Vasanthi Ramdas Pai Vs Income Tax Officer Ward 1 And TPS, Udupi, Aayakar Bhawan, Udupi Malpe Road, Ambalpadi Post, Mangalore-576103, Karnataka & Others

Court: Karnataka High Court At Bengaluru

Date of Decision: Feb. 12, 2024

Acts Referred: Income Tax Act, 1961 â€" Section 2(42A), 10A, 10AA, 11, 12, 12AA, 32A, 47, 56, 56(2), 56(2)(x)(c), 90, 90A, 119, 12AA, 135A, 139, 142(2A), 143, 143(3), 147, 148, 148A, 148A(b), 148A(d), 148(1), 149, 149(1)(b), 150, 151, 152, 153, 153A, 164, 246A
Constitution Of India, 1949 â€" Article 14

Hon'ble Judges: Krishna S Dixit, J

Bench: Single Bench

Advocate: Ajay Vohra, S K Tulsiyan, Annapoorna S, Abraham Joseph, N Venkataraman, M Dilip

Final Decision: Allowed

Judgement

Krishna S Dixit, J

These two petitions having substantially similar factual matrix and involving identical questions of law, seek to lay a challenge to the orders dated

31.3.2022 passed u/s 148A(d) followed by evenly dated notices issued u/s 148 of the Income Tax Act, 1961. The impugned action has been generated

at the hands of 1st respondent.

I. FOUNDATIONAL FACTS OF THE CASES:

(a) Petitioner in W.P.No.8815/2022 is the husband of petitioner in companion W.P.No.8797/2022; they are an octogenarian couple. In the year 2010

and up to the year 2016, petitioner-Dr.Ramdas Madhava Pai acquired certain shares in Manipal Education and Medical Group India Private Limited

(hereafter Ã¢â‚¬Ëœ MEMGIPL Ã¢â‚¬â„¢). In March 2017, his son Dr.Ranjan Pai gifted shares held in MEMGIPL to petitioner-Dr.Ramdas Madhava Pai.

Likewise, his daughter-in-law gifted shares to petitioner-Smt.Vasanthi Pai. On 16.11.2017, the National Company Law Tribunal (hereafter

Ã¢â‚¬ËœNCLT Ã¢â‚¬â„¢) approved the scheme of demerger of the property management business of MEMGIPL into another company namely Manipal

Integrated Services Private Limited (hereafter Ã¢â‚¬Ëœ MISPL Ã¢â‚¬â„¢). By way of consideration, 10,87,97,101 shares of MISPL were allotted to the

shareholders of MEMGIPL. The appointed day of demerger was denoted as 30.11.2016. Accordingly, petitioner-Dr.Ramdas Pai and petitioner-

Vasanthi Pai got to hold 5537216 and 5359885 shares respectively in MISPL. Another order dated 30.11.2017 came to be passed by the NCLT

approving the demerger of facility management services of MISPL into Quess Corp. Ltd. In consideration of this demerger, the two writ petitioners

were allotted shares in Quess Corp. The appointed date for this demerger was 1.12.2016. In February and March 2018, the petitioners are said to

have sold the shares in Quess Corp.

(b) On 10.12.2018, both Petitioners filed their Returns of Income for the Assessment Year 2018-19 u/s 139 of the Act. On 11.03.2022, notices u/s

148A(b) of the Act were issued to them, on the following two premises:

(i) that the petitioners were allotted shares in Quess Corp Ltd as a consequence of demerger arrangements and the same are taxable in

terms of Section 56(2)(x)(c) of the 1961 Act; and

(ii) that the petitioners having sold the shares of Quess Corp before March 2018 ought to have offered the same to tax.

Petitioners sent their replies dated 28.3.2022 to the subject Show Cause Notices taking up certain objections and requested for dropping of the

proposed action.

However, the Assessing Officer vide orders dated 31.3.2022 passed u/s 148A(d), overruled the objections and issued notices u/s 148 of the Act for

the Assessment Year 2018-19. These orders and notices are the subject matter of challenge in these petitions.

(c) After service of notice, the Assessing Officer having entered appearance through their Panel Counsel, resisted the Writ Petitions by filing

individual Statement of Objections. The learned Additional Solicitor General of India appearing for the Assessing Officer made his submission in

justification of the impugned action and the reasons on which the same has been founded. Both the Assessing Officer and the Assessees have filed

their Written Submissions as well. Certain rulings have been cited in support of their respective cases.

II. AS TO WHAT THE ASSESSEES HAVE ARGUED:

(a) The primary condition for reopening assessments envisages escapement of income which is absent in the case at hands and thus, the action is

without jurisdiction; in any circumstance, it is sans jurisdictional fact.

(b) The order passed under Section 148A(d) has gone well beyond the show cause notice and touched matters not even alleged and that the reply of

the petitioners have not been considered.

(c) The reasons recorded in the show cause notices issued under Section 148A(b) constitute the foundation for the case and it is impermissible for the

Assessing Officer to travel beyond the said grounds and traverse new grounds.

(d) The scheme that has been approved by the NCLT cannot be called into question by the Income Tax authorities, who too were parties before the

NCLT.

III. AS TO WHAT THE REVENUE CONTENDED:

(a) That the decision of the Assessing Officer u/s. 148A(d) to re-open the assessment is by its very nature tentative; what is being looked into is re-

opening-worthiness of the assessments. All submissions of the petitioners would be considered when the assessment is undertaken.

(b) That the issues raised by the petitioners being disputed questions of facts merit adjudication at the hands of Assessing Officer. For reopening

assessment, what one needs to see is, only a prima facie case of escapement of income. That the prima facie opinion formed u/s.148A(d) is based

on material available on record. Therefore, at this stage, the challenge is premature.

(c) The assesses had filed Returns of Income; no assessment was made although only an intimation was sent. Consequent to a survey under Section

133A on Quess Corp Ltd, it was found that consideration was liable to be taxed as short term capital gains.

