

110 and 118

Judgment pronounced on 19.07.2024

...Petitioner

Versus

...Respondents

CWP-15791-2024

...Petitioner

Versus

...Respondents

CORAM: HON'BLE MR. JUSTICE SHEEL NAGU, CHIEF JUSTICE
HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: - Mr. Sandeep Goyal, Advocate
Mr. Rishab Singla, Advocate
Mr. Peyush Pruthi, Advocate
Ms. Aakriti, Advocate
Mr. Nitish Bansal, Advocate
Mr. Nazuk Singhal, Advocate
for the petitioner.

Mr. Amanpreet Singh, Standing Counsel
for Income Tax Deptt. in CWP No.15745 of 2024.

Mr. Vaibhav Gupta, Standing Counsel
for Income Tax Deptt. in CWP No.15791 of 2024.

JAGMOHAN BANSAL, J.

1. By this common order, the civil writ petitions 15745-2024 & 15791-2024 are disposed of as issues involved and prayer sought therein are common. For the sake of brevity and convenience, facts are borrowed from CWP-15745-2024.

2. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking following relief:-

- (i) Issuance of a writ In the nature of prohibition restraining Respondent No.4 from proceeding ahead in pursuance to the intimation dated 21.06.2024 (Annexure P-4) as the initiation of proceedings by Respondent No.3 by issuing Notice under Section 148 dated 28.03.2024 (Annexure P-2) is without jurisdiction as Respondent No.3 could not have issued Notice under Section 148 after the introduction of E-Assessment Faceless Scheme and also for the reason that no reasoning has been assigned as to why the case of the petitioner is selected for proceedings under Section 148;*
- (ii) For the issuance of a writ in the nature of certiorari for quashing the Approval dated 22.03.2024 (Annexure P-3) accorded by Respondent No.2 under Section 151 of the Act ibid having been issued without due application of mind and without disclosing any information to the petitioner on the basis of which the proceedings in question have been initiated; and*
- (iii) In the interregnum, further proceedings in pursuance to the notice dated 28.03.2024 (Annexure P-2) issued by Respondent No.3 may be stayed; and*

(iv) Issuance of any other appropriate writ, order or direction, which this Hon'ble Court may deem fit and proper in the circumstances of the case.

3. The brief facts of the case which are necessary for the adjudication of the instant petition are that the petitioner is an Income Tax Assessee having PAN **BRKPB0596E**. He is a farmer and owns agriculture land. He for the assessment year 2020-2021 filed his Income Tax Return on 29.09.2020. During the previous year, he had received compensation on account of acquisition of his land. He received a notice dated 28.03.2024 under Section 148 of Income Tax Act (for short '1961 Act') from respondent No. 3-Income Tax Officer wherein it was mentioned that department has received information of escaping tax. The said officer proposed to re-assess petitioner's returned income and informed that notice has been issued after obtaining prior approval from Principal Commissioner of Income Tax. The petitioner was asked to file his return in the prescribed form within 94 days from the date of notice. He has further received intimation dated 21.06.2024 from the respondent to the effect that his case has been selected for the purpose of Faceless Assessment and proceedings would be conducted in a faceless manner.

4. The petitioner is assailing notice dated 28.03.2024 issued under Section 148 and intimation dated 21.06.2024 for assessment in accordance with the procedure prescribed under Section 144B of 1961 Act.

5. Mr. Sandeep Goyal, Advocate for the petitioner(s) submits that notice dated 28.03.2024 issued under Section 148 is in contravention of

notification dated 29.03.2022 as well as Section 151A of 1961 Act whereby concept of Faceless Assessment has been introduced. A Division Bench of Telangana High Court in '**Kankanala Ravindra Reddy Vs. Income-Tax Officer (2023) 295 Taxman 652 (Telangana)**', a Division Bench of Bombay High Court in '**Hexaware Technology Ltd. Vs. Assistant Commissioner of Income Tax, (2024) 464 ITR 430 (Bombay)**' and a Single Judge Bench of Gauhati High Court in '**Ram Narayan Sah. Vs. Union of India, (2024) 163 taxmann.com 478 (Gauhati)**' has held that notice under Section 148 of 1961 Act cannot be issued by Jurisdictional Assessing Officer (for short 'JAO') after introduction of concept of faceless assessment under Section 151A read with Section 144B of 1961 Act.

