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

% **Judgment reserved on: 15 July 2024**
Judgment pronounced on: 05 August 2024

\+ W.P.(C) 10485/2023, CM APPL. 40640/2023 (Direction) & CM APPL. 40642/2023 (Permission to file Lengthy Synopsis & List of Dates)

BANYAN REAL ESTATE FUND MAURITIUS .....Petitioner

Through: Mr. Balbir Singh, Sr. Adv. with Mr. Shyam Gopal, Mr. Karan Sachdev and Ms. Pragya Kaushik, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE INTERNATIONAL TAX 1 1 2 & ANR. .....Respondents

Through: Mr. Puneet Rai, SSC along with Mr. Ashvini Kumar and Mr. Rishabh Nangia, JSCs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitioner impugns the validity of the reassessment action which has come to be initiated pursuant to the notice dated 27 April 2023 under Section 148 of the **Income Tax Act, 1961**[1] and pertaining to **Assessment Year**[2] 2016-17. The proceedings for reassessment commenced in terms of a notice dated 24 March 2023 purporting to be under Section 148A(b) of the Act and in which the

[1]Act
[2]AY

following allegations came to be laid:-

> "This case has been picked up by the Risk management Strategy of Insight for Non-Filing of Income Tax Return for the subject year, despite information available with the department of income in the year the assessee has not filed its ITR for the subject year. On perusal of the AIR information and Form 26AS available with the systems, it is observed that the assessee during the A.Y 2016-17 has entered into the following transactions:-
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> | S. No. | Description | Amount (Rs.) |
> |---|---|---|
> | 1 | Remittance to a non-resident or to a foreign company (Form 15CA) | 367031500 |
> | 2 | Paid Rs. 1,00,000 or more for acquiring shares | 101859480 |
> | 3 | Remittance to a non-resident or to a foreign company (Form 15CA) | 89887560 |
>
> 2. However on perusal of the records/data available with ITD data base, it is seen that the assessee has not filed its return of income for the AY 2016-17. Hence in the absence of the same the source of the funds and the tax liability on the income to the tune of Rs.5,58,778,540/- could not be ascertained and transaction remains unexplained.
>
> 3. You are therefore required to show cause why the amount of Rs.5,58,778,540/- shall not be treated as unexplained and the proceedings shall be initiated u/s 147/148 of the Act. "

2. As is manifest from the above, the information on the basis of which reassessment was proposed was remittances purported to have been made to a non-resident or foreign company and a payment of more than INR 1,00,000/- for acquisition of shares. The notice in question proceeded on the assumption that the petitioner had not filed its Return of Income for the AY in question.

3. Responding to the said notice, the petitioner submitted a detailed response dated 04 April 2023. The petitioner at the outset disclosed that it had in fact filed its return for AY 2016-17, and which had been duly acknowledged. Insofar as the issue of remittance to a non-resident or a

foreign company was concerned, it was disclosed that in the year under consideration, the petitioner had in fact sold shares of **Landmark Hi Tech Development Private Limited**[3] and **Safari Retreats Private Limited**[4] leading to capital gains which too were duly disclosed in the return which had been furnished. The petitioner, however, sought and claimed exemption from taxation by virtue of Article 13(4) of the **India-Mauritius Double Taxation Avoidance Agreement**[5], and which had grandfathered all transactions in respect of shares acquired prior to 01 April 2017.

4. Proceeding further to deal with the allegation of acquisition of shares itself, the petitioner disclosed that it had originally purchased 1,41,47,150 equity shares of Treasured Developers Private Limited and which was followed by a further allotment of 70,73,575 bonus shares. It also alluded to a Scheme of Arrangement between Treasured Developers Private Limited and Suncity Dhoot Colonizers Limited[6] which ultimately came to be sanctioned by this Court on 18 February 2016 and pursuant to which, it came to be allotted 1,01,85,948 shares of Sun City Dhoot Colonizers Private Limited in the exchange ratio of 4800 shares of that entity for every 10,000 shares held in Treasured Developers Private Limited. The petitioner consequently took the position that since the shares had been received pursuant to a Scheme of Arrangement, the same would not constitute a transfer as per Section 47(vii) of the Act.

