

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Civil Writ Petition No. 7853/2022

Abdul Majeed Son Of Shri Ali Mohammed, Aged About 64 Years,
Resident Of Ward No. 18, Bara Mohalla, Jhunjhunu 333001

-----Petitioner

Versus

Income Tax Officer, Ward 1, Jhunjhunu Having its Address At
Behind Collectorate, Mandawa Road, Jhunjhunu 333001

-----Respondent

For Petitioner(s) : Mr. Siddharth Ranka Advocate with
Mr. Muzaffar Iqbal Advocate, Mr.
Saurav Harsh Advocate & Ms.
Apeksha Bapna Advocate.

For Respondent(s) : Mr. Amit Malani Advocate on behalf of
Mr. Nikhil Simlote Advocate.

HON'BLE MR. JUSTICE MANINDRA MOHAN SHRIVASTAVA

HON'BLE MRS. JUSTICE SHUBHA MEHTA

Judgment / Order

Reportable

29/06/2022

Heard.

With the consent of the parties, the matter is heard finally as
the reply has been filed.

This writ petition seeks to assail correctness and validity of
order dated 29.03.2022 passed by the respondent, whereby, after
initiating proceedings under Section 148A (d) of the Income Tax
Act, 1961 (herein after referred to as 'the Act') on the formation of
an opinion that income chargeable to tax has escaped
assessment, the authority proceeded to issue notice under Section
148 of the Act.

Brief facts, relevant and necessary for adjudication of the
controversy involved in the present writ petition are that on

15.03.2022, the respondent issued notice under clause (b) of Section 148A of the Act on the basis of certain information which suggested that income chargeable to tax for the assessment year 2015-2016 has escaped assessment within the meaning of Section 147 of the Act. The notice was sent along with the details of the cash deposits in the account of the assessee maintained with the Corporation Bank, which according to the notice disclosed deposit of a total amount of Rs.52,75,000/-. The notice stated that the assessee did not disclose this amount of cash deposit during the relevant financial year and, therefore, on that basis, the proceedings are required to be initiated.

Replying to the said notice, the petitioner-assessee stated that the initiation of proceedings on the basis that the cash deposits during the relevant financial year are Rs.52,75,000/- is factually incorrect and according to the petitioner-assessee, the total amount of cash deposit in his bank account in the Corporation Bank was only Rs.19,39,000/-. The petitioner-assessee, in order to satisfy the authority that the total cash deposits in that particular financial year were only Rs.19,39,000/-, also annexed along with the reply, complete bank statement of transactions done during the financial year in question.

The competent authority, however, proceeded to pass an order for issuance of notice under Section 148 of the Act on 29.03.2022. Thereafter, a notice under Section 148 of the Act has been issued to the petitioner-assessee. The order dated 29.03.2022 passed under Section 149A (d) of the Act as also notice under Section 148 of the Act have been assailed in this petition.

Learned counsel for the petitioner-assessee contended before us that in order to initiate proceedings under Section 148 of the Act, the law requires the authority to first arrive at satisfaction after holding an enquiry in terms of provisions contained in Section 148A of the Act based on material available on record which must suggest that income chargeable to tax has escaped assessment. He would further contend that in case this exercise is under taken beyond a period of three years with reference to the concerned assessment year, the proceedings under Section 148 of the Act could be initiated only when the total amount of the alleged income which is said to have escaped assessment is more than Rs.50,00,000/-, otherwise such exercise may not lead to proceedings under Section 148A of the Act because of statutory impediment under Section 149 Sub-Section 1 Clause (b) of the Act.

Learned counsel for the petitioner-assessee vehemently contended that the entire material, which has been collected by the authority, does not contain any material to even remotely suggest that the total income which according to them escaped assessment is more than Rs.50,00,000/-. Only on conjecture that the assessee may have some more bank accounts, order has been passed under Section 148A (d) of the Act followed by notice under Section 148 of the Act. Therefore, it is argued, the order and proceedings are liable to be set aside.

Per-contra, learned counsel appearing for the revenue would submit that the authority has drawn detailed proceedings after giving proper opportunity of hearing to the petitioner-assessee by issuing notice under Section 148A. Pursuant to the notice, the petitioner-assessee submitted his reply and the petitioner-

assessee could not dispute that during the relevant assessment year, certain cash deposits were made by the petitioner-assessee. While the department's stand is that the cash deposits are more than Rs.50,00,000/-, this being disputed by the petitioner-assessee, is essentially in the realm of factual dispute which could not be gone into by this court in exercise of its jurisdiction under Article 226 of the Constitution of India. His further submission is that the legal requirement as incorporated under Section 148A of the Act is only a *prima-facie* case for opening of assessment and not a full fledged enquiry in the matter which otherwise would be subject matter of assessment proceedings. He would further submit that the inference drawn by the authority on the basis of the fact that the account in which undisclosed cash deposits of more than Rs.19,00,000/- were made itself suggests that the assessee, who is otherwise an NRI, may have many more bank accounts. He would submit that such an inference taken together with the cash deposit details disclosed during enquiry, by itself, is sufficient to validate the impugned order and issuance of notice under Section 148 of the Act.