6. Per contra, Mr. Amanpreet Singh, and Mr. Vaibhav Gupta, Standing Counsels for the respondents submit that Gauhati High Court and Telangana High Court have set-aside notice issued under Section 148 by Jurisdictional Assessing Officer without considering office memorandum dated 20.02.2023 issued by Central Board of Direct Taxes (for short 'CBDT'). The Jurisdictional Assessing Officer in terms of circular dated 19.01.2024 issued by Directorate of Income Tax (Systems) can issue notice under Section 148. Calcutta High Court in '**Triton Overseas Private Limited Vs. Union of India (2023) 156 taxmann.com 318 (Calcutta)**' has formed an opinion contrary to opinion of other High Courts. The respondent vide SLP (Civil) Diary No. 2041/2024 has assailed judgment of Telangana High Court before Supreme Court which has issued notice to opposite side.

7. We have heard the arguments of learned counsel for both sides and perused the record with their able assistance.

8. The conceded position emerging from the record is that the petitioner has filed his return within stipulated time. JAO has issued notice under Section 148. The said notice has been issued after obtaining prior approval from Principal Commissioner of Income Tax. The respondent has further intimated the petitioner that his assessment would be completed in accordance with procedure prescribed under Section 144B. A detailed procedure of faceless assessment has been prescribed under Section 144B and Section 151A requires for issuance of notice and assessment by Faceless Assessing Officer.

9. A Division Bench of Telangana High Court in ***Kankanala Ravindra Reddy (Supra)*** has held that notice under Section 148 cannot be issued by Jurisdictional Assessing Officer. The relevant extracts of the judgment are reproduced as below:-

“6. The preliminary objection raised by the petitioner which is being considered as the foremost issue is "whether the impugned order under section 148A (d) as well as the notice under section 148 of the Act could be issued by the local jurisdictional officer, rather than the faceless assessment." The issue in other words was "whether was it not mandatory for the authorities concerned to initiate proceedings pertaining to re-assessment under section 148A and 148 of the Act in a faceless manner, (rather than being proceeded by the local jurisdictional officer), as is envisaged under section 144B as also under section 151A of the Act.

34. *What is also relevant to take note of the fact that the Hon'ble Supreme Court while exercising its power under Article 142 of the Constitution of India has also not relaxed the applicability of the Finance Act 2021. Rather, the Hon'ble Supreme Court in very clear and unambiguous terms had held that the notices issued under the un-amended provisions, which were struck down by the High Court, shall be treated as a notice under new amended provisions and the Union of India was directed to proceed further from that stage in terms of the amended provisions of law. In spite of such specific clear directions by the Hon'ble Supreme Court, the Union of India for reasons best known again proceeded with the procedure as it stood prior to the amended provisions which came into force from 1-4-2021.*

35. *In view of the aforesaid discussions, it is by now very clear that the procedure to be followed by the respondent-Department upon treating the notices issued for reassessment being under section 148A, the subsequent proceedings was mandatorily required to be undertaken under the substituted provisions as laid down under the Finance Act, 2021. In the absence of which, we are constrained to hold that the procedure adopted by the respondent-Department is in contravention to the statute i.e. the Finance Act, 2021, at the first instance. Secondly, it is also in direct contravention to the directives issued by the Hon'ble Supreme Court in the case of Ashish Agarwal, supra.*

36. *For all the aforesaid reasons, the impugned notices issued and the proceedings drawn by the respondent-Department is neither tenable, nor sustainable. The notices so issued and the procedure adopted being per se illegal, deserves to be and are accordingly set aside/quashed. As a consequence, all the impugned orders getting quashed, the consequential orders passed by the respondent-Department pursuant to the notices issued under section 147 and 148 would also get quashed and it is ordered accordingly. The reason we are quashing the consequential order is on the principles that when the*

initiation of the proceedings itself was procedurally wrong, the subsequent orders also gets nullified automatically.”

10. A Single Bench of Calcutta High Court in **Triton Overseas (P.) Ltd. (Supra)** relying upon office memorandum dated 20.02.2023 issued by CBDT, dismissed the petition assailing notice issued under Section 148 by JAO. It is apt to notice here that Calcutta High Court without testing contents of office memorandum vis-à-vis mandatory provisions dismissed the petition. The complete order dated 13.09.2023 passed by Calcutta High Court is reproduced as below:-

“1. The Court: Heard the learned advocates appearing for the parties.

2. By this writ petition, petitioner has challenged the impugned notice dated 28th April, 2023, under Section 148 of the Income-tax Act, 1961 relating to assessment year 2019-20 on the ground that the same has been issued by the jurisdictional assessing officer and not by National Faceless Assessment Center as required under section 151A of the Income-tax Act, 1961.