5. Faced with the aforesaid disclosures, the respondents proceeded

[3]Landmark HiTech
[4]Safari Retreats
[5]DTAA
[6]Scheme of Amalgamation

to pass an order under Section 148A(d) of the Act on 27 April 2023. Dealing firstly with the sale of shares of Landmark Hi Tech and Safari Retreats, the AO observed as follows:-

> "**3.** In view of the above information available with this office and verification of status of return of income filed by the assessee from e-filing portal, it is found that the assessee has filed its return of income for the A.Y. 2016-17. No assessment has been made earlier u/s 143(3)/147/144 of the I.T. Act. It is seen that during the year under consideration, the assessee under took above mentioned transaction wherein gross financial implication is Rs. 55,87,78,540/-. However, no income related to above high value transactions has been offered for taxation. After due analysis of the relevant information and verification from the Department's database, it is observed that the income corresponding to the above tabulated financial transactions has escaped assessment as the assessee has not declared the said transactions in its Return of Income for the year under consideration. As in this case, the assessee has not declared the said transaction in its return of income but no income is offered to tax, therefore, the aforesaid information suggests that the income chargeable to tax amounted to Rs. 55,87,78,540/- in the case of the assessee for the A.Y. 2016-17 has escaped assessment.
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> xxxx. xxxx xxxx
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> **5.** The assessee has claimed to sold shares of Landmark Hi-Tech Development Pvt Ltd and Safari Retreats Pvt Ltd which leads to capital gain and the said capital gain is not chargeable to tax in India as per the DTAA between India and Mauritius. The assessee has not provided the audited financial of the Indian entities whose shares were sold during the year from A.Y 2016-17, details of directors, share holding pattern of Indian entities, minutes of board meeting, valuation report as per section 50 of Income Tax Act read with Income Tax Rule 11UA.
>
> The benefit of DTAA between India and Mauritius has already been denied to the assessee in its own case for A.Y 2014-15, kindly consider the following findings below as-
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> ***(i) BREF has a management company namely Banyan Real Estate Venture ("BREV"), Landmark Banyan Real Estate Advisors LLC ("LBREA") has 100% share holding of BREV.***
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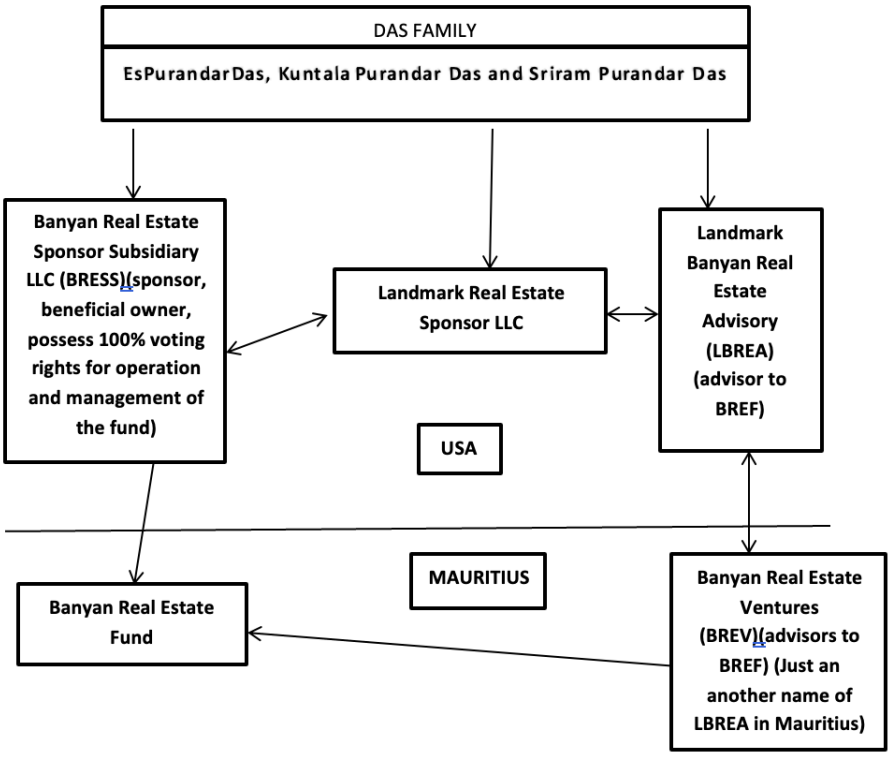
> (ii) Banyan Real Estate Fund(herein: BREF) is operated and managed by Landmark Banyan Real Estate Advisors LLC (herein: LBREA). Further Es Purandar Das is the owner and managing member of the LBREA. Nowhere it was found that LBREA is just

