Vikas Saini vs Income Tax Officer Ward 67 (1) Delhi on 17 September, 2024

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
\+ W.P.(C) 5802/2022
VIKAS SAINI
Through:

versus

INCOME TAX OFFICER
WARD 67 (1) DELHI
Through:

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

% 17.09.2024

1. The writ petitioner impugns the reassessment action initiated for Assessment Year ['AY'] 2018-19 and which was commenced with the issuance of a notice under Section 148A(b) of the Income Tax Act, 1961 ['Act'] dated 19 March 2022. That notice had alleged that the petitioner had made investments to the tune of INR 6,29,22,604/- in speculative transactions and had also received consideration from those transactions amounting to INR 72,86,278/-. It was on the aforesaid allegation that the petitioner was called upon to show cause why INR 72,86,278/- should not be treated as its income for the year and taxed accordingly.

2. Ultimately and when the order under Section 148A(d) of the Act came to be passed, the respondent took the stand that the escaped 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 27/09/2024 at 22:21:42 income related to purchase of foreign currency, credit card payments and statements filed by authorized dealers in respect of foreign remittances. This becomes apparent from the tabular statement which forms part of that order and is extracted hereinbelow: -

> S.No. Details of Transactions Carried out Amount during the Year 1 Purchase of foreign currency 23971440/-

2 Credit Card payments 25387456/-

3 Statement filed by authorized dealers- 3695/-

sending of foreign remittance Total 49362591/-

3. Upon the consideration of the aforesaid, the Assessing Officer ['AO'] proceeded to hold as follows: -

> "2. On going through return of income filed by the assessee for AY 2018-19, it is noticed that sources of payment made in the above mentioned transactions has not been included in ITR filed by the assessee. Therefore, it is established that the same has not been offered for tax and due tax has not been paid.
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> 3. Thus, an opportunity of being heard as per provision of section 148A(b) of the Income Tax Act,1961 was provided to the assessee with prior approval from specified authority wherein the assessee was given a show-cause as to the transactions carried out during the year amounting to Rs. 49362591/- should not be treated as income chargeable to tax which has escaped the assessment within the meaning of provision of section 147 of the IT Act, 1961 for the assessment year 2018-19.
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> 4. The assessee was required to furnish reply on or before 25.03.2022. In response to notice, reply has been furnished by the assessee. Reply has been perused and it has no merit as it is only a self satisfied story and is contradictory to the information available. Thus it is logical to conclude that the assessee has no proper explanation with respect to the above mentioned escapement of income in his case for AY 2018-19."

4. Quite apart from it being asserted that the AO has clearly failed to examine or deal with the various objections which were raised, it is further argued by Mr. Goel, learned counsel for the writ petitioner, 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 27/09/2024 at 22:21:42 that the order under Section 148A(d) of the Act is wholly unreasoned. Mr. Goel also sought to highlight the apparent disconnect between the original allegations which formed part of the notice under Section 148A(b) of the Act and the ultimate order that has come to be passed.

5. Insofar as the aspect of recordal of reasons is concerned, we note that AO in paragraph 4 of the order under Section 148A(d) of the Act has cursorily observed that the reply lacks merit and was contradictory to the information available. There has thus been an apparent failure to examine the objections or to record reasons in support of the ultimate conclusion which was arrived at.

6. We also find merit in the contention of Mr. Goel and who had highlighted the change of the reasoning forming the basis for the formation of an opinion that income had escaped assessment. We had while dealing with this aspect in ATS Infrastructure Limited v. Assistant Commissioner of Income Tax Circle 1 (1) & Ors. [2024 SCC OnLine Del 5048] held as follows:-

> "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 Officer4 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 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 27/09/2024 at 22:21:42 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 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 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 27/09/2024 at 22:21:42 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 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 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 27/09/2024 at 22:21:42 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 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, This is a digitally signed order.

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> xxxx xxxx xxxx
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> 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:--
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> "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,-
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> 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."

7. In view of the aforesaid, we find ourselves unable to sustain the order under Section 148A(d) of the Act and the consequential notice under Section 148 of which came to be issued.

8. We accordingly allow the instant writ petition and quash the order referable to Section 148A(d) of the Act as well as notice under Section 148, both dated 27 March 2022. The matter shall in consequence stand remitted before the AO to be revived and considered afresh from the stage of issuance of notice under Section 148A(b) of the Act.

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9. All right and contentions of respective parties on merits are kept open.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

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