3. Mr. Dutt, learned advocate appearing for the respondents submits that first of all the ground taken by the petitioner is hypertechnical since mode of service does not affect the contents and merit of the notice and secondly that the issuance of the aforesaid impugned notice under Section 148 of the Act is justifiable and sustainable in law in view of the office memorandum dated 20th February, 2023 being F No. 370153/7/2023-TPL issued by the CBDT and particularly

paragraph 4 of the said office memorandum upon which she relies is quoted as hereunder:

4. It is also pertinent to note here that under the provisions of the Act both the JAO as well as units under NFAC have concurrent jurisdiction. The Act does not distinguish between JAO or NFAC with respect to Jurisdiction over a case. This is further corroborated by the fact that under section 144B of the Act the records in a case are transferred back to the JAO as soon as the assessment proceedings are completed. So section 144B of the Act lays down the role of NFAC and the units under it for the specific purpose of conduct of assessment proceedings in a specific case in a particular Assessment Year. This cannot be construed to be meaning that the JAO is bereft of the jurisdiction over a particular assessee or with respect to procedures not falling under the ambit of section 144B of the Act. Since, section 144B of the Act does not provide for issuance of notice under section 148 of the Act, there can be no ambiguity in the fact that the JAO still has the jurisdiction to issue notice under section 148 of the Act."

4. Considering the facts and circumstances of the case and submissions of the parties and in view of the aforesaid circular of the Board, I find no merit in the writ petition being WPO 1566 of 2023 and accordingly the same is dismissed."

11. Similar issue came up for consideration before a Division Bench of Bombay High Court in **Hexaware Technology Ltd.(Supra)** which vide judgment dated 03.05.2024 discussed the issue at length and held that notice under Section 148 after introduction of Finance Act, 2021, cannot be issued by Jurisdictional Assessing Officer. It is apt to mention here that Bombay

High Court noticed order dated 13.09.2023 passed by Calcutta High Court as well as office memorandum issued by CBDT. The relevant extracts of judgment passed by Bombay High Court are reproduced as below:-

“20. After hearing all the counsels, the following issues came up for consideration:

(1) (2) and (3) xxx xxx xxx

(4) Whether the impugned notice dated 27th August 2022 is invalid and bad in law being issued by the JAO as the same was not in accordance with Section 151A of the Act?

36. With respect to the arguments of the Revenue, i.e., the notification dated 29th March 2022 provides that the Scheme so framed is applicable only ‘to the extent’ provided in Section 144B of the Act and Section 144B of the Act does not refer to issuance of notice under Section 148 of the Act and hence, the notice cannot be issued by the FAO as per the said Scheme, we express our view as follows:

Section 151A of the Act itself contemplates formulation of Scheme for both assessment, reassessment or recomputation under Section 147 as well as for issuance of notice under Section 148 of the Act. Therefore, the Scheme framed by the CBDT, which covers both the aforesaid aspect of the provisions of Section 151A of the Act cannot be said to be applicable only for one aspect, i.e., proceedings post the issue of notice under Section 148 of the Act being assessment, reassessment recomputation under Section 147 of the Act and inapplicable to the issuance of notice under Section 148 of the Act. The Scheme is clearly applicable for issuance of notice under Section 148 of

the Act and accordingly, it is only the FAO which can issue the notice under Section 148 of the Act and not the JAO. The argument advanced by respondent would render clause 3(b) of the Scheme otiose and to be ignored or contravened, as according to respondent, even though the Scheme specifically provides for issuance of notice under Section 148 of the Act in a faceless manner, no notice is required to be issued under Section 148 of the Act in a faceless manner. In such a situation, not only clause 3(b) but also the first two lines below clause 3(b) would be otiose, as it deals with the aspect of issuance of notice under Section 148 of the Act. Respondents, being an authority subordinate to the CBDT, cannot argue that the Scheme framed by the CBDT, and which has been laid before both House of Parliament is partly otiose and inapplicable. The argument advanced by respondent expressly makes clause 3(b) otiose and impliedly makes the whole Scheme otiose. If clause 3(b) of the Scheme is not applicable, then only clause 3(a) of the Scheme remains. What is covered in clause 3(a) of the Scheme is already provided in Section 144B (1) of the Act, which Section provides for faceless assessment, and covers assessment, reassessment or recomputation under Section 147 of the Act. Therefore, if Revenue's arguments are to be accepted, there is no purpose of framing a Scheme only for clause 3(a) which is in any event already covered under faceless assessment regime in Section 144B of the Act. The argument of respondent, therefore, renders the whole Scheme redundant. An argument which renders the whole Scheme otiose cannot be accepted as correct interpretation of the Scheme. The phrase "to the extent provided in Section 144B of the Act" in the Scheme is with reference to only making assessment or reassessment or total income or loss of assessee. Therefore, for the purposes of

