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

+ W.P.(C) 17145/2022

JAMINI ASHOKKUMAR DAVE Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aniket D. Agrawal & Mr.
Samarth Chaudhari, Advs.

versus

DEPUTY COMMISSIONER OF INCOME
TAX & ANR.

..... Respondents

Through: Mr. Puneet Rai, SSC with Mr.
Ashvini Kumar, Mr. Rishabh,
Mr. Nikhil, Advs.

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+ W.P.(C) 17199/2022

JAMINI ASHOKKUMAR DAVE Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aniket D. Agrawal & Mr.
Samarth Chaudhari, Advs.

versus

DEPUTY COMMISSIONER OF INCOME
TAX & ANR.

..... Respondents

Through: Mr. Puneet Rai, SSC with Mr.
Ashvini Kumar, Mr. Rishabh,
Mr. Nikhil, Advs.

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+ W.P.(C) 17200/2022

JAMINI ASHOKKUMAR DAVE Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with
Mr. Aniket D. Agrawal & Mr.
Samarth Chaudhari, Advs.

versus

DEPUTY COMMISSIONER OF INCOME



TAX & ANR.

..... Respondents

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh, Mr. Nikhil, Advs.

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+ W.P.(C) 17229/2022

JAMINI ASHOKKUMAR DAVE

..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aniket D. Agrawal & Mr. Samarth Chaudhari, Advs.

versus

DEPUTY COMMISSIONER OF INCOME

TAX & ANR.

..... Respondents

Through: Mr. Puneet Rai, SSC with Mr. Ashvini Kumar, Mr. Rishabh, Mr. Nikhil, Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR

KAURAV

ORDER

27.02.2024

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1. This batch of writ petitions assail the initiation of action under Section 148 of the **Income Tax Act, 1961**¹ as also final orders of assessment and consequential demand notices which came to be issued. The dispute itself pertains to **Assessment Years**² 2013-2014 to 2017-2018. For the sake of brevity, we propose to notice the facts as set out in W.P.(C) 17145 of 2022.

2. Proceedings under Section 148 are stated to have commenced consequent to the issuance of a notice dated 31 March 2021. As per the undisputed facts which emerge from the record, the aforesaid

¹ Act

² AYs



notice, according to the respondents, was dispatched on the same date via speed post. However, and undisputedly, the said postal article was returned back unserved in June 2021 in the office of the Respondents.

3. The issue of service upon the petitioner assessee arises in the backdrop of the individual assessee who is stated to be a doctor by profession and currently practicing and residing in the United States of America. The petitioner maintained a **Non-Resident (Ordinary) Account**³ as well as a **Non-Resident (External) Account**⁴ in India as per details which are set out hereinbelow:-

S. No.	Name of Bank	A/c No.	Type of A/c	Date of Opening of A/c
1.	ICICI Bank Ltd., 2/1, Popular House, Ashram Road, Ahmedabad-380006	018901076114	NRO Savings	Before 01.04.2012
2.	ICICI Bank Ltd., 2/1, Popular House, Ashram Road, Ahmedabad-380006	018901076019	NRE Savings	Before 29.12.2009

4. According to the petitioner, he had in 2009, while still a non-resident, made various investments in India in the form of bank fixed deposits, mutual funds, and savings accounts. He is stated to have earned income by way of interest and dividend therefrom. It is the case of the writ petitioner that the notice under Section 148 was neither served upon him via speed post nor was he electronically served in accordance with the Act and the **Income Tax Rules, 1962**⁵.

³ NRO Account

⁴ NRE Account

⁵ Rules



It is in the aforesaid backdrop that Mr. Vohra submits that the non service of the jurisdictional notice is fatal and consequently the writ petition is liable to be allowed on this score alone.

