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

% **Judgment reserved on: 02 July 2024**
Judgment pronounced on: 09 August 2024

\+ W.P.(C) 10507/2023 & CM APPL. 40707/2023 (stay)

TOSCA MASTER ..... Petitioner

Through: Mr. Percy Pardiwalla, Senior Advocate with Mr. Vishal Kalra and Ms. Snigdha Gautam, Advocates.

versus

THE DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 3(1)(1), (INT.TAX), NEW DELHI ..... Respondent

Through: Mr. Ruchir Bhatia, SSC with Ms. Deeksha Gupta, Advocate

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

J U D G M E N T

RAVINDER DUDEJA, J.

1. This Writ Petition has been filed seeking directions or order quashing/setting aside the impugned notice [hereinafter **"Impugned Notice"**] issued under Section 148A(b) of the Income Tax Act [**"Act"**] dated 22.03.2023, order passed under Section 148A(d) of the Act dated 26.04.2023 [hereinafter **"Impugned Order"**] and consequential notice issued under Section 148 of the Act dated 26.04.2023 by the respondent for the Assessment Year [**'AY'**] 2019-20.

2. Petitioner is a fund managed by Tosca Fund Asset Management, LLP [a foreign Company incorporated under the laws of Cayman Islands]. Petitioner is registered with the Security & Exchange Board of

India (SEBI) as a Foreign Institutional Investor ('FII')/Foreign Portfolio Investor ('FPI') in India.

3. During the year under consideration, petitioner received inward remittances in India for the purpose of subscribing to the securities and carried out certain transactions on the recognized Stock Exchange in India in relation to purchase of listed securities as reproduced below:-

S. No.	Name of scrip	Date of subscription	Quantity	Amount (in INR)
1	Yaari Digital Integrated Services Limited (erstwhile Indiabulls Integrated Services Limited)	14.05.2018	8,92,500	47,48,10,000
2	Dhani Services Limited (erstwhile Indiabulls Ventures Limited)	08.05.2018	20,00,000	90,00,00,000
	Total			137,48,10,000

4. As per the averments in the petition, petitioner has not earned income of any nature accruing or arising in India or taxable in India. Petitioner only used the funds remitted into India for subscription of the above mentioned securities and made outward remittance of the excess funds, which are summarized as under:-

Date of Transaction	Particulars	Amount (in INR)
02.05.2018	Inward remittance of funds	112,50,00,000
03.05.2018	Outward remittance of excess funds	(22,40,00,000)
08.05.2018	Securities purchased (Dhani Services Limited)	(90,00,00,000)
11.05.2018	Inward remittance of funds	47,48,10,000
14.05.2018	Securities purchased (Yaari Digital)	(47,48,10,000)
	Closing balance on 31	**10,00,000**

	March 2019	

5. Respondent issued notice dated 09.03.2023 under Section 148A(a) of the [Act] for conducting enquiry in respect of transactions pertaining to the petitioner during the impugned AY.

6. Petitioner filed submissions dated 15.03.2023 in response to the said notice dated 09.03.2023, furnishing all the details of the transactions along with the requisite documents/information, clarifying that no income was earned by the petitioner in India during the impugned AY and that petitioner was not required to file any return of income in India.

7. Respondent vide notice dated 22.03.2023 under Section 148A(b) of the Act, sought to initiate assessment under Section 147 read with Section 148 of the Act, pursuant to the information flagged by the Risk Management Strategy, alleging that in the absence of return of income, the source of income of the above investment remained unexplained.

8. Petitioner yet again filed submissions dated 31.03.2023 stating that during the impugned AY, no income had accrued or was received in India. Further, petitioner pointed out various fallacies in the notice dated 22.03.2023 issued under Section 148A(b) of the Act such as:-

(i) erroneously considering the purchase value of the shares of Yaari Digital to be INR 137,48,10,000 instead of INR 47,48,10,000 and

(ii) incorrectly considering the total transaction value to be INR 182,28,10,000 instead of INR 159,88,10,000.

9. Respondent passed the impugned order under Section 148-A (d) dated 26.04.2023.

10. In its counter affidavit respondent stated that petitioner did not file any Income Tax Return for the AY 2019-20 and therefore the source of investment remained unexplained.

11. It has been further stated that upon perusal of the documents submitted by the petitioner, it was noted that the petitioner had purchased 8,92,500 shares of Indiabulls Integrated Services Ltd. (now known as "Yaari Digital Integrated Services Ltd.") at Rs. 532/- per share on 14.05.2018 and had purchased 20 lacs shares of Dhani Services Ltd. (**formerly known as "Indiabulls Ventures Ltd.**") at Rs. 450/- per share on 08.05.2018 and as per the exchange rate (NSE) on 14.05.2018 and it was noted that the share price of Indiabulls Integrated Services Ltd. was between Rs. 575.20 to Rs. 585 per share and similarly the share price of Dhani Services Ltd. on 08.05.2018 was between Rs. 498 to Rs. 525. Thus, discrepancy was noted in the share price as provided by the petitioner.

SUBMISSIONS:

12. Learned counsel for the petitioner has argued that respondent has failed to take note that no income had accrued or was received in India in the impugned AY by the petitioner and thus the petitioner was not obligated to file a return and thus no income had escaped from assessment.

13. It was further argued that the petitioner provided various documentary evidences such as minutes of the Extraordinary General Meetings of both the companies to refute the allegation made in the impugned order that there was difference between the fair market value

and the value at which the shares were purchased by the appellant.