making assessment or reassessment, the provisions of Section 144B of the Act would be applicable as no such manner for reassessment is separately provided in the Scheme. For issuing notice, the term "to the extent provided in Section 144B of the Act" is not relevant. The Scheme provides that the notice under Section 148 of the Act, shall be issued through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in Section 148 of the Act and in a faceless manner. Therefore, "to the extent provided in Section 144B of the Act" does not go with issuance of notice and is applicable only with reference to assessment or reassessment. The phrase "to the extent provided in Section 144B of the Act" would mean that the restriction provided in Section 144B of the Act, such as keeping the International Tax Jurisdiction or Central Circle Jurisdiction out of the ambit of Section 144B of the Act would also apply under the Scheme. Further the exceptions provided in sub-section (7) and (8) of Section 144B of the Act would also be applicable to the Scheme.

37 *When an authority acts contrary to law, the said act of the Authority is required to be quashed and set aside as invalid and bad in law and the person seeking to quash such an action is not required to establish prejudice from the said Act. An act which is done by an authority contrary to the provisions of the statute, itself causes prejudice to assessee. All assesseees are entitled to be assessed as per law and by following the procedure prescribed by law. Therefore, when the Income Tax Authority proposes to take action against an assessee without following the due process of law, the said action itself results in prejudice to assessee. Therefore, there is no question of petitioner having to prove further prejudice before arguing the invalidity of the notice.*

38 With respect to the Office Memorandum dated 20th February 2023, the said Office Memorandum merely contains the comments of the Revenue issued with the approval of Member (L&S) CBDT and the said Office Memorandum is not in the nature of a guideline or instruction issued under Section 119 of the Act so as to have any binding effect on the Revenue. Moreover, the arguments advanced by the Revenue on the said Office Memorandum dated 20th February 2023 is clearly contrary to the provisions of the Act as well as the Scheme dated 29 March 2022.....

39 With reference to the decision of the Hon'ble Calcutta High Court in Triton Overseas Private Limited (Supra), the Hon'ble Calcutta High Court has passed the order without considering the Scheme dated 29th March 2022 as the said Scheme is not referred to in the order. Therefore, the said judgment cannot be treated as a precedent or relied upon to decide the jurisdiction of the Assessing Officer to issue notice under Section 148 of the Act. The Hon'ble Calcutta High Court has referred to an Office Memorandum dated 20th February 2023 being F No.370153/7/2023 TPL which has been dealt with above. Therefore, no reliance can be placed on the said Office Memorandum to justify that the JAO has jurisdiction to issue notice under Section 148 of the Act. Further the Hon'ble Telangana High Court in the case of **Kankanala Ravindra Reddy vs. Income Tax Officer**" has held that in view of the provisions of Section 151A of the Act read with the Scheme dated 29th March 2022 the notices issued by the JAOs are invalid and bad in law. We are also of the same view.

12. The issue involved came up for consideration before a Single Judge Bench of Gauhati High Court in ***Ram Narayan Sah*** (Supra). The Court expressed the same opinion as was formed by Telangana and Bombay High Courts. As per 1961 Act, every assessee has to file annual return disclosing its total income, taxable income and tax liability. In case Assessing Officer disagrees with the disclosed income, he has right to re-assess tax liability of the assessee. Re-assessment cannot be made without granting opportunity to the assessee. The opportunity is granted by way of issuing notice followed by personal hearing. Section 147, 148 and 148A contemplate procedure of re-assessment. Section 144B prescribes procedure of self assessment. Section 151A provides that assessment of escaped income shall be made faceless. The concept of self assessment has been introduced w.e.f. 01.04.2021. The object of faceless assessment is to eliminate interface between the Income Tax Authority and assessee to the extent feasible. There are further objects as enshrined in Section 151A. Section 148 provides for issuance of notice where income has escaped assessment. For the ready reference, Section 148 and 151A of 1961 Act are reproduced as below:-

“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, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income

or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

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:

Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section.

Explanation 1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—

- (i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;*
- (ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or*
- (iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or*
- (iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or*

(v) any information which requires action in consequence of the order of a Tribunal or a Court.

Explanation 2.—For the purposes of this section, where,—

(i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or

(ii) a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

(iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee [where] the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.—For the purposes of this section, specified authority means the specified authority referred to in section 151.

