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

% **Judgment reserved on: 08 August 2024**
Judgment pronounced on: 09 September 2024

\+ W.P.(C) 17364/2022

GENPACT INDIA PRIVATE LIMITED .....Petitioner

Through: Mr. Sachit Jolly, Ms. Disha Jham, Ms. Soumya Singh, Mr. Rishabh Malhotra, Mr. Devansh Jain, Mr. Raghav Dutt, Mr. Aditya Rathore, Mr. Abhudaya Shankar, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, RANGE 10, OSD, NEW DELHI & ANR. .....Respondents

Through: Mr. Gaurav Gupta, SSC with Mr. Shivendra Singh, Mr. Yojit Pareek, Advs.

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 reassessment action pertaining to **Assessment Year**[1] 2015-16 initiated pursuant to an order dated 30 July 2022 passed in accordance with section 148A(d) of the **Income Tax Act, 1961**[2] as well as the consequential notice under Section 148 dated 30 July 2022.

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[1]AY
[2]Act

2. The principal ground on which the reassessment action was impugned before us was of the same infracting the First Proviso to Section 149(1) of the Act and being barred by the prescription of limitation which applies. It was the submission of Mr. Jolly, learned counsel for the writ petitioner, that a reassessment action for AY 2015-16 could have been initiated only up to 31 March 2022. It was thus contended that the action for reassessment which was commenced pursuant to the Section 148A(b) notice dated 27 May 2022 cannot be countenanced and is liable to be quashed.

3. From the side of the respondents, it was the contention of Mr. Gupta that the reassessment action was commenced pursuant to a notice referable to Section 148 of the Act dated 30 June 2021. According to learned counsel, since the respondents were obliged to undertake a course correction in light of the decision rendered by the Supreme Court in **Union of India and Ors. vs. Ashish Agarwal**[3], the subsequent notice under Section 148A(b) came to be issued and would be deemed to be in continuation and substitution of the original Section 148 notice. According to Mr. Gupta, when viewed in the aforesaid light, it would be apparent that the action stands saved by virtue of the directions framed by the Supreme Court. It is the aforenoted contentions which fall for our consideration.

4. For the purposes of disposal of the present writ petition and before proceeding further, we deem it apposite to take note of the following essential facts.

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[3](2023) 1 SCC 617

5. The petitioner is stated to be a company engaged in the business of providing a host of business process outsourcing services, data modelling and analytics support, managed IT services, software solutions and e-learning.

6. The petitioner was earlier known as **Empower Research Knowledge Services Private Limited**[4]**,** and this fact is noticed since the transactions which formed the subject matter of the allegation of escapement of income were entered into in the erstwhile avatar of the present writ petitioner. The reassessment action itself was initiated based on information received pursuant to a survey carried out at the premises of the petitioner between 25 to 27 February 2019. In the course of that survey, various remittances made to foreign entities came to light and upon information and material being gathered, those remittances were broadly classified under the following heads:-

> "1. Remittances made to Genpact Limited on account of ESOPs
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> 2.Remittances made on account of communication charges, bandwidth charges, and other like charges
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> 3. Remittances made on account of data-centre bandwidth, etc. charges
>
> 4. Remittances made on account of license fee for web-hosting
>
> 5. Remittances made on account of Foreign language translation
>
> 6. Remittances made on account of training
>
> 7. Remittances made on account of licensing of software"

7. It was in respect of those remittances that the respondents alleged that they would clearly fall within the meaning of "royalty" or alternatively as "fee for technical services" and consequently be

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[4] ERKS

covered by Section 195 of the Act. A failure on the part of the writ petitioner to deduct tax at source constituted the first limb of the reassessment action.

8. The second subject of the proposed reassessment was the transfer of shares and the resultant capital gains which accrued pursuant thereto. The **Assessing Officer**[5] notes that in order to avoid tax, the shareholding of Genpact India held by Headstrong Consulting (Singapore) Pte. Limited and Genpact India Holding Mauritius was transferred to ERKS vide share transfers dated 28 January 2015 and 25 March 2015. It is alleged that the transaction had no underlying financial support and lacked commercial substance. It was thus alleged that the aforesaid share transfer was a ploy to avoid tax.

9. The AO also took note of ERKS subsequently amalgamating with Genpact India pursuant to a Scheme of Arrangement which came to be sanctioned by the High Court of Hyderabad and Telangana in terms of an order dated 17 August 2015. The respondents also picked up aspects pertaining to repayments made by ERKS in respect of Non-Convertible Debentures as well as interest thereon over the course of several years. It was in this connection alleged that funds were remitted in the form of principal payment of liabilities and a declaration of dividend thus avoided. This, according to the respondents, resulted in deviation of taxes and dividend payout being camouflaged as principal payments. It was thus alleged that since no dividend distribution tax had been deducted, the petitioner had evaded taxes which were otherwise liable to be paid.

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[5]AO

10. Although the reasons forming the basis for the belief that income chargeable to tax for AY 2015-16 had escaped assessment may have been originally drawn, the same have not been placed on our record. However, we proceed on the basis that the original Section 148 notice was premised on the aforesaid information when it came to be issued on 30 June 2021.