(d) A series of transactions undertaken by the petitioners and the companies of the Manipal group showed clear-round-trip-financing which lacks

commercial substance; prima facie it is not for bona fide purposes. Therefore a notice was issued for escaped assessment. Findings of the

Assessing Officer on round tripping, etc., are quite in order in terms of Sections 95 to 102 which are applicable from the AY 2018-19.

(e) That section 49 is not attracted in the said case to include the previous ownership of shares and therefore clause (b) of Explanation I to Section

2(42A) of the Act is not applicable. It is not permissible to take the holding period in MEMGIPL, but only the period in MISPL should be taken. If that

is done, the period is shorter than 12 months resulting in short term capital gains.

IV. Having heard the learned counsel for the parties and having perused the Petition Papers, I am inclined to grant indulgence in the matter as under

and for the following reasons:

(A) On the basis of pleadings coupled with submissions at the Bar, what needs to be essentially examined is the scope &invocabilityinter alia of

sections 147 & 148 of the 1961 Act which have been recast under the Finance Act, 2021, the subject notices having been issued post-amendment.

The statutory scheme envisaged under Chapter XIV has the following salient features:

(i) Section 147 provides for the assessment or reassessment of escaped income, subject to complying with the provisions of sections 148 to 153 of the

Act. The Explanation to the said section allows assessment or reassessment of any other income which is chargeable to tax but has escaped

assessment and comes to his notice during the course of assessment/reassessment even if provisions of Section 148A have not been complied with

subject. Therefore, it is clear that for doing an assessment/reassessment for escaped income, ingredients of Sections 148 to 153 should be satisfied in

the initial stages; if that happens, the requirement of fresh adherence to Section 148A pales into insignificance. Section 148 mandates issuance of

notice to undertake assessment under Section 147 after adhering to the provisions of Section 148A. It is incumbent on the officer to serve a copy of

the order issued under Section 148A(d) along with the notice under section 148. The notice under section 148 could be issued after taking prior

permission as contemplated in the First Proviso; the said notice calls upon the Assessee to furnish a Return of Income. However, with effect from

1.4.2022, such prior permission is not contemplated under the circumstances specified in the Second Proviso.

(ii) Section 148A, which assumes pivotal relevance in the matter has a heading which runs Ã¢â‚¬Å“Conducting inquiry and providing opportunity

before issue of notice under Section 148.Ã¢â‚¬ This provision apparently employing the word Ã¢â‚¬Ëœshall Ã¢â‚¬â„¢ and in its text, nothing being repugnant,

one can safely assume it to be mandatory. Thus, issuance of notice to the Assessee as to why a notice under Section 148 should not be issued to

assess his Ã¢â‚¬Ëœescaped income Ã¢â‚¬â„¢ is a sine qua non. The provision also mandates the Assessing Officer to objectively consider not only the material

gathered but also the reply furnished by the Assessee before an order is passed permitting the issuance of Section 148 notice. Rest of the provisions

of the Act do not matter since it is the specific case of Assessees that the impugned action lacks jurisdictional facts. Their thrust is on the questions,

whether at all the subject notices could have been issued u/s 148 and whether the subject orders could have been made in their present form &

substance.

(B) One of the jurisdictional issues which would arise for consideration is, whether there is Ã¢â‚¬Å“information suggesting escapement of income Ã¢â‚¬ so as

to invoke Section 147 and issue notice under Section 148. Should this jurisdictional fact be absent, the question of issuing notices or making orders

under Section 148A would not arise. It is pertinent to delve into the history of Sections 147 & 148 as they stood both before the amendment.

(a) Prior to 01.04.2021, Section 147 of the Income Tax Act, 1961 had the following text:

Ã¢â‚¬Å“If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he

may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which

has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the

loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section

and in sections 148 to 153 referred to as the relevant assessment year)Ã¢â‚¬â€‹

Post amendment w.e.f 01.04.2021, it reads:

Ã¢â‚¬Å“If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may,

subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any

other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to 153 referred to as the relevant

assessment year).Ã¢â‚¬â€‹

(b) Let me undertake the comparative examination of the old provision in Section 147 with the new: under the old section, the opening words were

Ã¢â‚¬Å“If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment yearÃ¢â‚¬. As

against that, in the amended section, the opening words are: Ã¢â‚¬Å“If any income chargeable to tax, in the case of an assessee, has escaped assessment

for any assessment yearÃ¢â‚¬. So, what is conspicuously missing from the new section is the term Ã¢â‚¬Å“reason to believeÃ¢â‚¬. In other words, under the

new provisions, section 147 of the Act can be invoked only if any income chargeable to tax has Ã¢â‚¬Å“escaped assessmentÃ¢â‚¬. Thus, the Assessing

Officer has to be prima facie satisfied that there is Ã¢â‚¬Å“escapement of incomeÃ¢â‚¬, unlike earlier law which permitted action based on mere reason to

believe. Now mere reason to believe, cannot be a ground for carrying out assessment under section 147 of the Act.

(c) Section 148 of the Income Tax Act, 1961:

As per section 148 of the Income Tax Act, 1961, before making the assessment, reassessment or recomputation under section 147, the AO has to

serve notice under section 148, requiring the Assessee to furnish a Return of Income during the previous year corresponding to the relevant

assessment year. The Return so furnished shall be considered as the one furnished under section 139 of the Act. As per first Proviso to section 148,

no notice under section 148 can be issued unless there is Ã¢â‚¬Ëœinformation which suggests that the income chargeable to tax has escaped

assessmentÃ¢â‚¬â„¢ in the case of an assessee for the relevant assessment year. Firstly, the Assessing Officer should have information; secondly, such

information should suggest that there is an escapement of income. The phrase Ã¢â‚¬Ëœinformation with the Assessing Officer which suggests that the

income chargeable to tax has escaped assessmentÃ¢â‚¬â„¢ is explained in Explanation 1 to section 148 to mean:

From 1.4.2021 to 31.03.2022:

(i) any information flagged 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; or

(ii) any final objection raised by the Comptroller and Auditor General of India 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

From 1.4.2022:

(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; or

(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.