an advisor to BREV. BREV and LBREA are the same entities with different name in different jurisdictions.

(iii) Landmark Banyan Real Estate Advisors owned by Es Purandar Das is a private equity company based in New York, United States. They have less than $150 million in assets under management and manage and operate BREF and hence direct relationship of LBREA with BREF is clearly established.

(iv) Chart of control and management of BREF:



(v) On the basis of the above discussion role of Mauritius based director is clearly disputed in the actual control and management of BREF. Further role of Das Family in actual control and management has been established in the preceding paras, therefore it can safely be held that the control and management of the assessee always lied in USA. In these circumstances, the assessee is not entitled to the benefit claimed under Article 13(4) of India-Mauritius DTAA for exemption of capital gain. The assessee is treated as a tax resident of USA as there is no benefit on Capital Gain in India- USA DTAA hence, the Capital Gain will be dealt in accordance with the provisions of section 48 of Income Tax Act, 1961.

In view of the discussion above, in earlier years, the DTAA benefits were denied to assessee as the beneficial ownership and management/control of the assessee company lies in USA. In the instant year, the assessee has earned revenue on sale of shares in

Indian entity and the claim the capital gain as exempt under the DTAA between India and Mauritius. The claim of assessee for DTAA benefits needs thorough investigation and examination, further, assessee has not filed any supporting documents such as audited financial, details of directors, share holding pattern for subject year. Thus, in absence of documents and evidence supporting the contention of the assessee, prima-facie, the high value transactions in respect of sale of shares and claim of assessee for exempt income is not explained and there is escapement of income under the relevant provision of Income Tax Act, 1961."

6. In respect of the acquisition of shares pursuant to the Scheme of Arrangement, the AO observed:-

"**6.** As per the information available, during the subject year, assessee has paid Rs.10,18,59,480/- to acquire shares. The assessee in its submission in response to show cause notice u/s 148A(B) of the Act has submitted that it has held 2,12,20,725 shares of M/s Treasured Developers Pvt Ltd. The said company was amalgamated with M/s Suncity Dhoot Colonizers Pvt Ltd. As per the amalgamation order passed by the Hon'ble Delhi High Court dated 22.06.2015, the assessee was allotted 1,01,85,948 shares of M/s Suncity Dhoot Colonizers Pvt Ltd in exchange of shares of 2,12,20,725 shares of M/s Treasured Developers Pvt Ltd. The 1,01,85,948 shares of M/s Suncity Dhoot Colonizers Pvt Ltd held by assessee was valued at Rs. 10 per shares which totaled at Rs. 10,18,59,480/-. The submission of assessee is considered, assessee has failed to provide bank statement of transaction, source of investment is not clearly established and there is no copy of share valuation, confirmation from concerned parties. Thus prima-facie escapement of income under the relevant provisi9n of Income Tax Act.

7. Accordingly, since the assessee has failed to explain the applicability of DTAA benefits and claim of exempt income, and genuineness of the said transactions within the due date as prescribed by Show Cause Notice u/s 148A(b) of the IT Act, 1961. Prima-facie, there is escapement of income under the relevant provision of Income Tax Act, 1961. The amount of income that has escaped assessment exceeds Rs. 50 lakhs. The Explanation to Section 149(1) provides an inclusive definition of the term 'asset' and since shares has been acquired and shares has been sold during the year, amount remitted outside through a bank account which are held, the income escaping assessment is represented in the form of an asset."