11. Responding to the aforesaid notice, the petitioner in terms of a letter dated 26 July 2021 drew the attention of the AO to the amended regime of reassessment which had come into force with effect from 01 April 2021 consequent to the enforcement of Finance Act, 2021. The petitioner appears to have asserted that it was incumbent upon the AO to follow the procedure as prescribed under Section 148A of the Act.

12. Responding to the Section 148 notice dated 30 June 2021, the petitioner is also stated to have filed its Return of Income on 30 July 2021. The reassessment proceedings, however, do not appear to have progressed further apart from notices under Section 142(1) coming to be issued on 15 and 16 November 2021.

13. In the meanwhile, challenges came to be raised across the country and before various High Courts with respect to reassessment notices having been issued post 01 April 2021, albeit following and adhering to the procedure which prevailed prior to the enforcement of Finance Act, 2021. A challenge along those lines also came to be laid before this Court, with the writ petitioners asserting that consequent to Finance Act, 2021 having come into force, it was incumbent upon the respondents to follow the procedure as prescribed under Section 148A.

14. The aforesaid batch of writ petitions ultimately came to be allowed in terms of the judgment rendered by this Court in **Man Mohan Kohli vs. Assistant Commissioner of Income Tax and Anr.**[6]. We deem it apposite to extract the operative part of that decision hereunder:-

> "**105.** Consequently, the impugned reassessment notices issued under section 148 of the Income-tax Act, 1961 are quashed and the present writ petitions are allowed. If the law permits the respondents-Revenue to take further steps in the matter, they shall be at liberty to do so. Needless to state that if and when such steps are taken and if the petitioners have a grievance, they shall be at liberty to take their remedies in accordance with law."

15. The aforesaid controversy also arose for consideration before different High Courts of the country and conflicting views came to be rendered in the context of the challenge which stood laid by assessees. The appeals from the decisions of the different High Courts ultimately reached the doorstep of the Supreme Court. It was those set of appeals which formed the subject matter of *Ashish Agarwal*.

16. While disposing of those appeals, the Supreme Court firstly took note of the salutary amendments to the reassessment procedure which had come to be introduced by Finance Act, 2021. This becomes evident from a reading of paragraphs 20, 21 and 22 of the report and which are reproduced hereinbelow:

> "**20.** Therefore, all safeguards are provided before notice under Section 148 of the IT Act is issued. At every stage, the prior approval of the specified authority is required, even for conducting the enquiry as per Section 148-A(a). Only in a case where, the assessing officer is of the opinion that before any notice is issued under Section 148-A(b) and an opportunity is to be given to the assessee, there is a requirement of conducting any enquiry, the assessing

[6]2021 SCC OnLine Del 5250

> officer may do so and conduct any enquiry. Thus if the assessing officer is of the opinion that any enquiry is required, the assessing officer can do so, however, with the prior approval of the specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment.
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> **21.** Substituted Section 149 is the provision governing the time-limit for issuance of notice under Section 148 of the IT Act. The substituted Section 149 of the IT Act has reduced the permissible time-limit for issuance of such a notice to three years and only in exceptional cases ten years. It also provides further additional safeguards which were absent under the earlier regime pre-Finance Act, 2021.
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> **22.** Thus, the new provisions substituted by the Finance Act, 2021 being remedial and benevolent in nature and substituted with a specific aim and object to protect the rights and interest of the assessee as well as and the same being in public interest, the respective High Courts have rightly held that the benefit of new provisions shall be made available even in respect of the proceedings relating to past assessment years, provided Section 148 notice has been issued on or after 1-4-2021. We are in complete agreement with the view taken by the various High Courts in holding so."

17. The Supreme Court thereafter proceeded to take note of the anomalous situation which had arisen on account of the conflicting views expressed by different High Courts as well as the imperative need of a just balance being struck between the rights of assessees and that of the Revenue to scrutinize income which may have escaped assessment. This becomes apparent from a reading of the following passages of that decision:-

> "**23.** However, at the same time, the judgments of the several High Courts would result in no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted Sections 147 to 151 of the IT Act. The Revenue cannot be made remediless and the object and purpose of reassessment proceedings cannot be frustrated. It is true that due to a bona fide mistake and in view of subsequent extension of time vide various notifications, the Revenue issued the impugned notices under Section 148 after the amendment was enforced w.e.f. 1-4-2021, under the unamended Section 148. In our view the same ought not to

have been issued under the unamended Act and ought to have been issued under the substituted provisions of Sections 147 to 151 of the IT Act as per the Finance Act, 2021.

24. There appears to be genuine non-application of the amendments as the officers of the Revenue may have been under a bona fide belief that the amendments may not yet have been enforced. Therefore, we are of the opinion that some leeway must be shown in that regard which the High Courts could have done so. Therefore, instead of quashing and setting aside the reassessment notices issued under the unamended provision of the IT Act, the High Courts ought to have passed an order construing the notices issued under the unamended Act/unamended provision of the IT Act as those deemed to have been issued under Section 148-A of the IT Act as per the new provision Section 148-A and the Revenue ought to have been permitted to proceed further with the reassessment proceedings as per the substituted provisions of Sections 147 to 151 of the IT Act as per the Finance Act, 2021, subject to compliance of all the procedural requirements and the defences, which may be available to the assessee under the substituted provisions of Sections 147 to 151 of the IT Act and which may be available under the Finance Act, 2021 and in law."

