IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3345 OF 2024

M/s. S V Jadhav
1 Sathe Complex, Opp. Tahsil Office
Fort Area MIRAJ
Sangli 416410
PAN: ACDFS1001N **...Petitioner**

Versus

1. The Income Tax Officer Ward 1, Sangli
   Aaykar Bhawan, Bhinge Building,
   Miraj Road, Opp.Z.P.,
   SANGLI, 416416
   Email: sangli.ito1@incometax.gov.in
2. Principal Commissioner of Income Tax-4, Pune
   Aayakar Sadan, Bodhi Towers,
   548/2B, Salisbury Park, Gultekdi,
   Sangli 411037.
3. Union of India
   Through the Secretary (Revenue),
   Department of Revenue, Ministry of Finance, Room No.128-A,
   North Block, New Delhi 110001
   Email: rsecy@nic.in **...Respondents**

Mr. Mihir C. Naniwadekar with Ms Rucha Vaidya and Mr. Ruturaj H Gurjar, for Petitioner.
Mr. Suresh Kumar, for Respondents-Revenue.

CORAM: K. R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED: 22ND APRIL, 2024

ORAL JUDGMENT:- (Per K.R.Shriram, J.)

1. **Rule**. By consent, Rule made returnable forthwith.

2. Petitioner is a partnership firm engaged in the business of Government contracts mainly of water supply schemes. Petitioner's work includes construction of elevated service reservoirs, water treatment plants, laying of water pipelines, etc.

3. Respondent No.1 is the Assessing Officer ("**AO**"), Respondent No.2 is the Principal Commissioner of Income Tax ("**PCIT**"), who has sanctioned the impugned order and Respondent No.3 is the Union of India.

4. Petitioner filed return of income ("**ROI**") on 12th September 2019 for Assessment Year ("**AY**") 2019-20 disclosing an income at Rs.1,45,78,825/-. Mr. Naniwadekar, on instructions, states Petitioner was unaware about the status of returns because Petitioner has not even received any intimation under Section 143(1) of the Income Tax Act, 1961 ("**the Act**").

5. Petitioner thereafter received a notice dated 23rd March 2023 issued under Section 148A(b) of the Act. The annexure to the notice stated thus:

> "*As per information available on Insight portal of Income Tax Department, it is noticed that you have undertaken huge transaction during F.Y.2018-19 relevant to A.Y.2019-20 but have not filed Income Tax Return (ITR) which suggests that income chargeable to tax for the year under consideration has escaped assessment within the meaning of section 147 of the Act. The details of the information on which reliance is being place are as under……..*"

A table containing details of payments made to contractors was also provided. Petitioner filed an undated reply but served on 17th April 2023 in which, after giving background of the business carried out by Petitioner, Petitioner also informed Respondent No.1 that he had filed ROI for AY 2019-20 and gave details thereof. The details of transactions given in the annexure to the impugned notice dated 23rd March 2023 was also made available. Petitioner informed Respondent No.1 that the income generated from all the transactions referred to in the notice had been offered for taxation and nothing had escaped the assessment.

6. Petitioner received the impugned order dated 21st April 2023 passed under Section 148A(d) of the Act in which it is stated that all transactions reported in Insight portal about gross receipts of Petitioner, interest income received by Petitioner and time deposits made by Petitioner have been verified and the information report by Insight portal is accounted by Petitioner in his books and income arising out of those transactions is duly offered for taxation. The impugned order, however, also stated as under:

> *"On detail verification of the records it is also noticed that the assessee has executed sub-contracting work of M/s Prathmesh Constructions which is one of the party with which contract work has been done. A Search action was conducted u/s 132 of the Income Tax Act 1961 on the assessee M/s Prathmesh Constructions. In order to enquire about the genuineness of the sub-contract transactions, details of sub-contracting parties of M/s Prathmesh Constructions with their sub-contract agreements were called for from the assessee. The assessee M/s Prathmesh Constructions provided only list of names of sub-*

