copper, Nickel and Zinc etc. that can be ordered on a need basis, purchased securely through online platform. LIPL operates out of various locations in India for refined metals. While LIPL corporate office is based out in Mumbai, warehouses are spread across India to ensure robust delivery model and customer reach covering western India through Ahmedabad (Gujarat) whereas north India is covered through Bhiwadi (Rajasthan); Eastern part is covered through Kolkata (West Bengal) and the southern part through Bangalore (Karnataka).

Act RCI Industries This is a digitally signed order.

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3. LIPL had e-filed the revised return of income on 31-03-2019 declaring total income at Rs 45,31,54,730/-

4. The case was selected for scrutiny and the Notice u/s 143(2) of the Income Tax Act, 1961 was issued to LIPL on 21.09.2019. LIPL received notice u/s 142(1) of the Act dated: 29.12.2019, 30.01.2021 and 12.02.2021 along with the questionnaire in the annexure. Copy of the same is enclosed as Annexure-C

5. LIPL submitted the replies to all queries made by the learned goodself.

6. That the learned goodself, passed draft order under section 143(3) of the Act dated 23.09.2021 for AY 2018-19 pursuant to scrutiny assessment whereby addition are proposed only on account of Transfer Pricing issue in returned of income after considering all relevant facts and details and all the documents submitted in response to assessment queries and also verifying the details etc as required. Copy of the draft assessment order is enclosed as Annexure-D.

7. Your learned goodself has already verified all the details for the year under consideration during the original assessment u/s 143(3) of the Act.

8. Further, as your learned goodself has raised some specific query in this Notice as issued under clause (b) of section 148A of the Income-tax Act, 1961 and alleged that LIPL was involved in the practice of availing /issuing bogus sales/purchase bills from RCI Industries and Technologies Ltd to the tune of INR 1,58,55,222. At the outset we deny all such allegations as LIPL is law abiding assessee and is not involved in such kind of alleged activities. Further, we would also like to submit that during the year under consideration, LIPL has not purchased any goods from the RCI Industries and Technologies Ltd and thus not able to determine from where the same amount (ie. INR 1,58,55,222) was picked and determined by your goodself. However, during the year under consideration, LIPL has sold goods to M/s RCI Industries and Technologies Ltd and a copy of Ledger of M/s RCI Industries and Technologies Ltd enclosed Annexure-E alongwith sample sales bills enclosed as Annexure-F. Furthermore, from the aforesaid ledger also, LIPL is not able to figure out from where your learned goodself has picked the amount (ie. INR 1,58,55,222) mentioned in this Notice as issued under clause (b) of section 148A of the Income-tax Act, 1961."

4. As is evident from a reading of the disclosures made in that communication, the petitioner had stated that it was an online portal working as a virtual exchange for procurement of refined metals. It This is a digitally signed order.

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5. From the reply which was submitted, we further gather that the petitioner had filed a Return of Income for AY 2018-19 declaring its total income to be INR 45,31,54,730/-. Pursuant to the scrutiny proceedings which were initiated, the matter also appears to have been referred for the consideration of the Transfer Pricing Officer. On conclusion of proceedings, a Draft Assessment Order is stated to have been framed on 23 September 2021. This was followed by a final order of assessment which would have perhaps been ultimately framed and drawn with reference to Section 144C of the Act.

6. Of crucial significance is the stand which was taken by the writ petitioner and stands reflected in para 8 of its response and wherein it was asserted that it had not undertaken any transactions with RCI Industries to the tune of INR 1,58,55,222/-, as alleged. In fact, it had also placed on the record and for the consideration of the respondents the ledger pertaining to that entity along with its reply.

7. The response of the writ petitioner, however, has come to be cursorily rejected by the Assessing Officer 4 while passing the order under Section 148A(d) and where it has held as follows:

"4.1 Reply furnished by the assessee has been considered u/s 148A(c) and found not on merit because. The enquiries made by the Investigation Wing indicate that the company involved in the practice of availing /issuing bogus sales/purchase bills. Thus, in view of the facts and information available with this office (which has already been communicated through opportunity of being heard), it is established that the assessee has no proper explanation for issue discussed above. It is also evident from information available with Assessing Officer that the income AO This is a digitally signed order.

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This order is being passed with prior approval of the Specified Authority."

8. As is ex facie evident, all that the AO has chosen to observe while considering the objections which had been preferred is that the reply was found to be "not on merit".

9. Suffice it to note that there has been an abject failure on the part of the AO to either engage with or examine the disclosures which were made by the writ petitioner in its reply dated 19 March 2022. The AO has also woefully failed to make appropriate or adequate disclosures with respect to what may have been found by the Investigation Wing and which would have possibly constituted the basis for the formation of the requisite opinion under Section 148A(b).

10. We take note of the following observations in the judgement rendered by us in ATS Infrastructure Limited vs Assistant Commissioner of income Tax Circle 1 (1) Delhi and Ors 5 and which the AO would have been well advised to bear in consideration:-

"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 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-tax*

"11. Reading the reasons of the Assessing Officer, it is 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 31/01/2025 at 22:33:36 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 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 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 31/01/2025 at 22:33:36 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 inbuilt 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 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 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 31/01/2025 at 22:33:36 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"

10. Our attention was lastly drawn to the recent judgment passed by this Court in *Catchy Prop-Build Pvt. Ltd. v. Assistant Commissioner of Income-tax*. We deem it apposite to extract the following passage from the decision:

"8. This court is further of the opinion that if the foundational allegation is missing in the notice issued under section 148A(b) of the Act, the same cannot be incorporated by issuing a supplementary notice".

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

"148. Issue of notice where income has escaped This is a digitally signed order.

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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 we come 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."

11. Accordingly, and for all the aforesaid reasons, we find ourselves unable to sustain the final order referable to Section 148A(d) as well as the consequential notice under Section 148 of the Act.

12. The writ petition is consequently allowed and the impugned order as well as notice dated 27 March 2022 for AY 2018-19 are hereby quashed. The matter shall stand revived before the AO from the stage of issuance of the Section 148A (b) notice who shall proceed afresh bearing in mind the observations appearing hereinabove.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

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