(C) CBDT has issued Instruction dated 10.12.2021 vide F.N0. 225/135/2021/ITA-II indicating as to what is information and how it would be collected.

The relevant portion of the instructions is reproduced for ready reference:

Ã¢â‚¬Å“2. As per the amended provisions of the section 148 of the Income-tax Act,1961 ('the Act'), the information which has escaped

assessment has been defined to include the two categories of information, i.e., (i) the information which is flagged in accordance with the

risk management strategy formulated by the Board; and (ii) final audit objection raised by the C&AG.

3. For effective implementation of risk management strategy, the Central Board of Direct Taxes (Board), in exercise of its powers under

section 119 of the Act, directs that the Assessing Officers shall identify the following categories of information pertaining to Assessment

Year 2015-16 and Assessment Year 2018-19, which may require action under section 148 of the Act, for uploading on the Verification

Report Upload (VRU) functionality on Insight portal:

(i) Information from any other Government Agency/Law Enforcement Agency.

(ii) Information arising out of Internal Audit objection, which requires action u/s 148 of the Act.

(iii) Information received from any Income-tax Authority including the assessing officer himself or herself.

(iv) Information arising out of search or survey action.

(v) Information arising out of FT&TR references.

(vi) Information arising out of any order of court, appellate order, order of NCLT and/or order u/s 263/264 of the Act, having impact on

income in the assessee's case or in the case of any other assessee.

(vii) Cases involving addition in any assessment year on a recurring issue of law or fact

a. exceeding Rs. 25 lakhs in eight metro charges at Ahmedabad, Bengaluru, Chennai, Delhi, Hyderabad, Kolkata, Mumbai and Pune while

at other charges, quantum of addition should exceed Rs. 10 lakhs.

b. exceeding Rs. 10 crore in transfer pricing cases.

and where such an addition:

1. has become final as no further appeal has been filed against the assessment order; or

2. has been confirmed at any stage of appellate process in favor of revenue and assessee has not filed further appeal; or

3. has been confirmed at the 1st stage of appeal in favor of revenue or subsequently;even if further appeal of assessee is pending, against

such order.

5. As per the provisions of section 149(1)(b) of the Act, in specific cases where the Assessing Officer has in his possession evidence which

reveal that the income escaping assessment, represented in the form of asset, amounts to or is likely to amount to fifty lakh rupees or more,

notice can be issued beyond the period of three years but not beyond the period of ten years from the end of the relevant assessment year.

Further, the notice under section 148 of the Act cannot be issued at any time in a case for the relevant assessment year beginning on or

before 1st day of April, 2021, if such notice could not have been issued at that time on account of being beyond the time limit prescribed

under the provisions of clause (b), as they stood immediately before the proposed amendment. As per explanation provided to section 149 of

the Act, the term ""asset"" shall include immovable property, being land or building or both, shares and securities, loans and advances,

deposits in bank account.Ã¢â‚¬â€‹

(D) MEANING OF WORDS: Ã¢â‚¬ËœSUGGESTÃ¢â‚¬â„¢ AND Ã¢â‚¬ËœINFORMATIONÃ¢â‚¬â„¢ EMPLOYED IN THE SUBJECT PROVISIONS:

(a) The word Ã¢â‚¬Ëœsuggestâ€™ is not defined in the 1961 Act and therefore, one has to ascertain its meaning from other sources.

As per Advanced Law Lexicon Ã¢â‚¬" The word Ã¢â‚¬Ëœsuggestâ€™, either in its meaning as ordinarily employed or as affected by the context of the will,

that can be regarded as expressive of confidence, or belief, or desire, or hope, or will, or as the equivalent of a word of entreaty or recommendation: is

in fact, and a precatory word at all, in the ordinary sense. As per BlackÃ¢â‚¬â„¢s Law Dictionary - To introduce indirectly to the thought; to propose with

difference or modesty; to hint; to intimate. As per Merriam-Webster - Ã¢â‚¬Å“to call to mind by thought or associationÃ¢â‚¬â€‹.

(b) Ã¢â‚¬ËœInformationÃ¢â‚¬â„¢: The expression Ã¢â‚¬Ëœinformationâ€™ in the context in which it occurs must, mean instruction or knowledge derived from an

external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment vide: CIT vs A. RAMAN & CO. [1968]

67 ITR 11 (SC)]. Therefore, Section 148 would point out to concrete information which could be facts which point out to a case of income having

escaped assessment.

In LARSEN AND TOUBRO LTD Vs STATE OF JHARKHAND 2017-TIOL-129-SC, the following has been stated:

Ã¢â‚¬Å“What is information? According to the Oxford Dictionary, 'information' means facts told, heard or discovered about

somebody/something. The Law Lexicon describes the term 'information' as the act or process of informing, communication or reception of

knowledge. The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as

to law relating to and/or having a bearing on the assessment. A mere change of opinion or having second thought about it by the competent

authority on the same set of facts and materials on the record does not constitute 'information' for the purposes of the Act. But the word

information"" used in the aforesaid Section is of the widest amplitude and should not be construed narrowly. It comprehends not only

variety of factors including information from external sources of any kind but also the discovery of new facts or information available in

the record of assessment not previously noticed or investigated.Ã¢â‚¬â€‹

(E) Let me refer to some of the Rulings rendered both on the amended & unamended provisions in question.