5. It was further submitted that the various investments which were made by the petitioner was through the NRO savings account and to which interest and dividend came to be credited. Mr. Vohra contended that by virtue of Section 115A of the Act and since the nature of income earned would fall within the ambit of clause (a) of Section 115A(1), the assessee was not obliged to file any return of income. This submission was addressed in light of Section 115A(5) of the Act. Mr. Vohra also submitted that the mere uploading of the jurisdictional notice on the **Income Tax Business Application**⁶ portal would clearly not constitute service in light of the judgment rendered by the Court in **Suman Jeet Agarwal vs. ITO.**⁷

6. As is evident from a reading of the notice dated 31 March 2021, as also the final order framed, the respondents assert that there was a failure on the part of the petitioner to respond to the various notices which were issued to him and were dated 29 October 2021, 30 November 21, 02 December 2021, and 24 January 2022. According to Mr. Rai, consequent to a failure on the part of the petitioners to respond to the aforesaid notices, the **Assessing Officer**⁸ was left with no option but to proceed ex parte.

7. It becomes pertinent to note that the initiation of action under Section 148 was itself based on a failure on the part of the petitioner to explain the source of investment of INR 3 crores in mutual funds purchased as also a failure to disclose interest of INR 1,77,45,221/- in

⁶ ITBA

⁷ 2022 SCC OnLine Del 3141

⁸ AO



the subject AY. The respondents consequently made additions under Section 69 of the Act in respect of the unexplained source of investment and addition in respect of the interest income generated in that year.

8. It becomes pertinent to note that the additions are more or less common in all the writ petitions, as would be evident from the following chart which has been placed on the record along with the written submissions of the petitioner:-

S. No.	Assessment Year & WPC No.	Additions/ Allegations made in the impugned order
1.	AY 2013-14 [WPC No.17145 of 2022]	Rs.3,00,00,000 – as unexplained investments u/s. 69 of the Act. Rs.1,77,45,221 – interest income earned which was not offered to tax (no ITR filed)
2.	AY 2014-15 [WPC No.17200 of 2022]	Rs.13,30,06,472 - as unexplained investments u/s. 69 of the Act. Rs.39,60,111 - interest income earned which was not offered to tax (no ITR filed) Rs.30,90,92,142 – unexplained cash transaction u/s. 69C of the Act.
3.	A Y 2015-16 [WPC No.17199 of 2022]	Rs.4,26,94,269 – as unexplained investments u/s. 69 of the Act. Rs.35,73,024 – interest income earned which was not offered to tax (no ITR filed)
4.	A Y 2017-18 [WPC No.17229 of 2022]	Rs.6,04,74,925 – as unexplained investments u/s. 69 of the Act. Rs.94,48,134 – interest income earned which was not offered to tax (no ITR filed)

9. Apart from the facts as set forth in the Section 148 notice, Mr.



Rai submitted that the petitioner merely alleges non service of the notice referable to Section 148. According to learned counsel, insofar as the various other notices are concerned, it is the case set up in the writ petition itself that some of those notices came to be placed in the spam folder of the petitioner's email account, and it was only after finalization of reassessment proceedings that the petitioner derived knowledge of those notices.

10. According to Mr. Rai, the aforesaid explanation, as proffered, is clearly inexplicable and in any case is an admission of the petitioner having been served electronically. It was further contended by Mr. Rai that the petitioner also failed to update his email and mobile phone particulars as he was obliged to do on the Income Tax portal and thus the proceedings are not liable to be interfered with.

11. Insofar as the issue of the obligation of the petitioner to file a return of income is concerned, Mr. Rai submitted that the petitioner earned income not only from investments made in mutual funds but also interest from fixed deposits which had been created with scheduled banks. According to learned counsel, the income generated from such investments would clearly not fall within clause (a) of Section 115A(1). In view of the aforesaid, it was submitted that the stand of the assessee that he was not placed under a statutory duty to file a return of income is unsustainable.