7. As would be evident from the aforesaid extract, the sale of shares

which had given rise to capital gains was questioned by the AO taking the view that the petitioner in AY 2014-15 had been denied benefits of the DTAA. It is pertinent to note that the respondents had for AY 2014-15 and while passing an order under Section 148A(d) of the Act doubted whether the assessee could claim benefits of the DTAA. It is the view expressed in those proceedings that appears to have weighed upon the respondents to sustain the proposed reassessment notwithstanding the original notice being premised on "remittances" to non-resident or foreign companies.

8. The respondents further appear to have drawn an adverse inference from a failure on the part of the petitioner to provide audited financials of the Indian entities whose shares had been sold in AY 2016-17 apart from other details such as composition of their respective Board of Directors, shareholding pattern of Indian entities and the absence of a valuation report as per Section 50 of the Act read along with Rule 11UA of the **Income Tax Rules, 1962**[7].

9. It was also observed that although the petitioner had alluded to the Scheme of Arrangement sanctioned by this Court, it had failed to provide the requisite bank statements and the source of investment. The AO observed that the petitioner had also failed to provide adequate documentation such as copy of the share valuation reports, confirmation from concerned parties and bank statements pertaining to those transactions.

10. Appearing for the writ petitioner, Mr. Balbir Singh, learned senior counsel, assailed the impugned orders contending that the

[7] Rules

original notice under Section 148A(b) had itself proceeded on the premise that the petitioner was a non-filer for the AY in question. It was submitted that the aforesaid premise was itself factually erroneous and incorrect since the petitioner had in fact filed a return for AY 2016-17. Learned senior counsel further submitted that the transactions which came to be noticed and formed the basis for the initiation of reassessment stood duly disclosed in the return which had been filed for the said AY. In view of the above, Mr. Singh contended that once the very foundation for the proposed reassessment was found to be incorrect, the proceedings were liable to be quashed on this score alone. In support of the aforesaid contention, Mr. Singh sought to rely upon the following observations as rendered by the Court in **Catchy Prop-Build Pvt. Ltd. Vs. Assistant Commissioner of Income-tax and Ors**[8]:-

> "**8.** This court is further of the opinion that if the foundational allegation is missing in the notice issued under section 148A(b) of the Act, the same cannot be incorporated by issuing a supplementary notice."

11. Proceeding further, Mr. Singh submitted that as would be ex facie evident from a reading of the Section 148A(b) notice, the respondents sought to initiate reassessment based on a purported remittance to a non-resident or foreign company. Mr. Singh contended that the aforesaid assumption too was incorrect since in the year in question the petitioner had sold a tranche of shares and the amounts which fell for notice were in fact revenues generated from those sales. Insofar as the aforesaid revenue is concerned, the petitioner, Mr Singh pointed out, had sought exemption in terms of Article 13(4) of the DTAA. It was then urged that ultimately and when the final order under

[8]2022 SCC OnLine Del 3457

Section 148A(d) came to be passed, the same was sought to be founded on the final assessment order which had come to be framed for AY 2014-15.

12. Learned senior counsel drew our attention to the existing challenge to the aforesaid assessment order in W.P.(C) 4652/2022 and on which the following interim order operates:-

> "**12**. Conclusion: On the basis of the above discussion:
>
> (i) Role of Mauritius based director is clearly disputed in the actual control and management of BREF.
>
> (ii)Further role of Das Family in actual control and management has been established clearly as Das family controls all the entities which are operating and managing the Fund.
>
> (iii) Further it is also clear that as per ITR filed by the assessee in response to the 148 notice, BRESS is the beneficial owner of the Fund which is controlled by the Fund therefore it can safely be held that the control and management of the assessee always lied in USA. In these circumstances, the assessee is not entitled to the benefit claimed under Article 13(4) of India-Singapore DTAA for exemption of capital gain. The assessee is treated as a tax resident of USA as there is no benefit on Capital Gain in India- USA DTAA hence, the Capital Gain will be dealt in accordance with the provisions of section 48 of Income Tax Act, 1961."