DECISIONS ON SECTIONS 147 & 148 AND 148A:

(a) (Prior to amendment of section 147)

(i) CIT vs KELVINATOR OF INDIA LTD., (2010) 2 SCC 72 3T:he HonÃ¢â‚¬â„¢ble Supreme Court held that a mere change of opinion cannot be

the reason to reopen the case. It observed:

Ã¢â‚¬Å“Ã¢â‚¬Â¦One needs to give a schematic interpretation to the words Ã¢â‚¬Å“reason to believeÃ¢â‚¬ failing which, Section 147 would give arbitrary

powers to the assessing officer to reopen assessments on the basis of Ã¢â‚¬Å“mere change of opinionÃ¢â‚¬, which cannot be per se reason to

reopenÃ¢â‚¬Â¦ We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has

no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the

concept of ""change of opinion"" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment,

review would take placeÃ¢â‚¬Â¦. The assessing officer has power to reopen, provided there is Ã¢â‚¬Å“tangible materialÃ¢â‚¬ 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.Ã¢â‚¬â€‹

(ii) ACIT vs ICICI SECURITIES PRIMARY DEALERSHIP LTD., (2012) 13 SCC: I5n1 4this case, the assessee had filed Return of

Income declaring income from shares and the assessment was concluded based on the said Return of Income. However, after 4 years of time, the

revenue sought to reopen the assessment on the ground that there is loss incurred by the assessee on trading of shares and such loss is a speculative

loss. The HonÃ¢â‚¬â„¢ble Supreme Court held that once the assessment is finalised based on details furnished in Return, reopening of assessment is not

permissible due to change of opinion of Assessing Officer.

(iii) INCOME-TAX OFFICER v. LAKHMANIMEWAL DAS [1976] 103 ITR 437 (: SICn)this case, the assessee was assessed for AY

1958-59 and one of the expenses that was allowed was Rs. 10,494 by way of interest paid. However, in 1967, the ITO issued notice under section 148

for reassessment on the belief that loans shown and the interest paid were not genuine. The credits were in the name of persons known to the name-

lenders. The HonÃ¢â‚¬â„¢ble SC held that the live link or close nexus which should be there between the material before the Income Tax Officer in the

present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's

failure or omission to disclose fully and truly all material facts was missing in the case. The Court also explained the meaning of the term Ã¢â‚¬Ëœreason to

believeÃ¢â‚¬â„¢ and distinguished the same with Ã¢â‚¬Ëœreason to suspectÃ¢â‚¬â„¢ as under:

Ã¢â‚¬Å“11. the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief.

Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax

Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year

because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or

adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be

initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and

indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the

assessee from assessment. The fact that the words Ã¢â‚¬Å“definite informationÃ¢â‚¬ which were there in Section 34 of the Act of 1922 at one time

before its amendment in 1948 are not there in Section 147 of the Act of 1961 would not lead to the conclusion that action can now be taken

for reopening assessment even if the information is wholly vague, indefinite, farfetched and remote. The reason for the formation of the

belief must be held in good faith and should not be a mere pretence.

12. The powers of the Income Tax Officer to reopen assessment though wide are not plenary. The words of the statute are Ã¢â‚¬Å“reason to

believeÃ¢â‚¬ and not Ã¢â‚¬Å“reason to suspectÃ¢â‚¬ The reopening of the assessment after the lapse of many years is a serious matter. The Act, no

doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The

underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to

the notice of the Income Tax Authorities after the assessment has been completed. The provisions of the Act in this respect depart from the

normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial

proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied.Ã¢â‚¬â€‹

(iv) JINDAL PHOTO FILMS LTD vs DCIT 1998 SCC OnLine DEL :4 I0n1 this case, the assessee had claimed investment allowance under

section 32A of the IT Act, 1961. The said claim was disallowed by the AO who passed an order making additions. The assessee filed an appeal

against the order of the AO, wherein the CIT (A) observed that no deduction under section 32A is permissible but the assessee is free to claim

deduction under section 80I. The assessee claimed the deduction under section 80I including for the subsequent years. However, the AO issued notice

under Section 147/148 proposing to reopen the assessments on the grounds of the income having escaped assessment. The High Court set aside the

reassessment notice by holding that though the AO used the phrase Ã¢â‚¬Ëœreason to believeÃ¢â‚¬â„¢ in his order, admittedly, between the date of orders of

assessment sought to be reopened and the date of forming of opinion by the ITO nothing new has happened. There is no change of law. No new

material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same

set of facts.

(v) M/s. SANMINA-SCI TECHNOLOGY INDIA PRIVATE LIMITED Vs ACIT 2021 (5) TMI 486 - MADRAS HIGH C: OInU thRisT

case, the assesse had filed a Return of Income claiming deduction under Section 10A and 10AA of the Act and by making a full disclosure in relation

to the deduction claimed under the provisions of Section 10AA. The assessment order under section 143(3) was also passed and the claim of

deduction under section 10A was allowed. Later, the AO issued a notice under section 148 for re-assessment on the ground that the assessee has

claimed excess deduction under section 10A. The High Court held that the provisions of Section 147 prescribe a limitation of four years normally,

extended to six years in cases where an order of scrutiny has been passed at the first instance. In addition, the assessee should have defaulted in filing

of the Return, or the proceedings for re-assessment should be based on the failure of the petitioner to have made full and true disclosure of income.

Since these conditions are not fulfilled, no re-assessment could have been made.

(vi) TRAVANCORE DIAGNOSTICS P. LTD. v. ASST. CIT, 2016 SCC OnLine Ker 204: A23n income escaping assessment as provided

under section 147, may not be based on the return filed or on the basis of the materials thereunder, but may be the materials independently collected

leading to a subjective opinion in the minds of the Assessing Officer that he has reasons to believe that any income has escaped assessment with the

only limitation that this shall be done within four years after the completion of assessment.