12. Seeking to controvert those submissions, Mr. Vohra in rejoinder submitted that the pleas taken by the respondents in the counter affidavit would itself indicate that there was no actual service of the Section 148 notice upon the petitioner. Mr. Vohra drew our attention to paragraphs 4 and 5 of the reply affidavit filed by the respondents and which is extracted hereinbelow:-



“4. That the present petition came up for hearing before this Hon’ble court on 16.12.2022. This Hon’ble court issued notice to the Respondents primarily on the aspect that documents with regard to speed post of Notice u/s 148 to be placed on record. In this regard, it is submitted that the notice u/s 148 of the Act was issued on 31.03.2021 and the said notice was also dispatched on the same date via speed post bearing postal no. ‘ED962352673IN’. However, it is submitted that the said postal envelope returned back in June 2021 in the office of the Respondents. True copy of notice dated 31.03.2021 for AY 2013-14 issued u/s 148 of the Act along with the copy of Speed post Envelope(Return proof) are annexed and marked as ANNEURE R-l(colly)

5. That it is further submitted that the impugned notice for AY 2013-14 was generated and issued by the answering Respondent on 31.3.2021. The Respondent also attempted to send the said notice to the Petitioner through Email , however the Petitioner has not registered any Email on the Income Tax Portal, therefore the notice could not be sent through Email. However, the said notice was uploaded on the E-Filing portal of the Income Tax Department on 31.03.2021 which is evident from the copy of order sheet downloaded from the portal by the Respondent.

The true copy of Order sheet for AY 2013-14 as per Income Tax Portal is annexed and marked as ANNEXURE R-2.”

13. It was submitted that the initiation of action is even otherwise wholly unjustified, since tax had been duly deducted on all investments and returns obtained therefrom.

14. It becomes pertinent to note that while the postal article was clearly never served upon the writ petitioner, there appears to be a serious dispute with respect to service via electronic mode. Dealing with the procedural safeguards which must imbue service through electronic modes, the Court in *Suman Jeet Agarwal* had held as follows:-

“25.12. The review of the aforesaid judgments of the Supreme Court and the several High Courts shows that all courts have consistently held that the expression "issue" in its common parlance and its legal interpretation means that the issuer of the notice must after drawing up the notice and signing the notice, make an overt act to ensure due despatch of the notice to the



addressee. It is only upon due despatch, that the notice can be said to have been "issued".

25.13. Further, a perusal of the compliance affidavit reveals that while the function of generation of notice on Income Tax Business Application portal and digital signing of the notice is executed by the jurisdictional Assessing Officer, the function of drafting of the e-mail to which the notice is attached and triggering the e-mail to the assessee is performed by the Income Tax Business Application e-mail software system. Thus, mere generation of notice on the Income Tax Business Application screen cannot in fact or in law constitute issue of notice, whether the notice is issued in paper form or electronic form. In case of paper form, the notice must be despatched by post on or before March 31, 2021 and for communication in electronic form the e-mail should have been despatched on or before March 31, 2021. In the present writ petitions, the despatch by post and e-mail was carried out on or after April 1, 2021 and therefore, we hold that, the impugned notices were not issued on March 31, 2021.

25.14. The Department has not disputed the correctness of the law settled by the Supreme Court in the case of R. K. Upadhyaya (supra) in which the court was concerned with issuance of the section 148 notice in paper form and concluded that, since the date of despatch was within the prescribed period of limitation, the notice was validly issued for the purpose of section 149 of the Act of 1961, and held that the date of service of notice was not relevant. In fact, the Department has relied upon the said judgment. The said judgment squarely applies to the notice classified as category "E". The amendments to the Act of 1961 including section 282A was to enable the Income-tax authority to issue notice either in paper form or electronic form and were made to provide an adequate legal framework for paperless assessment. Similarly, setting up of the digital platform of Income Tax Business Application portal and the e-filing portal is for facilitating assessment proceedings electronically. The said amendments or the use of Income Tax Business Application portal by the Department for issuing notice in no manner mitigates against or dispense with the legal requirement of the Department to ensure due despatch of the section 148 notice to satisfy the test of section 149 of the Act of 1961. The contention of the Department that upon generation of the notice on the Income Tax Business Application screen simplicitor (even before its despatch) is to be held to be issued does not persuade the court and is contrary to the judgment relied upon by the said party.