151A. Faceless assessment of income escaping assessment.

(1) The Central Government may make a scheme, by notification in the Official Gazette, for the purposes of assessment, reassessment or re-computation under section 147 or issuance of notice under section 148 or conducting of enquiries or issuance of show-cause notice or passing of order under section 148A or sanction for issue of such notice under section 151, so as to impart greater efficiency, transparency and accountability by—

(a) eliminating the interface between the income-tax authority and the assessee or any other person to the extent technologically feasible;

(b) optimising utilisation of the resources through economies of scale and functional specialisation;

(c) introducing a team-based assessment, reassessment, re-computation or issuance or sanction of notice with dynamic jurisdiction.

(2) The Central Government may, for the purpose of giving effect to the scheme made under sub-section (1), by notification in the Official Gazette, direct that any of the provisions of this Act shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification:

Provided that no direction shall be issued after the 31st day of March, 2022.

(3) Every notification issued under sub-section (1) and sub-section (2) shall, as soon as may be after the notification is issued, be laid before each House of Parliament.”

13. The Central Government in exercise of power conferred by Section 151A of 1961 Act by notification S.O. 1466(E) dated 29.03.2022 has introduced e-Assessment scheme for escaped income. The said scheme is known as e-Assessment of Income Escaping Assessment Scheme, 2022 which is reproduced as below:-

“In exercise of the powers conferred by sub-sections (1) and (2) of section 151A of the Income-tax Act, 1961 (43 of 1961), the Central Government hereby makes the following Scheme, namely:-

Short title and commencement.

1. (1) This Scheme may be called the e-Assessment of Income Escaping Assessment Scheme, 2022.

(2) It shall come into force with effect from the date of its publication in the Official Gazette.

Definitions.

2. (1) In this Scheme, unless the context otherwise requires,

—

(a) “Act” means the Income-tax Act, 1961 (43 of 1961);

(b) “automated allocation” means an algorithm for randomised allocation of cases, by using suitable technological tools, including artificial intelligence and machine learning, with a view to optimize the use of resources.

(2) Words and expressions used herein and not defined, but defined in the Act, shall have the meaning respectively assigned to them in the Act.

Scope of the Scheme.

3. *For the purpose of this Scheme,—*

(a) assessment, reassessment or recomputation under section 147 of the Act,

(b) issuance of notice under section 148 of the Act, shall be through automated allocation, in accordance with risk management strategy formulated by the Board as referred to in section 148 of the Act for issuance of notice, and in a faceless manner, to the extent provided in section 144B of the Act with reference to making assessment or reassessment of total income or loss of assessee.”

14. The respondent during the course of arguments vehemently and vigorously pleaded that notice under Section 148 can be issued by Jurisdictional Assessing Officer. In support of his contention, they heavily relied upon office memorandum dated 20.02.2023 and letter dated 19.01.2024 issued by Directorate of Income Tax (System).

15. From the perusal of Section 151A, it is quite evident that scheme of faceless assessment is applicable from the stage of show cause notice under Section 148 as well as 148A. Clause 3 (b) of notification dated 29.03.2022 issued under Section 151A clearly provides that scheme would be applicable to notice under Section 148. Even otherwise, it is a settled proposition of law that assessment proceedings commence from the stage of issuance of show cause notice. The object of introduction of faceless assessment would be

defeated if show cause notice under Section 148 is issued by Jurisdictional Assessing Officer. The respondents are heavily placing reliance upon office memorandum and letter issued by departmental authorities. It is axiomatic intax jurisprudence that circulars, instructions and letters issued by Board or any other authority cannot override statutory provisions. The circulars are binding upon authorities and Courts are not bound by circulars. The mandate of Section 144B, 151A readwith notification dated 29.03.2022 issued thereunder is quite lucid. There is no ambiguity in the language of statutory provisions, thus, office memorandum or any other instruction issued by Board or any other authority cannot be relied upon. Instructions/circulars can supplement but cannot supplant statutory provisions.

16. In the wake of above discussion and findings, we find it appropriate to subscribe view expressed by Bombay, Telangana and Gauhati High Court. The instant petitions deserve to be allowed and accordingly allowed.

17. The notices issued by Jurisdictional Assessing Officer under Section 148 are hereby quashed with liberty to respondent to proceed in accordance with procedure prescribed by law.

(SHEEL NAGU)
CHIEF JUSTICE

(JAGMOHAN BANSAL)
JUDGE

19.07.2024
manoj

Whether speaking/reasoned	Yes
Whether reportable	Yes