14. It is submitted that the reason/information provided to the petitioner in the impugned notice dated 22.03.2023 do not satisfy the test of "information" within the meaning of Section 148/148A of the Act. It is submitted that there is neither any information nor tangible material provided in the impugned notice with regard to any income earned during the subject assessment year by the petitioner that had escaped assessment.

15. It is also argued that the impugned order under Section 148A(b) dated 26.04.2023 substituted the reasons recorded at the time of issuing the impugned notice under Section 148A(b) of the Act without confronting the petitioner about the change of stand. It is thus argued that the impugned notices and the order are liable to be quashed/set aside.

16. Per contra, learned counsel for the respondent has argued that documentary proof having not been submitted by the petitioner with regards the source of investment, there is due justification for issuance of notice under Section 148A(b) of the I.T. Act and that petitioner would get ample opportunity during the course of proceedings before the appropriate statutory forum to show that the finding of fact arrived at by the Assessing Officer was erroneous.

17. It is further submitted that the question of going into the veracity and genuineness of the material/evidence forming the opinion of the Assessing Officer suggesting that the income of the petitioner/assessee has escaped assessment ought not to be gone into while exercising the writ jurisdiction under Article 226. It is argued that petition is devoid of

any merit.

REASONING & DECISION

18. A perusal of the record reveals that proceedings initiated under Section 148-A of the Income Tax Act, 1961 [‘**Act**’] pertain to certain investments made in shares by the petitioner, which is an FPI, having received remittances in India for the purpose of subscribing to securities. The subscription of share capital in India would undoubtedly be a “Capital Account Transaction”. Since the funds remitted in India were used for subscription in securities, no income was earned in AY 2019-20 and therefore petitioner was under no requirement to file return of income in India.

19. While dealing with an identical question, a Co-ordinate Bench of this Court in the case of **M/s. Angelantoni Test Technologies SRL Vs. Assistant Commissioner of Income Tax, Circle INT Tax 1 (1) (1) & Ors. W.P. (C) 15928/2023**, had held as follows:-

> “6. It is settled law that investment in shares in an Indian subsidiary cannot be treated as ‘income’ as the same is in the nature of “capital account transaction” not giving rise to any income. In ***Nestle SA Versus Assistant Commissioner of Income Tax (W.P.(C) No. 12643/2018)***, this Court held that the allegation of the Revenue that the investment in the shares of Indian subsidiary amounted to ‘income’ is flawed. The relevant portion of the said judgment is reproduced hereinunder:
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> “24. The principal objection of the Petitioner that its investment in the shares of its subsidiary cannot be treated as ‘income’ is well founded. The decision of the Bombay High Court in ***Vodafone India Services Pvt. Ltd. v. Union of India*** (supra) holding such investment in shares to be a ‘capital account transaction’ not giving rise to income was accepted by the CBDT. Para 2 of Instruction No.2 of 2015 dated 29th January, 2015 reads thus:
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> “2. It is hereby informed that the Board has accepted the decision of the High Court of Bombay in the above mentioned Writ Petition. In view of the acceptance of the above judgment, it is directed that

> the ratio decidendi of the judgment must be adhered to by the field officers in all cases where this issue is involved. This may also be brought to the notice of the ITAT, DRPs and CIT (Appeals)."
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> 25. Therefore, the fundamental premise of the Respondent that the above investment by the Petitioner in the shares of its subsidiary amounted to 'income' which had escaped assessment was flawed. The question of such a transaction forming a live link for reasons to believe that income had escaped assessment is entirely without basis and is rejected as such."

20. Following the aforesaid, we find that the fundamental premise of the Revenue that the investment made by the petitioner in shares amounted to "income" which has escaped assessment was flawed and therefore we are unable to sustain the impugned notices.

21. There is yet another reason as to why the impugned notices cannot be sustained, inasmuch as, the basis of order dated 26.04.2023 passed under Section 148A(d) of the Act is the alleged discrepancy noticed between the share prices as provided by the petitioner from the exchange rate (NSE). Undoubtedly, this aspect of the matter was never taken up with the petitioner in the notice issued under Section 148A(b) of the Act. The noticee or the assessee should not be prejudiced or be taken by surprise. The uncontroverted fact is that in the notice under Section 148A(b) of the Act, there is no mention of any discrepancy in the share price.

22. Reiterating the aforesaid position, this Court in W.P.(C) 10485/2023 titled as ***Banyan Real Estate Fund Mauritius Vs. Assistant Commission of India Tax Circle International Tax 112 & Anr.*** has held as under:

> "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.** 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 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:-

> "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 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 reasons subsequent to the issuance of notice and this is impermissible in law."
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> 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."

23. When tested on the aforesaid principles, it becomes manifest that foundational material alone would be relevant for the purposes of evaluating whether reassessment powers were justifiably invoked. Revenue cannot take a fresh ground while passing order under Section

148A(d) of the Act. We are clearly of the view that notice and the reasons given, therefore do not conform to the principles of natural justice as the assessee did not get a proper and adequate opportunity to reply to the allegations.

24. For the above reasons, we hold that the reasons recorded for issuance of notice under Section 148 cannot be sustained. Accordingly, the impugned notices issued under Section 148A(b) dated 22.03.2023, order dated 26.04.2023 passed under Section 148A(d) and consequential notice under Section 148 of the Act dated 26.04.2023 issued by the respondent for the Assessment Year 2019-20 are quashed.

25. The writ petition is allowed with no orders as to costs.

RAVINDER DUDEJA, J.

YASHWANT VARMA, J.

09 August 2024/*RM*