Anilesh Ahuja vs Union Of India & Anr on 10 March, 2025

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 3409/2023
ANILESH AHUJA
Through:

versus

UNION OF INDIA & ANR.
Through:

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE HARISH VAIDYANATHAN SHANKAR
ORDER

% 10.03.2025

1. The writ petitioner has approached this Court challenging the final order of assessment dated 27 January 2023 pertaining to Assessment Year1 2017-18. Consequential reliefs are also sought for deletion of the additions which were made referable to Section 69A of the Income Tax Act, 19612 as well as the penalty proceedings which came to be initiated under Section 274 read along with Section 271AAC(1) of the Act.

2. We had on 20 March 2023, while entertaining the writ petition, passed the following order:

> AY Act 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 13/03/2025 at 21:49:21 " W.P.(C) 3409/2023 & CM APPL. 13175/2023 [Application filed on behalf of the petitioner seeking interim relief].

> 2. This writ petition assails the assessment order dated 27.01.2023 and consequent demand notice of even date i.e., 27.01.2023.

Challenge is also laid to the notice dated 31.01.2023 seeking to impose penalty.

3. Via the impugned assessment order, the Assessing Officer (AO) has sought to tax INR 13,22,40,752/- on the ground that this amount constitutes unexplained money. In this context, Section 69A of the Income Tax Act, 1961 [in short "the Act] is taken recourse to by the AO.

4. The petitioner has not only challenged the impugned assessment order, but also the interest levied and penalty imposed by the AO.

5. Counsel for the petitioner says that the petitioner is a non- resident and that he has been residing in the USA for quite some time.

6. It is the stand of the petitioner that he had remitted a part of the consideration, i.e., Rs 13,22,40,752, to Lodha Developers Private Limited [in short, "Lodha"] for the purposes of purchasing two immovable properties, i.e., flats located in Mumbai, via an account maintained with CITI Bank in USA.

6.1 It appears that the said amount was remitted by the petitioner in the backdrop of two separate agreements to sell of even date, i.e., 09.12.2016, executed between him and Lodha.

6.2 It is the petitioner s case that the transaction did not go through, and accordingly, two cancellation deeds dated 27.12.2018 were executed between the petitioner and Lodha.

6.1 It is also the petitioner s case that after certain amount was forfeiting Rs 3,00,00,000, the rest was remitted to the petitioner. The fact that the transaction did not go through, according to the counsel for the petitioner, is evident from the response that the AO received upon notice being issued to Lodha under Section 133(6) of the Act.

7. Mr Aseem Chawla, learned Senior Standing Counsel, will place on record the response received from Lodha, pursuant to notice issued under Section 143(6) of the Act.

7.1 For this purpose, list the matter on 03.05.2023.

8. We may also note that the petitioner had filed objections against the draft assessment order dated 29.03.2022, with the Dispute Resolution Panel (DRP). The DRP disposed of the objection via order dated 29.12.2022. In its order, the DRP, inter alia, made the following observations:

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Server on 13/03/2025 at 21:49:21 "4.2.2 The assessee vide letter dated 05.12.2022, has filed a rejoinder and stated inter alia as under:

"....In this regard, as already explained earlier, the Assessee submits that the bank account of the assessee with CITI Bank, USA through which wire transfer payments were made to Lodha Developers Private Limited was closed in 2018. Therefore, obtaining bank statement of 2016 (which were more than 5 years old) from CITI Bank, USA was taking time and the said fact was clearly mentioned by the Assessee in its letter dated March 17, 2022 (Kindly refer to Page no. 27 to 28 of the Paper Book filed).

14. Thus, it is not a case where the Assessee had the documents and did not furnish the same purposefully to stall the assessment proceedings. As soon as tile bank statements were received by the Assessee on March 31, 2022 from CITI Bank, USA, the same were filed with the AO vide letter dated March 31, 2022 (Kindly refer to Page no. 42 to 47 of the Paper Book filed).