We have heard learned counsel for the parties and perused the records.

After amendment carried out in the income tax under The Finance Act, 2021, even before proceedings under Section 148 of the Act could be drawn, the law requires an order to be passed under Section 148A of the Act by conducting an enquiry in the manner provided under Section 148A of the Act and satisfaction to be arrived at on the basis of material available on record that income chargeable to tax has escaped assessment for the relevant

assessment year. The relevant provisions contained in Section 148A of the Act, being relevant, are extracted as below:-

“148A. Conducting inquiry providing opportunity before issue of notice under section 148.- The Assessing Officer shall, before issuing any notice under section 148,-

(a) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;

(b) provide an opportunity of being heard to the assessee, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);

(c) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);

(d) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:

Provided that the provisions of this section shall not apply in a case where,-

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

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

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, [relate to, the assessee; or

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.]

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

The provision is explicitly clear that the Assessing Officer shall, before issuing any notice under Section 148 of the Act, conduct enquiry, the details of which have been contained in Sub Clause (a) (b) & (c), which requires seeking prior approval of specified authority with respect to the information; providing an opportunity of being heard to the assessee and consideration of the reply of the assessee.

Sub-Clause (d) of Section 148A of the Act mandates that after conducting enquiry by affording an opportunity of hearing and consideration of reply, the authority shall decide, on the basis of material available on record, including reply of the assessee, whether or not it is a fit case for issuance of notice under Section 148 of the Act, by passing an order. The expression 'material available on record', has been consciously used by the legislature to put a fetter on the exercise of power in the manner that an order under Section 148A of the Act deciding to issue notice under Section 148 of the Act can be based only on the basis of material available on record.

Therefore, the decision in the enquiry as contemplated under Section 148A of the Act needs to be based on material available on record. The words 'material available on record', in its just, fair and logical interpretation would only mean a tangible material and can not be interpreted to mean remote likelihood of availability of material, it being taxing statute, requiring strict construction.

The notice which was issued to the petitioner-assessee by invoking jurisdiction under Section 148A(d) of the Act by the authority was based on information regarding undisclosed cash deposits reflected by various transactions, which according to the authority, was more than Rs.52,00,000/-. However, when the petitioner-assessee filed his reply, he clearly disclosed that the total amount of cash deposits in the bank by him was only Rs.19,39,000/- and not Rs.52,75,000/- as alleged in the notice. The petitioner-assessee along with his reply annexed complete bank statements showing all debit and credit transactions, which have also been placed before us. The total transactions, which

have been shown, do not exceed the amount as has been stated by the petitioner-assessee.

While considering the reply and the bank statements, the competent authority did not dispute the transactions, which were placed before it along with the reply filed by the petitioner-assessee. Therefore, the very basis of initiation of proceedings that income exceeding more than Rs.50,00,000/- had escaped assessment, was factually not correct. But then, the authority thereafter, without disputing the transactions, proceeded to pass an order for issuance of notice under Section 148 of the Act on conjecture, which is reflected from what has been stated in para 6 of the impugned order dated 29.03.2022, which is reproduced herein below:-

"6. The submission filed by the assessee has been considered under clause (c) of 148A of the Act for A.Y. 2015-16 but not found tenable as the assessee has furnished copy of one saving account only, there may be one or more account(s) in Corporation Bank in his name or PAN. Thus, it is logical to conclude that the assessee's reply is not fully satisfactory with respect to the above mentioned escapement of income in his case for AY 2015-16.

It is crystal clear from what has been recorded in para 6 of the impugned order that though the competent authority did not dispute various transactions meaning thereby that the material available on record, did not show any cash deposits more than what was asserted by the petitioner-assessee, which was far less than the amount as stated in the notice under Section 148A (d) of the Act, the officer proceeded to hold that there may be one or more accounts in the Corporation Bank in his name or PAN. It is

on this surmise, bereft of any material on record that the authority seems to justify its action and impugned order dated 29.03.2022.

The provisions contained in Section 148A (d) of the Act referred to hereinabove, clearly show that the decision has to be taken on the basis of material available on record. The material available on record before the authority did not disclose any cash deposit or any other transactions which can be said to have escaped assessment, which was more than Rs.50,00,000/-. At the most, the exercise could justify the conclusion that the *prima-facie*, cash transactions and deposits of Rs.19,39,000/- have escaped assessment.

