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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 905/2023

MUSETTA BUILDERS AND DEVELOPERS PRIVATE LIMITED .....Petitioner

Through: Ms. Kavita Jha, Sr. Adv. with Mr. Vaibhav Kulkarni and Mr. Himanshu Aggarwal, Advs.

versus

INCOME TAX OFFICER WARD 17(1) & ANR. .....Respondents

Through: Mr. Abhishek Maratha, SSC with Mr. Apoorv Agarwal, JSC, Mr. Parth Samwal, JSC with Mr. Nupur Sharma, Mr. Gaurav Singh, Mr. Bhanukaran Singh Jodha, Ms. Muskaan Goel and Mr. Kamakshraj Singh, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

ORDER

% **16.12.2024**

1. The writ petitioner impugns the order under Section 148A(d) of the **Income Tax Act, 1961**[1] dated 26 July 2022 as well as the consequential notice under Section 148 of even date, pertaining to **Assessment Year**[2] 2016-17.

2. The record would reflect that the aforesaid order was preceded by the issuance of a notice referable to Section 148A(b) on 23 May 2022 and where the following allegations were leveled:-

[1] Act
[2] AY

> "2. In this regard, in compliance with the subject order of the Apex Court, you are hereby provided with the information/ material relied upon by this office for issue of the show cause notice as above. The information available is as under :-
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> *"<u>The information available reveals that the assessee has entered into transaction in the nature of taking loan of Rs.18,00,00,000/- from M/s IndiaBulls Housing Finance Ltd. which is nothing but a bogus accommodation entry. The amount borrowed has been utilized for purchase of property and loans to related parties</u>.""*

3. For purposes of completeness, it may also be noted that the action itself had been initiated originally on 30 June 2021 in terms of a notice issued under Section 148 of the Act. However, a course correction appears to have been adopted pursuant to the judgment rendered by the Supreme Court in **Union of India and Ors. vs. Ashish Agarwal**[3]. It is pursuant to the said decision and the liberty accorded, that the Section 148A(b) notice came to be issued.

4. As is evident from the above, the allegation leveled was that the transaction of obtaining a loan of INR 18 crores from **M/s Indiabulls Housing Finance Ltd.**[4] was a "bogus accommodation entry". It was further alleged that the amount borrowed appeared to have been utilized for purchase of property and advancing loans to related parties. It was on this basis that the **Assessing Officer**[5] appears to have formed the opinion that income liable to tax had escaped assessment.

5. Responding to the notice dated 23 May 2022, the petitioner furnished its return and also filed a detailed reply. The order under Section 148A(d) ultimately came to be passed on 26 July 2022 and insofar as the merits of the matter and disclosures made are concerned, the authority has observed as follows:-

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[3] (2023) 1 SCC 617

[4] Indiabulls Housing Finance

"5.3 On merits, the assessee is engaged in the business of real estate. The information available has been analysed. The information indicate that there is total sanction amount of Rs.27 crore to the assessee against which the balance as on 31.03.2018 is at Rs.18 crore.

The information uploaded on Insight Portal is for the same amount of Rs.18 crore for the AYs 2013-14 to 2017-18 which in fact is closing balance as on 31.03.2018. It is well known fact that M/s Indiabulls Housing Finance Limited is a well known NBFC company engaged in the business of loans and advances upon which interest is earned by them. The assessee has filed copy of loan agreement, ledger account and bank statement in support of the loan taken. Therefore, the identity, credit worthiness and genuineness of the transaction stand fulfilled.

5.3.1 The assessee is also filing its ITRs regularly. The details of major heads are as under :-

Head	As on 31.03.2015	As on 31.03.2016
Loans from Banks	22,74,60,224	22,50,00,000
Loans given	0	10,14,00,000
Opening stock	32,29,29,127	38,02,06,000
Closing stock	38,02,06,000	42,31,37,745
Interest income	0	19,70,555
Interest paid	0	18,15,145

From the above, it can be inferred that the loan taken of Rs. 27 crore during the year from IndiaBulls has been utilized for making investment in stock and repayment of existing loan liability. But with regard to the loan given of Rs. 10,14,00,000/- the assessee has not furnished copy of bank statement or source thereof. Therefore, the source of amount of Rs. 10,14,00,000/- remained unexplained and has escaped assessment in the hands of the assessee.

[5] AO

> 6. Considering the above and on the basis of the material available on record, it is a fit case to issue a notice under section 148 of the Act."

6. As is ex facie evident from a reading of that order, the petitioner/assessee appears to have proffered requisite information and material insofar as the loan of INR 18 crores was concerned. However, the AO while seeking to affirm its original decision to reopen and reassess has now taken a position that from the disclosures made, the petitioner had failed to provide requisite information and details with respect to a loan of INR 10,14,00,000/-. Regard must be had to the fact that insofar as the issue of the loan from Indiabulls Housing Finance is concerned, the AO had come to record its opinion that the identity, creditworthiness and genuineness of the transaction stood duly established.

7. The doubt which was then expressed with respect to the loan of INR 10,14,00,000/- was one which did not even constitute the basis for the formation of opinion to reopen and reassess and which stood reflected in the Section 148A(b) notice. It is this which constrains us to observe, yet again, that the formation of opinion cannot be based on a set of reasons which are of changing hues. We bear in consideration the following observations that we had rendered in **ATS Infrastructure Limited v. Assistant Commissioner of Income Tax Circle 1 (1) & Ors.**[6] in this regard: -

> **"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 Officer 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

[6] 2024 SCC OnLine Del 5048

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 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 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 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. <u>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</u>. 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."

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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:—

> "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
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> 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."

8. Consequently, and for the aforesaid reasons we find ourselves unable to sustain the orders impugned.

9. The writ petition is accordingly allowed. The impugned order under Section 148A(d) as well as the consequential notice referable to Section 148, both dated 26 July 2022 are hereby quashed.

10. This order, however, shall be without prejudice to the right of the respondents to draw proceedings afresh, if otherwise permissible in law.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

DECEMBER 16, 2024/gunn