17. Without prejudice to the above, the Assessee submits that the bank statements of CITI Bank, USA are only corroborative evidence to support of the return of income filed in USA, the claim of the Assessee that the payment was made to Lodha Developers Private Limited from foreign income source which were duly declared in the return of income filed in USA and the statements made by Lodha Developer Private Limited in response to notice under Section 133(6) of the IT Act.

18. Therefore, even without considering the said bank statements, the Assessee had clearly established his creditworthiness and the sources of income for investment which was in USA. It is certainly not a case where payments for investment in immovable properties are made out of unaccounted / undisclosed money and therefore the proposed addition unwarranted.

Prayer

19. In view of the above submissions, the Assessee humbly prays to the Hon'ble DRP that:

a) Kindly admit and consider the bank statements of the account maintained by the Assessee with CITI Bank, USA;

b) Kindly issue directions to the AO under Section 144C(5) of the IT Act to delete the variations proposed to the total income of the Assessee in the Draft Order passed for AY 2017- 18..... "

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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 13/03/2025 at 21:49:22 4.3 The Panel has carefully considered the rival averments as above. The Panel takes a note that the assessee's objection are filed before the Panel at the draft stage of the assessment proceedings after the assessing officer makes a proposal for additions, as the case may be; hence, the DRP is considered to be a superior extension of the % of the AO. Provisions of Rule 46A are not applicable in terms of admitting the additional evidence to the DRP and in fact, DRP proceeding are governed by Income Tax (Dispute Resolution Panel) Rules, 2009. The AO vide the remand report, has on various occasions, taken a plea that the assessee did not furnish the requisite details and evidences before the AO despite providing ample opportunity given to him. The Panel further takes a note of the assessee's contention that obtaining the requisite details and documents was taking time and as soon as same were filed vide letter dated 31.03.2022. In view of above, the AO is directed to consider and verify the assessee's contentions in light of submissions made as above including the assessee's rejoinder as observed by the Panel at para no 4.2.2 above by passing a speaking and reasoned order within the ambit of law and facts of the case. The Panel hastens to clarify that the AO shall not conduct any fresh inquiry in this regard; the verification shall be made on the basis of documents/submissions available on the records. The assessee's objections made at all grounds of objections in this regard, are hereby, disposed off accordingly."

9. In the meanwhile, no precipitate action will be taken against the petitioner.

10. Parties will act based on digitally signed copy of the order."

3. As is evident from the recordal of facts in that order, the Court had noticed that the petitioner was a non-resident who was staying in the United States of America3 at the relevant time. The petitioner is stated to have made certain investments with Lodha Developers Private Limited, a real estate developer in Mumbai, for purchase of two immovable properties via an account maintained with Citi Bank, USA. The Court took note of the assertion of the writ petitioner that the remittances were made to the real estate developer via established 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 13/03/2025 at 21:49:22 banking channels and pursuant to the execution of two separate Agreements to Sell executed on 09 December 2016. It was also the case of the writ petitioner that since those transactions did not fructify, the parties executed two Cancellation Deeds on 27 December 2018, and an amount of INR 3 crores was forfeited.

4. The petitioner appears to have asserted that he was neither a taxable entity nor could those investments be viewed as income which had accrued or arisen in India. It had thus questioned the justification of the respondents invoking Section 147 of the Act and the attempt of the respondents to tax the remittances which were made. The petitioner had also questioned the applicability of Sections 69 and 69A of the Act since he was a non-resident and the investments thus not qualifying either Sections 9 or 5 of the Act so as to be held as exigible to tax.