> *contractors and the amount of subcontract. No supporting documents related to these parties were furnished. Present assessee M/s S.V. Jadhav is one of such sub-contractor of M/s Prathmesh Constructions. Hence it is necessary to verify the genuineness of the contract-work done or mere accommodation entry is provided to the firm M/s Prathmesh Construction. All the transactions with Prathmesh Construction are needed to be examined as the genuineness of the contract work is in question. Details of contractual expenses of the assessee with M/s Prathmesh Constructions also need to be verified to establish the genuineness of work done. Thus considering this aspect, the provisions of section 147 and 148 are applicable in this case. Therefore, for the assessment year under consideration, the assessee's case is a fit case where any income chargeable to tax has escaped assessment....*
>
> *I have, therefore, reason to believe that income to the extent of Rs. 25,25,57,767/- (Contract receipts from M/s Prathmesh Constructions) has escaped assessment for A.Y.2019-20"*

Petitioner was also served with the impugned notice dated 21st April 2023 under Section 148 of the Act.

7. It is at this stage, Petitioner has filed the present Petition impugning the order dated 21st April 2023 passed under Section 148A(d) of the Act and the notice also of the same date issued under Section 148 of the Act on various grounds.

8. An affidavit in reply has been filed through one Ajay Raghunath Pawar, who is Respondent No.1, affirmed on 20th September 2023. In the affidavit in reply, Petitioner's averment that in the impugned order dated 21st April 2023, Respondent has accepted that on verification, the information reported by Insight portal is accounted for, has not been denied. The stand taken in effect is that the AO is a mere post office, who finds materials and then

forwards it to the Faceless Assessing Officer ("**FAO**") and the FAO will go into the details to decide whether there is any escapement of income. We do not agree with the stand taken in the affidavit in reply.

9. Admittedly, in the notice issued under Section 148A(b) of the Act, certain allegations have been made to which reply has been filed and the AO has accepted that the information is accounted for by the assessee. Paragraph 6 of the impugned order reads as under:

> "*6.Thus all the transaction reported in INSIGHT portal about gross receipts of the assessee, interest income received by the assessee and time deposits made by the assessee. It is verified that the information report by the INSIGHT portal is accounted by the assessee in its books and income arising out of those transactions is duly offered for taxation.*
>
> *6.1 On detail verification of the records it is also noticed that the assessee has executed sub-contracting work of M/s Prathmesh Constructions which is one of the party with which contract work has been done. A Search action was conducted u/s 132 of the Income Tax Act 1961 on the assessee M/s Prathmesh Constructions. In order to enquire about the genuineness of the sub-contract transactions, details of sub-contracting parties of M/s Prathmesh Constructions with their sub-contract agreements were called for from the assessee. The assessee M/s Prathmesh Constructions provided only list of names of sub-contractors and the amount of sub- contract. No supporting documents related to these parties were furnished. Present assessee M/s S.V. Jadhav is one of such sub-contractor of M/s. Prathmesh Constructions. Hence it is necessary to verify the genuineness of the contract-work done or mere accommodation entry is provided to the firm M/s. Prathmesh Construction. All the transactions with Prathmesh Construction are needed to be examined as the genuineness of the contract work is in question. Details of contractual expenses of the assessee with M/s Prathmesh Constructions also need to be verified to establish the genuineness of work done. Thus considering this aspect, the provisions of section 147 and 148 are applicable in this case Therefore for the assessment year under consideration, the assessee's case is a fit case where any income chargeable to tax has escaped assessment."*

In paragraph 6.1, however, the AO proceeds on the basis that on a search conducted under Section 132 of the Act on one

Prathamesh Constructions, it was found that Prathamesh Constructions was subcontracting its jobs to various sub-contractors and Petitioner was one of such subcontractors. The AO, therefore, wanted to verify the genuineness of the contract work done by Petitioner or whether any accommodation entry was provided to Prathamesh Constructions. It is necessary to note that, first of all, in re-assessment proceedings, the law is clear. An Assessing Officer cannot indulge in a fishing enquiry. In ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Private Limited*** [1], the Apex Court has held that at the stage of issuance of notice, the only question is whether there was relevant material on which a reasonable person could have formed the requisite belief of escapement of income. In the notice issued under Section 148A(b) of the Act, there is not even a reference of what is stated in paragraph 6.1 of the impugned order. As held by this Court in ***Neetu M. Chandaliya v. Income Tax Officer-14(2)(3)***[2], the reasons as mentioned in paragraph 6.1 of the impugned order, at the highest, can only be termed as "a suspicion subject to a case of fishing enquiry".