25.15. This court in the case of Court on its Own Motion v. CIT [2013] 352 ITR 273 (Delhi), while dealing with section 143(1) of the Act of 1961, has held that the law requires that, the



intimation under section 143(1) should be communicated to the assessee. The uncommunicated orders or intimations cannot be enforced and are not valid. The relevant extract of the aforesaid decision is reproduced herein under (page 295 of 352 ITR) :

"The second grievance of the assessee is with regard to the uncommunicated intimations under section 143(1) which remained on paper/file or the computer of the Assessing Officer. This is serious challenge and a matter of grave concern. The law requires intimation under section 143(1) should be communicated to the assessee, if there is an adjustment made in the return resulting either in demand or reduction in refund. The uncommunicated orders/intimations cannot be enforced and are not valid. .. But when there is failure to despatch or send communication/intimation to the assessee consequences must follow. Such intimation/order prior to March 31, 2010, will be treated as non est or invalid for want of communication/service within a reasonable time. This exercise, it is desirable should be undertaken expeditiously by the Assessing Officers. The Central Board of Direct Taxes will issue instructions to the Assessing Officers. . ." (emphasis supplied)

XXXX

28. Question (V) : Whether upload of the section 148 notice on the "My Account" of the assessee on the e-filing portal is valid transmission under the Act of 1961 ? - The court has answered this in the negative, against the Department.

28.1. With respect to the notices falling under category "D" dated March 31, 2021 and digitally signed on March 31, 2021 it has been stated that, they were not served on the assessee either by e-mail or post or by courier services as they were just uploaded on the e-filing portals of the assessee. It is the case of the petitioners that no real time alert was received by the assessee and the Department has not disputed this fact.

28.2. The mode of service of electronic record, i. e., notices in the present case is provided under section 282 of the Act of 1961 and rule 127 of the Income-tax Rules. The mode of service of a notice, electronically, is prescribed in section 282 of the Act of 1961, it states that service may be made by transmitting a copy in the form of electronic record as per Chapter IV of the Act of 2000. It also states that the Central Board of Direct Taxes is empowered with the responsibility to make rules providing addresses for



communication through electronic mail or electronic mail message. The Central Board of Direct Taxes vide rule 127(2)(b) of the Income-tax Rules prescribed e-mail addresses, as made available by the assessee, for communication transmitted electronically.

28.3. Thus, there is no dispute that the transmission of an electronic notice by placing an authenticated copy in the registered account of the assessee on the e-filing portal is not specifically prescribed in section 282 and rule 127. Instead, it finds a mention in the Central Board of Direct Taxes Notification No. 4 of 2017, dated April 3, 2017 ([2017] 393 ITR (St.) 93). The said notification, provides that, the notices issued by any Income-tax authority will be visible to the assessee after logging in under "E-Proceeding" tab in the e-filing portal and that an e-mail "may also" be sent to the registered e-mail address of the assessee. It also mentions that a text message notifying a real time alert to the assessee "may also" be sent to the mobile number registered on the e-filing website.

28.4. The "E-Proceedings", as per Notification No. 4 of 2017 is optional. The assessee has to register for the same and can also choose to opt out of it by notifying the Department.

28.5. It is unclear to us as to why e-mail based communication of notices is made optional in Notification No. 4 of 2017, despite it being the statutorily prescribed mode of service through electronic transmission. Further, the Income Tax Business Application portal itself is programmed in such a way that it triggers the e-mail software system when a notice is generated by the jurisdictional Assessing Officer and an authenticated copy of the same is thereafter also uploaded in the e-filing portal of the assessee, hence the Department cannot contend that it had done away with e-mailing of notices issued. Most importantly, the Department has been consistently using this mode of e-mail based communication to transmit notices and no reason whatsoever has been provided to explain as to why these notices were not e-mailed to the select few assessee falling under category "D" and was only uploaded on the e-filing portal. It is also unclear as to why the notices though digitally signed on March 31, 2021 were never e-mailed to the assessee, because, as per the compliance affidavit, upon affixation of digital signature certificate by the jurisdictional Assessing Officers the e-mail software system of the Income Tax Business Application portal would be automatically triggered.