5. It is this foundational challenge which was reiterated before us today with submissions being led by Mr. Gulati, learned senior counsel, who appeared for the writ petitioner. Mr. Gulati submitted that the petitioner was undisputedly a non-resident as envisaged under Section 6 of the Act. According to learned senior counsel, by virtue of the provisions comprised in Section 5(2) of the Act, a non-resident becomes liable to tax only if income is either received or is deemed to be received in India or where it accrues or is deemed to accrue therein. It was submitted that the investments were made based on the income which had been earned by the writ petitioner and which had undoubtedly accrued and arisen in USA. It was in the aforesaid light that Mr. Gulati had contended that a remittance to India could not USA 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 13/03/2025 at 21:49:22 have possibly been viewed as income liable to tax.

6. Learned senior counsel submitted that though this proposition is well settled, it would be apposite to refer to the following passages as appearing in the judgment of this Court in Angelantoni Test Technologies Srl vs. Assistant Commissioner of Income-tax and Ors4 and which had essentially held that investments would not constitute income. We deem it apposite to extract the following paragraphs from that decision:

> "6. It is settled law that investment in shares in an Indian subsidiary cannot be treated as „income as the same is in the nature of "capital account transaction" not giving rise to any income. In Nestle SA v. Assistant Commissioner of Income Tax (W.P.(C) No. 12643/2018), this Court held that the allegation of the Revenue that the investment in the shares of Indian subsidiary amounted to „income is flawed. The relevant portion of the said judgment is reproduced hereinunder:
>
> "24. The principal objection of the Petitioner that its investment in the shares of its subsidiary cannot be treated as „income is well founded. The decision of the Bombay High Court in Vodafone India Services Pvt. Ltd. v. Union of India (supra) holding such investment in shares to be a „capital account transaction not giving rise to income was accepted by the CBDT. Para 2 of Instruction No. 2 of 2015 dated 29th January, 2015 reads thus:
>
> "2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CIT (Appeals)."

25. Therefore, the fundamental premise of the Respondent that the above investment by the Petitioner in the shares of its subsidiary amounted to „income which had escaped assessment was flawed. The question of such a transaction forming a live link for reasons to believe that income had 2023 SCC OnLine Del 8486 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 13/03/2025 at 21:49:22 escaped assessment is entirely without basis and is rejected as such."

7. Further, the action of the Respondents is in contravention of the CBDT Instruction No. 2 of 2015 dated 29th January, 2015 reiterating the view expressed by the Bombay High Court in Vodafone India Services Pvt. Ltd. v. Union of India ((2014) 368 ITR 1 (Bom)) that no income arises on investment in shares since it is a capital account transaction.

8. In fact, the judgment of the Bombay High Court was accepted by the Union Cabinet and a press note dated 28th January, 2015 was issued by the Press Information Bureau, Government of India. The relevant portion of the said press note is reproduced hereinbelow:

> "Acceptance of the Order of the High Court of Bombay in the case of Vodafone India Services Private Limited The Union Cabinet, chaired by the Prime Minister Shri Narendra Modi, in a major decision, has decided to accept the order of the High Court of Bombay in the case of Vodafone India Services Private Limited (VISPL) dated 10.10.2014. This is a major correction of a tax matter which has adversely affected investor sentiment. Based on the opinion of Chief Commissioner of Income-tax (International Taxation), Chairperson (CBDT) and the Attorney General of India, the Cabinet decided to i. accept the order of the High Court of Bombay in WP No. 871 of 2014, dated 10.10.2014; and not to file SLP against it before the Supreme Court of India;
>
> ii. accept of orders of Courts/IT AT/DRP in cases of other taxpayers where similar transfer pricing adjustments have been made and the Courts/IT AT/DRP have decided/decide in favour of the taxpayer.
>
> The Cabinet decision will bring greater clarity and predictability for taxpayers as well as tax authorities, thereby facilitating tax compliance and reducing litigation on similar issues. This will also set at rest the uncertainty prevailing in the minds of foreign investors and taxpayers in respect of possible transfer pricing adjustments in India on transactions related to issuance of shares, and thereby improve the investment climate in the country.
>
> The Cabinet came to this view as this is a transaction on the capital account and there is no income to be chargeable to tax. So applying any pricing formula is irrelevant.
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> 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 13/03/2025 at 21:49:22 xxxxxxxxx VISPL filed a 2nd Writ Petition in the High Court of Bombay. The High Court, on 10.10.2014, has amongst other things

observed:

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e) The issue of shares at a premium is on Capital account and gives rise to no income. The submission on behalf of the revenue that the shortfall in the ALP as computed for the purposes of Chapter X of the Act is misplaced. The ALP is meant to determine the real value of the transaction entered into between AEs. It is a re-computation exercise to be carried out only when income arises in case of an International transaction between AEs. It does not warrant re-computation of a consideration received/given on capital account."