(b) Post substitution of sections 147/148/148A (i) SMT. KULWANTI BHATIA CHARITABLE TRUST SOCIETY vs PCIT[2023] 155

taxmann.com 653 (Allahabad): In this case, the Assessee society was registered under section 12AA for claiming exemption under section 11 and

the said registration was cancelled. Hence, the assessment order was passed under section 143(3) denying exemption under section 11 and 12 of the

Act. Meanwhile, a notice under section 148A(b) was issued on the ground that the total receipt was to be treated as an income of the assessee as per

Section 164 as the assessee was not registered under section 12AA. The High Court observed as under:

Ã¢â‚¬Å“The Act does not contemplate any detailed adjudication on the merits of information available with the Assessing Officer at the stage of

passing order under section 148A(d). There is a specific purpose for not introducing any further enquiry or adjudication in the statute, on

the correctness or otherwise of the information, at this stage. The reason for it is obvious. Under the scheme of the Act a detailed procedure

has been provided under Section 148 for issuance of notice whereafter the Assessing Authority has to determine, in the manner specified,

whether income has escaped assessment and the defence of assessee, on all permissible grounds, remains open to be pressed at such stage.

The ultimate determination made by the Assessing Authority under Section 147 for reassessment is otherwise subject to appeal under Section

246-A. Merits of the information referable to Section 148A thus remains subject to the reassessment proceedings initiated vide notice under

Section 148. It is for this reason that issues which require determination at the stage of reassessment proceedings and in respect of which

departmental remedy is otherwise available are not required to be determined at the stage of decision by the assessing authority under

Section 148A(d). The scope of decision under Section 148A(d) is limited to the existence or otherwise of information which suggests that

income chargeable to tax has escaped assessmentÃ¢â‚¬â€‹.

Accordingly, the Court declined interference with respect to the notice issued under Section 148.

(ii) GANDHIBAGSAHAKARI BANK LTD. vs DCIT [2023] 156 taxmann.com 221 (Bom)b: aIny this case, the return filed by the assessee

was scrutinized and an assessment was carried out under section 143(3) of the Act. Thereafter, notice under section 148 was issued proposing to

undertake reassessment by reopening the earlier completed assessment. Reason provided for reopening of the assessment was by indicating that

information was available on the insight Portal-CRIR/VRU High Risk cases for an amount of Rs. 17.99 crores. The said amounts were not reflected

by the assessee in its return of income. The High Court quashed the notice under section 148 with the following observations:

Ã¢â‚¬Å“On perusal of the notice dated 31-3-2021 issued under section 148(1) coupled with the reasons assigned by the respondents for

seeking to reopen the proceedings it becomes clear that it is on the basis of the information shared on the Insight Portal with regard to high

value cash deposits that has prompted the Assessing Officer to have a 'reason to believe' that the said amount in the hands of the petitioner

had escaped assessment. Except for stating that such information was available on the Insight Portal it has not been indicated in the said

reasons as to how there was formation of belief by the Assessing Officer that income had escaped assessment. The reasons supplied do not

indicate that any exercise of independent verification thereafter was undertaken resulting in consideration of the same with due application

of mind by the Assessing Officer so as to reopen the completed assessment.Ã¢â‚¬â€‹

(iii) SUBODH AGARWAL vs STATE OF UP [2023] 149 taxmann.com 448 (Allahabad):In this case, during the relevant AY, search

proceedings were carried out and an order under section 153A was issued. During the pendency of proceedings, a show cause notice was issued

under section 148A(b). The reasons for issuance of notice under section 148A(b) were based on the audit objection. The High Court, after analyzing

the provisions of both pre-amendment and post-amendment of section 147, held that w.e.f. 01.04.2022, clause (ii) of Explanation 1 provides the

condition that information includes information in the form of audit objection. It was further held that prima facie availability of material is sufficient for

reopening of the reassessment proceedings and the sufficiency and correctness of the material is not to be considered at that stage.

(iv) IDFC LTD vs DCIT [2023] 155 taxmann.com 602 (Madras:)In this case, the return filed by the assessee was scrutinized and an order

under section 143(3) was passed. Assessee had also filed an appeal before CIT (A) on such an order of assessment. Later, the AO issued notice

under section 148 stating that he had reason to believe that income had escaped assessment as regards disallowance of unrealised loss on foreign

exchange. The High Court quashed the notices under section 148 on the ground that there exists no material to show that there was escapement of

assessment as the information was already available with the department. Further, the High Court made the following observations with respect to

amended provisions of section 148 w.e.f. 01.04.2021:

- Ã¢â‚¬Å“On a conjoint reading of the provisions newly introduced, the new scheme of re-assessment is seen to have incorporated the

procedure set out in the judgement of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO [2002] 125 Taxman 963/[2003] 259 ITR

19, statutorily.

- The respondents argue that the new scheme, with the omission of the phrase 'reason to believe' has done away with the requirement that

the officer must establish 'escapement of tax', prima facie, at the stage of assumption of jurisdiction. I do not agree. Such a requirement

continues in light of the proviso under section 148 that casts a statutory burden upon the officer to be in possession of 'information'

suggesting that income chargeable to tax has escaped assessment for the year concerned. If the existence of such information is not

established even at the initial stage, the foundation of the proceedings stands vitiated in law.

- The raison d'etre of the new provisions is itself to streamline the scheme of re-assessment and induce certainty. The limitation under the old

scheme extended upto 10 years and Legislature was of the view that such a long period breeded uncertainty in finalisation of assessments

which was undesirable.

- whether, in a situation where all material in regard to the issues in respect of which reassessment is proposed have been placed on record

even at the original instance, the assessment has been completed under scrutiny and no new material brought on record to warrant re-

opening, there could not be any legal justification for re-assessment.

- material already on record and that has undergone scrutiny at the first instance cannot satisfy the statutory condition.