10. Moreover, in the impugned notice dated 23rd March 2023 under Section 148A(b) of the Act, there is reference to Prathamesh Constructions to whom an amount of Rs.39,80,357/- has been paid.

1 2007 (291) ITR 500 (SC)
2 2023 SCC Online Bom 2046

In the reply that was filed to the notice issued under Section 148A(b) of the Act, Petitioner has, in the reconciliation of the annexure, mentioned that gross amount paid to Prathamesh Constructions was Rs.44,58,000/- of which basic amount was Rs.39,80,357/- and 12% GST was Rs.4,77,643/-. This has been accepted by the AO in paragraph 6 of the impugned order, which is quoted above. The AO states "*...........It is verified that the information report by the INSIGHT portal is accounted by the assessee in its books and income arising out of those transactions is duly offered for taxation.*"

11. Mr. Suresh Kumar submits that in paragraph 7 of the impugned order, the AO is referring to the explanation to Section 147 of the Act, which reads as under:

> *" Section 147.-* ***xxxxxxx***
>
> *Explanation.- For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with."*

We do not find that to be the case of the AO in the impugned order nor is it so stated in the affidavit in reply filed. In any case, the Division Bench of this Court in ***Commissioner of Income Tax v. Jet Airways***[3] held that the effect of Section 147 is that the AO has to assess or reassess such income that has escaped assessment and

3 2010 SCC Online Bom. 2065

which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under Section 148 of the Act, the AO accepts the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. Paragraphs 22 and 23 read as under:

> *"22. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment of reassessment on grounds other than those on the basis of which a notice was issued under section 148. Setting out the reasons, for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance (No. 2) Act of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.*
>
> *23. We have approached the issue of interpretation that has*

> *arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147 and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147 as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion to Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh (2008) 306 ITR 343. Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147 as they stood after the amendment of April 1, 1989, continue to hold the field.”* *(emphasis supplied)*

In this case, the AO has accepted the contention of the assessee and held that the information report by the Insight portal is accounted for by the assessee in his books and income arising out of those transactions is duly offered for taxation. Therefore, the impugned order dated 21st April 2023 under Section 148A(d) of the Act cannot be sustained. At the same time if the AO wishes to, he could issue a fresh notice under Section 148A(b) of the Act if, that is permitted in law. We are expressing no opinion.

12. In the circumstances, the AO having accepted the explanation of Petitioner, he could not have gone ahead and recommended that it was a fit case where income chargeable to tax has escaped assessment. We would add that the approval granted by the PCIT is

also without application of mind. In the approval, it is stated "*I have perused the facts of the case vis-a-vis information/material available on record and found the case to be fit case for issue of notice u/s 148 of the I.T.Act, 1961. Accordingly, the draft order u/s 148A(d) of the I.T. Act submitted by the AO is approved.*" If only the PCIT had read the impugned order and the notice issued under Section 148A(b) of the Act, he would have refused to grant the approval. The PCIT seems to have done nothing and it is clear that he has mechanically signed the approval.

13. In the circumstances, we allow the Petition in terms of prayer clause (b), which reads as under:

> "*(b) Issue a writ of Certiorari or a writ in the nature of certiorari or any other writ, order or direction, quashing the Impugned Order u/s. 148A(d) of the Act dated 21st April 2023 (Exhibit E) and the Impugned Notice under s.148 of the Act dated 21st April 2023 (Exhibit F);*"

14. Rule is made absolute accordingly.

15. Petition disposed.

(DR. NEELA GOKHALE, J.) **(K. R. SHRIRAM, J.)**