9. Further, this Court in Divya Capital One Private Limited (Earlier Known as Divya Portfolio Private Limited) v. Assistant Commissioner of Income Tax Circle 7(1) Delhi, 2022 SCC OnLine Del 1461 held that „Whether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable of tax" still remains the primary condition to be satisfied before invoking powers under Section 147 of the Act ."

7. Mr. Gulati then submitted that on a more fundamental plane, the Assessing Officer5 was wholly unjustified in seeking to tax the remittance and make additions by resorting to the provisions comprised in Sections 68, 69 and 69A of the Act. It was contended that the taxability of income of a non-resident must at the outset qualify the pre-conditions comprised in Section 5(2) and the provisions alluded to above enabling an AO to ordinarily make additions to returned income not being liable to be construed as either enlarging the scope of taxability or reinventing the threshold as created by Section 5(2).

8. Mr. Gulati then submitted that a non-resident, in any case, is This is a digitally signed order.

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9. From the disclosures which are made in the writ petition, we note that the proceedings themselves commenced pursuant to the issuance of notices under Sections 148 and 142(1) of the Act and which were dated 27 March 2021 and 02 December 2021, respectively. It is alleged by the writ petitioner that the notice under Section 148 and the notice referable to Section 142(1) dated 02 December 2021 were never served upon him. However, upon receipt of the notice referable to Section 142(1) dated 10 December 2022, the petitioner furnished detailed replies dated 28 February 2022 and 03 March 2022 through its attorney.

10. The petitioner was ultimately provided the reasons which constituted the basis for the invocation of Section 148 under cover of a letter dated 05 March 2022. It would be relevant to reproduce those

reasons hereinbelow:

"Reasons of reopening in case of Anilesh Ahuja for AY 2017-18 PAN:BVZPA1249L The assessee, Anilesh Ahuja PAN - BVZPAI249L, has not filed return of its income for the assessment year 2017-18.

2. Information available in ITS-AIR details was analyzed and it was observed that the assessee, during the financial year 2016-17 relevant to A.Y. 2017-18 has made following transactions:

S. No.	Transaction Amount (Rs./-)	C
1.	534202362	P (P
2.	1403291	P

AO

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3. It is pertinent to mention that though the assessee has made large transactions, the assessee has chosen not to file return of its income for the relevant year. Therefore, it appears that the assessee is carrying on some activity which has resulted in generation of income, but the income has escaped assessment as no ITR has been filed by the assessee.

4. Thus, the above facts indicate that the assessee has not filed return of income for the year under consideration. As per the provisions of Section, 139, which is reproduced below, every individual with taxable income is required to compulsorily file return of income.-

"139. (1) Every person,-

(a) being a company [or a firm); or

(b) being a person other than a company [or a firm], if its 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, shall, on or before the due date, furnish a return of its income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed:"

5. In the above background and after examining the available information, I have reason to believe that income of Rs.53,56,05,653/- as mentioned above during the FY 2016-17 (relevant to AY 2017-18) has escaped assessment within the meaning given in Section 147 of the Income-tax Act. Therefore, I am of the belief that it is a fit case for the issuance of notice u/s 148 of the Act and initiation of proceedings u/s 147 of the Act. I propose to issue notice u/s 148 of the Act for AY 2017-18 and to assess or reassess the above mentioned income and also any other income chargeable to tax which has escaped assessment and which comes to my notice subsequently in the course of 'proceedings under section 147ofthe Act.