- As on 1-4-2021 the command of the law is to the effect that there must be material indicating the existence of an 'asset' that leads to the

inference of escapement of income.Ã¢â‚¬â€‹

(F) On a conjoint reading of section 147 and section 148 of the Act, it is clear that the escapement of income is a sine qua non for initiating

proceedings under section 147. Therefore, availability of the Ã¢â‚¬Ëœinformation which suggests that there is an escapement of incomeÃ¢â‚¬â„¢ is a pre-

requisite for issuing notice under section 148. The argument that omission of phrase Ã¢â‚¬Ëœreason to believeÃ¢â‚¬â„¢ has gotten away and has given way to

Ã¢â‚¬Å“information with the assessing officer which suggests that the income chargeable to tax has escaped assessmentÃ¢â‚¬ would mean that there should

be no need for any reason seems incorrect. The phraseology of amended Section 148 makes in unmistakable terms clear that there should be a

concrete information as defined in Explanation 1 to Section 148. Such information should be suggestive of income escaping assessment and such

information should be objective in nature. In other words, the arguable subjectivity in the pre-amendment provision is given a go-by. For conducting

assessment under section 147, there should be not only escapement but also the reason to believe that there is such escapement, the reason being the

information itself. Hence, a plausible view could be taken that post-amendment of the provision, the escapement has to be established with concrete

information. Section 148A would only assist the Assessing Officer in coming to a conclusion whether such information is good enough to allow a

notice to be issued under Section 148. This is how, to my mind, the new provisions should be interpreted so as to make them workable in accord with

the intent to achieve the purpose for which statutory change was brought about. An argument to the contrary would hijack the statutory object.

(a) Now, to say that the Assessing Officer can invoke Section 147 without any reason would, apart from being contrary to the aforestated rule of law,

also fall foul of Article 14 as he is expected to act reasonably. The requirement to act reasonably being in-built into the amended provision, an act in

variance with the same is unsustainable. Therefore, I am of the considered view that the Assessing Officer should have information as defined in

Explanation 1 to section 148 that suggests escapement of income and only thereafter, the provisions of Section 148 can be invoked. Further, such an

exercise should be reasonable and not fanciful or roving as pointed out in ITO vs LAKHMANIMEWAL DAS (1976) 3 SCC 7.5 T7hough this

decision was rendered long before the amendment to the subject section was effected, its inner voice animates the Division Bench decision of Delhi

High Court in DIVYA CAPITAL ONE PRIVATE LIMITEDvs.ACIT [2022] 445 ITR 436 (Del), that has been rendered post-amendment.

(b) If one looks at the reasons given in the notices in question, as also in the impugned orders that followed the said notices, it becomes evident that

they merely mention that, information was received in line with the risk management strategy. They do not disclose what kind and content of

information it was. While the notice does not state anything more, the annexure to the notice talks of Section 56 and long term capital gains versus

short term capital gains. An Assessing Officer functioning under the statute cannot employ jugglery of words in notices of the kind and let the

assessee keep guessing why is his assessment being re-opened. The order clearly sets out that the Assessees have already disclosed the said

transactions in the Return, though arguably they could have been taxed differently. It is very intriguing to note paragraph 3 of the impugned orders

issued under Section 148A(d) of the Act which has the following text:

Ã¢â‚¬Ëœ On going through return of income filed by the assessee for AY 2018-19, it is noticed that the assessee has not disclosed the above

transaction and the income there upon in the Return of Income for the relevant AY 2018-19. As per the return of income, the assessee has

claimed exempt income of Rs. 298,96,71,235/- as Long Term Capital Gain from sale of shares.

Ã¢â‚¬â„¢ In the similar notice issued to another petitioner, everything is verbatim except the amounts involved. The first sentence in the said paragraph that

the Assessee has not disclosed the transactions in question for the Assessment Year 2018-19, is falsified by the second sentence which states that the

Assessee has claimed exempt income as long term capital gain from the sale of shares, which manifests the contradiction. Nothing more is necessary

to specify as the matter is as apparent as can be. Therefore, this is a clear case of issuing notices based on disclosure in the existing Return of Income

filed by the Assessee but on incorrect premise of nondisclosure. There was no new information whatsoever that has come into his domain suggestive

of escapement of income.

(c) It is pertinent to mention that the definition of information given under Explanation I to Section 148 is a Ã¢â‚¬Ëœmeans definitionÃ¢â‚¬â„¢ as distinguished

from Ã¢â‚¬Ëœmeans and includes definitionÃ¢â‚¬â„¢. This Explanation enumerates only two [upto 31.3.2022] and five [from 1.4.2022] categories and the

information even if it be true, unless is the one relatable to any of these categories, the jurisdiction cannot be assumed by the Assessing Officer. It

hardly needs to be stated that where the legislature employs Ã¢â‚¬Ëœmeans definitionÃ¢â‚¬â„¢, it is exhaustive and therefore, nothing can be added vide

P.KASILINGAM vs. P.S.G. COLLEGE OF TECHNOLOGY, 1995 Supp (2) SCC 348.

(d) In the opinion of this court, the term Ã¢â‚¬Ëœinformation Ã¢â‚¬â„¢ appearing in Explanation 1 to Section 148 cannot include the return of income filed by the

Assessee as it does not fall within any of the above five categories specified therein. Even the CBDT instructions, though may not be binding on the

issue of interpretation, also do not talk of the very Return which has been filed becoming information permitting the Assessing Officer to issue notice

under section 148 stating that income has escaped assessment. In fact, based on the returns filed by the petitioners, it was open to the Assessing

Officer to undertake a regular assessment under Section 143 if he had felt that there was a wrong claim to exemption or that income should have

been taxed differently. To permit the Assessing Officer to state that income has escaped assessment and re-open the same based on the very Return

filed by the Assessee who has already disclosed the transaction, would enable him to by-pass the regular assessment procedures; that would virtually

render Section 147 to be an enabling provision to make second assessment where the Assessing Officer has missed the bus under Section 143. Such a

course of action cannot be permitted as that would go against the very spirit of these sections and the time limits specified in Section 153. That would

militate against the statutory scheme brought about by the amendment of sections 147 & 148; further, that would render the provisions prescribing

limitation period under section 153 for assessment/re-assessment, otiose. I am therefore of the opinion that the jurisdictional facts in terms of

Ã¢â‚¬Ëœinformation Ã¢â‚¬â„¢ as defined under Explanation I to Section 148 which suggests that some income chargeable to tax has escaped assessment itself,

were apparently lacking. This threshold having not been met, issuing a notice under Section 148A(b) and passing order under (d) of Section 148A are

liable to be voided.