We are further informed that the aforesaid interim order dated 31 March 2022 was ultimately made absolute in terms of an order of the Court dated 23 January 2023.

13. In view of the orders passed by this Court on the aforenoted writ petition and which, according to learned senior counsel, restrained the respondent from giving effect to the assessment orders framed for AY 2014-15, they have acted wholly arbitrarily in seeking to justify the initiation of reassessment action for AY 2016-17 based on the above.

14. Mr. Singh then urged us to strike down the reassessment bearing in mind the following facts. According to learned senior counsel the

original notice under Section 148A(b) never proceeded on the formation of a prima facie opinion by the respondents that the petitioner was disentitled from claiming benefits under the DTAA. Viewed in the aforesaid light, it was submitted that there is a clear disconnect between the reasons which stood recorded in the original notice under Section 148A(b) and the ultimate order that came to be framed under Section 148A(d) of the Act. According to Mr. Singh, it is wholly impermissible for the respondents to either seek to buttress or improve upon the reasons on which reassessment was originally proposed to be initiated by seeking to sustain that action on the basis of a wholly new or novel set of reasons.

15. Mr. Singh also assailed the conclusions appearing in the order disposing of objections and insofar as it pertained to the allotment of shares to the petitioner pursuant to a Scheme of Arrangement coming to be approved by this Court. According to learned senior counsel, once the petitioner had been able to establish that the allotment of shares was pursuant to a stipulation comprised in a Scheme of Arrangement which stood duly approved by the jurisdictional High Court, there clearly existed no justification for the respondent to undertake a further exercise of examining the source of investment or seeking to continue the proposed reassessment based upon additional documentation which was demanded.

16. It was then contended by Mr. Singh that the primary condition to assume jurisdiction under Section 148 of the Act is escapement of income. It was contended that the aforesaid precondition was clearly not met since the reassessment action was itself premised on the factually incorrect premise of the petitioner having not filed a return for

the concerned assessment year.

17. Mr. Singh, then assailed the notice for reassessment which ultimately came to be issued under Section 148 contending that the petitioner had in terms of the original show cause notice been afforded an opportunity to respond to a limited set of allegations which had been levelled. However, the allegations and facts on which the final order came to be based were neither disclosed to the petitioner nor was it afforded an opportunity to represent against the view that the respondent proposed to take. Mr. Singh submitted that the aspect of whether the petitioner could claim benefit of Article 13(4) of the DTAA was neither doubted in the original show cause notice nor was the petitioner afforded an opportunity to explain why it would not be entitled to claim benefits of that Article. In view of the aforesaid, Mr. Singh submitted that the impugned reassessment action is liable to be quashed on the aforesaid grounds.

18. Controverting the aforenoted submissions, Mr. Rai, learned counsel appearing for the respondents, submitted that as would be evident from the ultimate order which came to be passed under Section 148A(d) of the Act, the petitioner had not denied any of the transactions which had formed the basis for commencement of reassessment action. In view of the aforesaid, Mr. Rai, contended that the error in the original SCN and which had proceeded on the premise that the petitioner had failed to file its return would not be fatal.

19. It was further submitted by Mr. Rai that as long as the AO is able to justify that sufficient reasons do exist and which would support its belief that income had escaped assessment, the reassessment action

would not merit any interference by this Court. Reliance was placed on the decision of the Supreme Court in **Assistant Commissioner of Income Tax v. Rajesh Javeri Stock Brokers Pvt. Ltd.**[9] in support of the aforesaid submission.

20. Mr. Rai further argued that the AO was justified and entitled in law to take into consideration the assessment order passed in the petitioner's own case for AY 2014-15 and that the same clearly constituted relevant material and information for the purposes of proposing reassessment. It was pointed out by Mr. Rai that although the aforesaid assessment order presently forms subject matter of challenge in W.P.(C) 4652/2022, the interim orders operating thereon did not denude the AO of the jurisdiction to take cognizance of the various conclusions which had come to be recorded in the said assessment order.