It would be worthwhile to submit here that in the case of Rajesh Jhaveri Stock Brokers Pvt Ltd ACIT(2007) 291 ITR 500/161 Taxman 316 (SC), Hon'ble Supreme Court has held that:

> "All that is required for the Revenue to assume valid jurisdiction u/s 148 is the existence of cogent material that would lead a person of normal prudence, acting reasonably, to an honest belief as to the escapement of income from assessment."

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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 13/03/2025 at 21:49:22 It is also pertinent to mention that on similar lines, in the case of CIT v. Nova Promoters & Finlease (P) Ltd (ITA NO. 342 of 2011), the Hon'ble Delhi High Court, which is the jurisdictional High Court, has held as below:

> "We are aware of the legal position that at the stage of issuing the notice under Section 148, the merits of the matter are not relevant and the Assessing Officer at that stage is required to form only a prima facie belief or opinion that income chargeable to tax at escaped assessment."

I am satisfied that the eligibility conditions for initiation of proceedings u/s 147 as laid down by the Act and relevant case laws are adequately fulfilled in the present case.

6. Approval u/s 151(2) of the Income-tax Act, 1961 is requested to issue a notice u/s 148 of the Act, in order to initiate proceedings u/s 147 of the Act for AY 2017-18."

11. As is manifest from the reasons which were assigned, the solitary basis for invoking Section 148 was the purchase of immovable properties and the payments made in connection therewith by the petitioner. The AO, it becomes pertinent to note, has chosen to record that the petitioner had not filed a Return of Income and, therefore, "it appears that the assessee is carrying on some activity

which has resulted in generation of income, but the income has escaped assessment as no ITR had been filed by the assessee". It was on this solitary basis that it proceeded to hold that it had reason to believe that income amounting to INR 53,56,05,653/- had escaped assessment and thus it being a fit case for issuance of notice under Section 148.

12. In our considered opinion, nothing could have been described as being even more gloriously vague than the AO alleging that the petitioner was carrying on "some activity" and which had "resulted in generation of income". The reasons so recorded do not even allude to the provisions of Sections 5 or 9 of the Act and which may have been demonstrative of the AO having come to a prima facie conclusion that This is a digitally signed order.

 income had arisen or accrued in India.

13. We note that even in these proceedings, there has been an abject failure on the part of the respondents to establish that the primordial conditions for invoking the provisions of the Act had been met. The mere investment made by the petitioner in the course of its desire to acquire immovable properties within the country could not have possibly been construed as income having been generated in India. An investment, in any case, as Angelantoni clearly holds, is not income which could be said to have escaped assessment.

14. We also find ourselves at a loss to appreciate how any additions could have been made with reference to Sections 68, 69 or 69A of the Act. Those set of provisions would have been attracted provided the petitioner could have been acknowledged to be an assessee subject to the rigours of the Act and required to make disclosures to Indian Income Tax authorities. In any event, and once it is accepted that the investment itself was not based on any income or revenue which had arisen or accrued in India, we find ourselves unable to sustain the orders impugned.

15. As was rightly argued by Mr. Gulati, the various provisions of the Act which have been invoked for the purposes of making additions are not liable to be read as expanding the scope of income chargeable to tax and which is governed by Sections 5 and 9. Therefore, and unless it were established that income had arisen or accrued or could be said to fall within the deeming provisions comprised in Section 9, the investment as made by the writ petitioner could not have been subjected to tax.

16. We, accordingly, and for all the aforesaid reasons, allow the This is a digitally signed order.

 present writ petition and quash the impugned order of assessment dated 27 January 2023. The consequential demand notice dated 27 January 2023, and the penalty notice dated 31 January 2023 are also set aside.

YASHWANT VARMA, J.

HARISH VAIDYANATHAN SHANKAR, J.

MARCH 10, 2025/kk This is a digitally signed order.