Had it been a case of opening of the case within a period of three years having elapsed from the end of the relevant assessment year, the order of the authority could be well justified on the touch stone of the legal requirement as embodied under Section 148A of the Act. However, in the present case, undisputedly it is a case where more than three years have elapsed from the end of the relevant assessment year. In that case, in order to initiate proceeding under Sections 148 of the Act, it is not only required to be shown that some income chargeable to tax has escaped assessment, but also that it amounts to or is likely to amount to Rs.50,00,000/- or more than for that year.

For this purpose, it is relevant to refer to the provision contained in Section 149 (1)(b) of the Act, which is reproduced herein below:-

"149. Time Limit for notice.-(1) No notice under section 148 shall be issued for the relevant assessment year,-

(a)....X.....X.....X.....X

(b) if three years, but not more than ten years, have elapsed from the end of the relevant assessment year unless the Assessing Officer has in his possession books of account or other documents or evidence which reveal that the income chargeable to tax, represented in the form of-

- (i) an asset;
- (ii) expenditure in respect of a transaction or in relation to an event or occasion; or
- (iii) an entry or entries in the books of account, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more:]

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if [a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be], as they stood immediately before the commencement of the Finance Act, 2021:

Provided further that the provisions of this sub-section shall not apply in a case, where a notice under Section 153A, or section 153C read with section 153A, is required to be issued in relation to a search initiated under section 132 or books of account, other documents or any assets requisitioned under section 132A, on or before the 31st day of March, 2021:

Provided also that for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded:

Provided also that where immediately after the exclusion of the period referred to in the immediately preceding proviso, the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.

Explanation.-For the purposes of clause (b) of this sub-section, "asset" shall include immovable property, being land or building or both, shares and securities, loans and advances, deposits in bank account.

[(1A) Notwithstanding anything contained in subsection (1), where the income chargeable to tax represented in the form of an asset or expenditure in relation to an event or occasion of the value referred to in clause (b) of sub-section (1), has escaped the assessment and the investment in such asset or in more than one previous years relevant to the assessment years within the period referred to in clause (b) of sub-section (1), a notice under section 148 shall be issued for every such assessment year for assessment, reassessment or recomputation, as the case may be.]

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.] "

Therefore, while passing an order under Section 148A of the Act, the authority is required to reach satisfaction to not only that income chargeable to tax has escaped assessment, but in case where three years have elapsed from the end of the relevant assessment year, the order under Section 148A of the Act for issuance of notice under Section 148 of the Act could be passed if there were no statutory impediment as contained in Section 149 Sub-section (1) (b) of the Act, referred to hereinabove.

The authority, as is apparent, sought to bridge this statutory impediment not on the basis of any material available on record but only with the help of a surmise that the assessee may have some more accounts. Even before this Court, when the reply has been filed by the respondent, no material has been placed to show that at the time when the authority passed order under Section 148A of the Act, there was some material on record that the income chargeable to tax which escaped assessment amount to or is likely to amount Rs.50,00,000/- or more for that year.

On conjoint reading of the provisions contained in Section 148A of the Act and what has been provided under Section 149 of the Act, it is vividly clear that in order to initiate proceedings under Section 148A of the Act, it is not enough that in case where notice is proposed to be issued under Section 148 of the Act after three years have elapsed from the end of the relevant assessment year that there should exist material available on record to reach to conclusion that some income chargeable to tax has escaped assessment, but the amount should be more than Rs.50,00,000/-. Only on the basis that the cash deposits of Rs. 19,39,000/- chargeable to tax have escaped assessment, without anything more, the authority was not justified in jumping to the conclusion that the assessee may have more bank accounts. If such an interpretation is placed on the provision of Section 148A (d) of the Act with reference to expression 'material available on record', then in that case, it will open flood gate and even without availability of any material, the authority would be initiating proceedings under Section 148 of the Act, which will completely frustrate the object of incorporation of Section 148A in the Act. It is well settled principle of interpretation that the taxing statute is

required to be construed strictly. The interpretation as has been suggested by the learned counsel for the revenue cannot be placed upon the expression 'material available on record' to include possibility of collection of any relevant or tangible material for opening of proceedings under Section 148A of the Act.

Learned counsel for the revenue has placed reliance upon the decision of the Delhi High Court in the case of **Gulmuhar Silk Pvt. Ltd. Versus Income Tax Officer Ward 10 (3), W.P.(C) 5787/2022 and CM Appl. 1729/2022**, decided on 07.04.2022. The decision in the said case does not apply in the facts and circumstances of the present case. It is not a case where the assessee is disputing the factual aspects with regard to transactions. Present is a case where the respondent has failed to place before the Court any material to suggest that the income exceeding Rs.50,00,000/- chargeable to tax has escaped assessment, which would warrant issuance of order under Section 148A (d) of the Act followed by issuance of notice under Section 148 of the Act.

In the result, the impugned order and the proceedings are unsustainable in law. The impugned order and the notices are quashed and set aside.

The petition is accordingly allowed.

No order as to costs.

(SHUBHA MEHTA),J

(MANINDRA MOHAN SHRIVASTAVA),J