(G) AS TO COMPLIANCE OF SECTION 148A REQUIREMENT:

(i) The next question that would arise is, whether the ingredients of Section 148A of the Act have been scrupulously followed by the Assessing

Officer Revenue keeping in mind the objectives of the legislative scheme, that has been re-framed w.e.f. 1.4.2021. This is done by the Parliament

with the accumulated experience gained in the working of the statute in question with intent to reduce unending litigation that obtained under the

erstwhile scheme of Section 147/148. What the Apex Court in GKN DRIVESHAFTS INDIA LTD v. ITO (2003) 259 ITR h1a9d observed

assumes relevance:

Ã¢â‚¬Å“Ã¢â‚¬Â¦ we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file

a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable

time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the

same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to

dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the above said five

assessment years.Ã¢â‚¬â€‹

The safeguards which the above observations indicate made their way into legislative amendment that has eventually recast the subject provisions of

the Act.

(ii) The newly introduced section 148A of the Act leaves no manner of doubt that before initiating action under Section 148 by issuance of a notice,

the Assessee should be given an opportunity of hearing as to why notice under section 148 should not be issued. In other words, even before a notice

for income escaping assessment is made under Section 148, a salutary provision is introduced to consider the reply filed by the Assessee. This ensures

that, notices of the kind are not issued in matters where prima facie there is no income that has escaped assessment or for other valid reasons.

Further it is made imperative to hear him before an order is passed under Section 148A(d), to assess or not, with adequate reasons. Whatsomore, the

order under section 148A(d) requires the prior approval the specified authority. The object of Section 148A is to reduce potential litigation and to

ensure that scrupulous assesses are not put to avoidable agony. Thus, pre-notice satisfaction assumes significance. Further, law mandates passing of a

reasoned order. One cannot discount serious civil consequences when the AssesseeÃ¢â‚¬â„¢s books are sought to be re-opened. The term Ã¢â‚¬Ëœincome

escaping assessmentÃ¢â‚¬â„¢ employed in the provisions does show that the threshold namely there is escapement of income would remain intact. What

the Apex Court observed in SAHARA INDIA FIRM vs. C I(T2008) 300 ITR 403 as to the requirement of opportunity of hearing being given to the

Assessee before special audit is ordered u/s. 142(2A) of the Act, becomes relevant in matters like this too.

(iii) Referring to what Krishna Iyer, J., in MOHINDER SINGH GILLvs.THE CHIEF ELECTION COMMISSIO, ANIERR 1978 SC 851,

meant by 'Civil Consequence', the court in SAHARA supra made the following observations:

Ã¢â‚¬Å“21. In the light of the aforenoted legal position, we are in respectful agreement with the decision of this Court in Rajesh Kumar (supra)

that an order under Section 142 (2A) does entail civil consequencesÃ¢â‚¬Â¦ We are convinced that special audit has an altogether different

connotation and implications from the audit under Section 44AB. Unlike the compulsory audit under Section 44AB, it is not limited to mere

production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and

clarification which may be required by the special auditor on various issues with relevant data, document etc., which, in the normal course,

an assessee is required to explain before the Assessing Officer. Therefore, special audit is more or less in the nature of an investigation and

in some cases may even turn out to be stigmatic. We are, therefore, of the view that even after the obligation to pay auditor's fees and

incidental expenses has been taken over by the Central Government, civil consequences would still ensure on the passing of an order for

special audit.Ã¢â‚¬â€‹

The impugned orders dated 31.03.2022 passed by the Assessing Officer under Sec. 148A(d) of the Act are bad because, PetitionersÃ¢â‚¬â„¢ Objections

have not been considered.

Thus, apart from being in violation of principles of natural justice, the assumption of jurisdiction under Sec. 148 is perverse and unsustainable.

H. AS TO CONTENT AND COMPLIANCES OF THE IMPUGNED NOTICES:

(i) The subject notices issued u/s.148A(b) of the Act have three paragraphs, and of them only one sets out the reasons for re-opening: It says that as

per the information available with the department in connection with the scheme of arrangements between Quess Corp Ltd and MISPL, the assesses

have been allotted securities for consideration; the same is taxable u/s. 56(2)(x)(c); since the shares are sold before 31.3.2018, there is a case of short

term capital gains liable to suffer tax. Admittedly, the Assessees had sent detailed replies inter alia stating that Sec.56(2)(x)(c) was not invocable; the

issue of taxability of capital gains would not arise since there is no Ã¢â‚¬Ëœtransferâ€™ vide Sec.47; the holding period of shares by the petitioners far

exceeds 12 months. The subject notices do not speak of Ã¢â‚¬Ëœround-trip-financingÃ¢â‚¬â„¢ which according to the Revenue allegedly lacks Ã¢â‚¬Ëœcommercial

substance and bona fideÃ¢â‚¬â„¢. This lacuna was pointed out by the petitioners. The grounds urged in the replies have not been duly discussed. Thus,

there is a legal infirmity of great magnitude vide SHRENIK SUDHIR VIMAWALA vs. SCIT in WP 8256 of 2022, 2022(5) TMI 528- GUJ.