21. Mr. Rai lastly submitted that even if the Court were to come to the ultimate conclusion that the order under Section 148A(d)of the Act was liable to be set aside on acceptance of any or some of the contentions addressed on behalf of the writ petitioner, the ends of justice would warrant the matter being remitted to the AO for consideration afresh.

22. Having noticed the rival contentions which were addressed, we find that the notice under Section 148A(b) of the Act undoubtedly suffers from certain fundamental factual errors. As was pointed out by the writ petitioner, and which fact has been tacitly admitted by the respondents, the SCN had proceeded on the premise that the petitioner

[9](2008) 14 SCC 208

had not filed its Return of Income for AY 2016-17. Once this was established to be factually incorrect, the respondent while passing the order under Section 148A(d) sought to overcome this mistake by observing that although a Return of Income had been submitted, it had not been subjected to assessment as contemplated under Sections 143(3), 147 or 144 of the Act. It while passing the order disposing of the objections taken by the writ petitioner, also observed that the income relating to the transactions in question had not been offered to tax. It is on the aforesaid basis alone that the AO proceeded to observe that income earned in the concerned AY appeared to have escaped assessment.

23. We at the outset note that the aforesaid reasoning as adopted is rendered wholly unsustainable since undisputedly prior to the petitioner submitting its reply to the SCN, the AO was not only totally oblivious of a return having been submitted, it had not even examined the same in order to form an opinion that income liable to tax had escaped assessment. The original show cause notice was neither reflective of nor based on a due evaluation of the return as submitted. Regard must also be had to the fact that undisputedly the financial transactions which were spoken of were duly disclosed in the return which had been submitted for AY 2016-17. Merely because the petitioner had taken the position that the income was not taxable under the Act, would not constitute a basis for the respondent forming the opinion that income had escaped assessment. The question of income being voluntarily offered to taxation would ultimately depend upon an assessee conceding to its exigibility to tax. In order to sustain a proposed reopening, it was incumbent upon the respondent to have formed an

opinion that the financial transaction was in fact liable to be taxed under the Act and thus, resulting in income having escaped assessment. However, and as is manifest from a reading of the original SCN, no such allegation stood levelled against the petitioner.

24. We then find that the question of whether the petitioner would be entitled to the benefits of the DTAA was one which came to be alluded to only in the order framed under Section 148A (d) of the Act. Suffice it to note that the original notice under Section 148A(b) was not even founded on the allegation that the petitioner was not entitled to claim the benefit of that Article. It was only in the course of framing of the final order under Section 148A(d) that the respondent ultimately sought to draw sustenance from a separate order of assessment which had come to be framed for AY 2014-15. However, and undisputedly, the said order of assessment presently forms subject matter of challenge in W.P.(C) 4652/2022 and on which an interim order operates restraining the respondents from giving effect to the same.

25. The material on the record further establishes beyond a measure of doubt that not only did the respondents fail to base the original show cause notice on a purported ineligibility of the petitioner to treaty benefits, even the order impugned in this writ petition is not based on any independent evaluation of whether the petitioner could be said to be disentitled to claim the exemptions contemplated under Article 13(4) of the DTAA. The order, in this regard, is based entirely upon the findings and conclusions which underlie the order of assessment for AY 2014-15. This was also not a case where the order of assessment for AY 2014-15 was non-existent on the date when the original notice under Section 148A(b) came to be issued.

26. Insofar as the allotment of shares pursuant to the Scheme of Arrangement is concerned, undisputedly the original show cause notice had neither noticed nor taken into consideration the Scheme in terms of which the allotment of shares came to be made in favour of the petitioner.

27. We also find sufficient merit in the contention of the writ petitioner addressed in this respect, bearing in mind the provisions contained in Section 47(vii) of the Act and which in unequivocal terms excludes a charge of capital gains in case of transfer of shares pursuant to a Scheme of Arrangement that may come to be approved. While we desist from rendering any definitive opinion in this regard, we do deem it apposite to observe that the ultimate order under Section 148A(d) fails to either examine or render any finding in this respect.