28.6. It should be noted that, when the Legislature decided to include this mode of transmission, i. e., placing it on the e-filing portal/registered account of the assessee, as valid service in the Act of 1961, it duly included the safeguard of a real time alert. For reference, section 144B(6)(ii)(a) of the Act of 1961 statutorily recognizes this mode of transmission between the Income-tax authority and the assessee. Section 144B(6)(ii)(a) reads as under :

"Section 144B(6)(ii)(a). ..

(ii) every notice or order or any other electronic communication shall be delivered to the addressee, being the assessee, by way of—

(a) placing an authenticated copy thereof in the registered account of the assessee ; or. ..

and followed by a real time alert ;"

Finding for notices falling under category "D"

28.7. We hold that, in order for this mode of transmission, i. e., uploading of the notices in the e-filing portal of the assessee, to be considered valid service, the Department should have issued a real time alert as provisioned in the aforementioned section 144B(6)(ii)(a) of the Act of 1961. Since, the prescribed mode of service is not followed it is akin to no due despatch of notices, therefore, it cannot be said that the notices were validly issued.

28.8. However, since the assessee in the present case did become aware of the notices later and the assessment proceedings in their cases are still pending, we are not inclined to quash these notices.

28.9. It has come on record that the Income Tax Business Application records the time and date when the e-filing portal is accessed by the assessee, so the first date on which the notices were accessed by the assessee is duly available. This date will be considered by the jurisdictional Assessing Officers as the date of issuance of notices by the jurisdictional Assessing Officers.

Illustratively, in W. P. (C) No. 13888 of 2021 the notice dated March 31, 2021 was never served on the assessee, instead the assessee claims that he became aware of the same on November 23, 2021 while checking his e-filing portal, the jurisdictional Assessing Officers is directed to



verify the date on which the notice was first viewed by the assessee, and consider the same as the date of issuance.”

15. The dispute is further compounded by the petitioner while denying receipt of the notice under Section 148 concedes that some of the latter communications were received through email although they came to be placed in the spam folder. The service of the Section 148 notice thus clearly becomes a disputed question of fact and consequently, we find that in the absence of cogent and decisive material forming part of the record, we would not be justified in quashing that notice on grounds as suggested by Mr. Vohra.

16. At the same time, we also take note of the position taken by the respondents in their affidavit, and more particularly paragraph 5 thereof, and where it is averred that although they attempted to send a notice via email, the same could not be completed since the petitioner had not registered an email address on the ITBA. However, the subsequent notices ultimately came to be received by the petitioner in his email account thus remains an issue which neither side has been able to satisfactorily explain.

17. Notwithstanding the above, we take note of the disclosures which have been made by the writ petitioner, and which pertained to the source of income and the manner in which investments were made coupled with the fact that tax thereon had been duty deducted at source. Those details are also verifiable from the Form 26AS statement which has been placed on the record. Presently the AO is yet to examine the extent of income which may be referable to clause (a) of Section 115A and that which may not fall within its scope.

18. We also note prima facie that if the petitioner had also earned interest on bank fixed deposits, the said income would strictly not fall



within clause (a) of Section 115A. We are thus unable to render a determinative finding on whether the case of the petitioner would fall within the scope of Section 115A(5) of the Act.

19. On an overall consideration of the aforesaid and bearing in mind the fact that the proceedings undisputedly were taken ex parte, we are of the considered opinion that the ends of justice would warrant the matter being remitted to the AO who may commence proceedings from the stage of issuance of the Section 148 notice and undertake a reassessment exercise afresh.

20. We accordingly allow the writ petition in part and quash the final orders of assessment dated 23 May 2022 as well as the consequential demand notices, and the notices seeking imposition of penalty. The matter shall stand remitted to the AO, who shall commence proceedings from the stage of issuance of the notice referable to Section 148 of the Act.

21. The AO shall proceed in the matter with due notice to the petitioner and ensure that an opportunity of hearing is also provided. All rights and contentions of respective parties on merits are kept open.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.
FEBRUARY 27, 2024/*neha*