(ii) Now let me examine the notices in question that have been issued under Section 148A(b): they are rather cryptic. Annexures to the notice have

only three paragraphs and only one paragraph sets out the reasons for re-opening. It states that as per the information available with the department,

the scheme of arrangements between Quess Corp Ltd and MISPL has resulted in allotment of shares taxable under the provisions of Section 56(2)(x)

(c) and since the shares are sold before 31.3.2018, the same is liable to tax as short term capital gains. An elaborate reply dated 28.3.2022 had been

filed by the Assessees taking up several grounds. It is seen from the reply that the petitioners have challenged applicability of Section 56(2)(x)(c).

They have also said that the issue of taxability of capital gains can arise only when there is a Ã¢â‚¬Ëœtransferâ€¢ and if the same is not a Ã¢â‚¬Ëœtransferâ€¢

under Section 47, the question of levying capital gains tax would not arise.

(iii) A perusal of the impugned orders issued under Section 148A(d) clearly shows that these contentions of the assesses have not been addressed at

all. In fact, at paragraph 6 of the order, non-disclosure of the said transactions has been noted as one reason for re-opening. It is also found that there

is a definitive finding that the entire scheme of demergers, merger and amalgamation is done with a sole intention of avoiding tax liability and that the

transactions were independently verified to be nothing but Ã¢â‚¬Ëœround trip financing lacking commercial substance and not for bonafide

purposesÃ¢â‚¬â„¢. This finding is clearly well beyond what is contained in the notice issued under Section 148A(b) and could not have been rendered

without giving the petitioners adequate opportunity to rebut the assertion. In fact, coming to a definitive conclusion that there is avoidance of tax

liability through independent verification but not disclosing the reasons or materials based on which such findings could be rendered and without giving

an opportunity to the petitioners to put their case clearly. Thus, there is a gross violation of the principles of natural justice.

(iv) It hardly needs to be stated that the order to be passed under Section 148A(d) cannot transcend the scope of proposal notice under Section

148A(b) inasmuch as such a notice happens to be the foundation on the basis of which such an order can be passed, and not otherwise. That is how

the statutory scheme is devised. Definitive conclusions as to grounds that are not indicated in the proposal notice cannot be said to be in line with the

scheme and purpose of Section 148A. This apart, non-consideration of the reply relating to Section 56 and Section 47 would make the order also

violative of the mandatory requirements of Section 148A. This view is supported by the latest Division Bench decision of Calcutta High Court in

SOMNATH DEALTRADE PRIVATE LIMITED. VERSUS UNION OF INDIA & ORS [2023] 455 ITR 720 w (hCearel)in it has been

observed as under:

Ã¢â‚¬Å“Ã¢â‚¬Â¦The assessing officer no doubt has referred to the assesseeÃ¢â‚¬â„¢s reply dated 9th April, 2022 but there is no discussion as to the

objection raised by the assessee in their reply. There is no discussion on the documents, which were placed by the assessee along with the

reply with soft copies uploaded in the e-proceeding. Though the assessing officer states that Ã¢â‚¬Å“in the light of the discussion and material

available on record he was of the opinion that income chargeable to tax has escaped assessmentÃ¢â‚¬, there is no discussion on any of the

materials, which were placed by the assessee along with the reply dated 9th April, 2022. Thus, it can be safely held that the order dated

13th April, 2022 passed under Section 148A(d) of the Act is not sustainable and liable to be set aside.Ã¢â‚¬â„¢

A bit earlier, similar view has been taken by the Division Bench decision of Gujarat High Court in SHRENIK SUDHIR VIMAWALA vs. ACIT,

2022 (5) TMI 528 Ã¢â‚¬" GUJARAT HIGH COURT.

(v) It is true that the Statements of Objections have been filed in these petitions and they are supported by affidavits. Several contentions have been

taken up by the respondents supportive of the impugned notices & orders. However, that would not come to their rescue. It hardly needs to be

reiterated that the validity of the orders made by the statutory authorities has to be adjudged on the basis of the reasons contained in the womb of

these orders; such reasons cannot be supplemented by way of affidavit or otherwise. What the Apex Court said in COMMISSIONER OF

POLICE vs. GORDHANDAS BHANJI AIR 1952 SC 16, wherein it was observed as under:

Ã¢â‚¬Å“We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations

subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders

made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are

addressed and must be construed objectively with reference to the language used in the order itself.Ã¢â‚¬â„¢ Referring to said decision, Krishna

Iyer J., in MOHINDER GILL supra, has wittily observed: Ã¢â‚¬ËœOrders are not like old wine becoming better as they grow older.Ã¢â‚¬â€‹

(I) AS TO WHETHER MATTER MERITS REMAND OR CLOSURE HERE ITSELF:

(i) Both the sides having argued at length have also filed the Written Submissions touching merits of the matter that would belong to the domain of

Assessing Officer. There is no need for this court to undertake a deeper examination of the aspects argued at the Bar namely whether the

transactions in question amounted to transfer at all in view of section 47(vid) of the 1961 Act which enacts a fiction as to what is not a

Ã¢â‚¬Ëœtransferâ€™ which otherwise in common parlance would have amounted to. Similarly, it was also debated at the Bar that as to whether the

transactions in question were chargeable to income tax under the head Ã¢â‚¬Ëœincome from other sourcesâ€™ under section 56(2). In addition, it was also

fiercely argued as to whether the subject transactions amounted to short term or long term capital gains.

(ii) All the above aspects do not merit consideration in view of this court specifically faltering the impugned notices & orders, inter alia on the ground

of lack of jurisdictional facts. For the same reason, the matter does not warrant remand; the lis should attain finality at the hands of this court itself, all

contentions having been argued at the Bar, have duly been considered on merits. Even otherwise, the remand would prove futile.

In the above circumstances, these Writ Petitions having been allowed, a Writ of Certiorari issues quashing the impugned orders both dated 31.3.2022

under Section 148A and also the two impugned notices both dated 31.3.2022 issued by the answering respondent under Section 148 of the Income

Tax Act, 1961.

Costs made easy.