28. Before concluding, and in our considered opinion, the impugned action is liable to be faulted since it clearly suffers from the following foundational illegality. As was rightly contended by Mr. Singh, the reasons which weigh upon an Assessing Officer proposing to reopen an assessment and form the bedrock of a notice under Section 148A(b) of the Act alone are germane for the purposes of evaluating the validity of that action. It is those set of reasons and which form the basis for the Assessing Officer forming an opinion that income liable to tax has escaped assessment alone which would merit examination and evaluation. A decision to reopen or reassess cannot be based or sought to be justified either on additional reasons or those which may be supplied subsequently while disposing of objections preferred by an assessee. The statutory scheme of reassessment neither sanctions vacillation nor can a decision to trigger reassessment be sustained based

upon an attempted supplementation aimed at bolstering or buttressing the original opinion. The reasons on the basis of which a reassessment is proposed to be initiated is not a field of shifting sand and which authorises the AO to continually alter the basis on which the action is sought to be initiated.

29. These fundamental precepts assume added significance when viewed in light of the right to object which stands statutorily conferred upon an assessee. If the ultimate decision to justify initiation of reassessment be based on entirely new or previously undisclosed material or reasoning, it would clearly result in deprivation of a right to effectively object to the proposed action. It is these aspects which constrain us to come to the conclusion that the impugned action is rendered wholly unsustainable.

30. The aforenoted imperatives were duly highlighted by us in our recent decision in **ATS Infrastructure Limited Vs. Assistant Commissioner of Income Tax Circle 1(1) Delhi &Ors.**[10] and where we had an occasion to deal with a similar challenge. While ruling on these aspects, we in *ATS Infrastructure Limited* had observed as follows:-

> "**6.** Our Court in Commissioner of Income Tax-II Vs. Living Media India Ltd. had pertinently observed that additional reasons cannot be provided or recorded by the Assessing Officer[4] 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 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

[10] 2024:DHC:5474-DB

> 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. Vs. Additional Director of Income-tax and Ors.[5]

> "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 2006-07 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. 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. 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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> xxxx xxxx xxxx

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, -
>
> xxxx xxxx xxxx
>
> 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.

31. When tested on the aforesaid principles, it becomes manifest that the impugned action is rendered wholly untenable. While the original SCN had proceeded on the basis that the petitioner was a non-filer and the subject income constituting remittances made to a foreign entity, it was clearly established that a return had in fact been filed and duly acknowledged. The petitioner had not made any remittances to third parties. In fact it had earned revenue from the sale of shares which were claimed exempt from taxation by virtue of Article 13(4) of the DTAA. Once the aforesaid explanation was proffered, the AO then proceeded to hold that the petitioner was not entitled to treaty benefits, a charge which was not even laid in the original SCN or which could be said to have constituted the basis for the formation of opinion that reassessment was warranted. In fact the petitioner was not even made aware of the view which the AO was inclined to take in this regard. The AO then sought to salvage the reopening by requiring the petitioner to furnish further particulars with respect to the allotment of shares in terms of the Scheme of Arrangement. Suffice it to note that the original SCN not only failed to refer to this Scheme, a reading thereof leaves us with the definite impression that the AO was perhaps not even aware of those developments. We are thus constrained to hold that the impugned action when tested in light of the above and the legal principles which stand enunciated in respect of the authority to reassess cannot sustain.

32. We accordingly allow the writ petition and quash the impugned order under Section 148A(d) of the Act dated 27 April 2023 and impugned notice under Section 148 of the Act dated 27 April 2023. For reasons aforenoted, we also set aside the original SCN under Section 148A(b) dated 24 March 2023. We, however, accord liberty to the

respondents to initiate proceedings afresh if otherwise permissible in law.

33. Though needless to state, we out of abundant caution observe that no observation in this decision would impact the rights and contentions of respective sides which may be sought to be urged or canvassed in the pending writ petition pertaining to AY 2014-15.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

AUGUST 05, 2024/Neha/RW