18. Proceeding further and in its quest to salvage the situation and carve out an equitable solution, the Supreme Court proposed that the judgments of the various High Court be modified in the following terms:-

"**25.** Therefore, we propose to modify the judgments and orders passed by the respective High Courts as under:

25.1. The respective impugned Section 148 notices issued to the respective assessees shall be deemed to have been issued under Section 148-A of the IT Act as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of Section 148-A(b). The respective assessing officers shall within thirty days from today provide to the assessees the information and material relied upon by the Revenue so that the assessees can reply to the notices within two weeks thereafter.

25.2. The requirement of conducting any enquiry with the prior approval of the specified authority under Section 148-A(a) be dispensed with as a one-time measure vis-à-vis those notices which have been issued under Section 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High

Courts.

25.3. The assessing officers shall thereafter pass an order in terms of Section 148-A(d) after following the due procedure as required under Section 148-A(b) in respect of each of the assessees concerned.

25.4. All the defences which may be available to the assessee under Section 149 and/or which may be available under the Finance Act, 2021 and in law and whatever rights are available to the Assessing Officer under the Finance Act, 2021 are kept open and/or shall continue to be available.

25.5. The present order shall substitute/modify respective judgments and orders passed by the respective High Courts quashing the similar notices issued under unamended Section 148 of the IT Act irrespective of whether they have been assailed before this Court or not."

19. Bearing in mind the broad consensus which was reached before the Supreme Court between counsels appearing for the Revenue as well as those representing the assessees, it proceeded to invoke its powers conferred by Article 142 of the Constitution and framed the following directions:-

"**26.** There is a broad consensus on the aforesaid aspects amongst the learned ASG appearing on behalf of the Revenue and the learned Senior Advocates/learned counsel appearing on behalf of the respective assessees. We are also of the opinion that if the aforesaid order is passed, it will strike a balance between the rights of the Revenue as well as the respective assessees as because of a bona fide belief of the officers of the Revenue in issuing approximately 90,000 such notices, the Revenue may not suffer as ultimately it is the public exchequer which would suffer.

27. Therefore, we have proposed to pass the present order with a view to avoiding filing of further appeals before this Court and burden this Court with approximately 9000 appeals against the similar judgments and orders passed by the various High Courts, the particulars of some of which are referred to hereinabove. We have also proposed to pass the aforesaid order in exercise of our powers under Article 142 of the Constitution of India by holding that the present order shall govern, not only the impugned judgments and orders passed by the High Court of Judicature at Allahabad, but shall

also be made applicable in respect of the similar judgments and orders passed by various High Courts across the country and therefore the present order shall be applicable to **PAN INDIA.**

28. In view of the above and for the reasons stated above, the present appeals are allowed in part. The impugned common judgments and orders [Ashok Kumar Agarwal v. Union of India, 2021 SCC OnLine All 799] passed by the High Court of Judicature at Allahabad in WT No. 524 of 2021 and other allied tax appeals/petitions, is/are hereby modified and substituted as under:

28.1. The impugned Section 148 notices issued to the respective assessees which were issued under unamended Section 148 of the IT Act, which were the subject-matter of writ petitions before the various respective High Courts shall be deemed to have been issued under Section 148-A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be show-cause notices in terms of Section 148-A(b). The assessing officer shall, within thirty days from today provide to the respective assessees information and material relied upon by the Revenue, so that the assessees can reply to the show-cause notices within two weeks thereafter.

28.2. The requirement of conducting any enquiry, if required, with the prior approval of specified authority under Section 148-A(a) is hereby dispensed with as a one-time measure vis-à-vis those notices which have been issued under Section 148 of the unamended Act from 1-4-2021 till date, including those which have been quashed by the High Courts.

28.3. Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the assessing officers concerned to hold any enquiry, if required.

28.4. The assessing officers shall thereafter pass orders in terms of Section 148-A(d) in respect of each of the assessees concerned; Thereafter after following the procedure as required under Section 148-A may issue notice under Section 148 (as substituted).

28.5. All defences which may be available to the assessees including those available under Section 149 of the IT Act and all rights and contentions which may be available to the assessees concerned and Revenue under the Finance Act, 2021 and in law shall continue to be available.

29. The present order shall be applicable **PAN INDIA** and all judgments and orders passed by the different High Courts on the issue and under which similar notices which were issued after 1-4-2021 issued under Section 148 of the Act are set aside and shall be

> governed by the present order and shall stand modified to the aforesaid extent. The present order is passed in exercise of powers under Article 142 of the Constitution of India so as to avoid any further appeals by the Revenue on the very issue by challenging similar judgments and orders, with a view not to burden this Court with approximately 9000 appeals. We also observe that the present order shall also govern the pending writ petitions, pending before various the High Courts in which similar notices under Section 148 of the Act issued after 1-4-2021 are under challenge.
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> **30.** The impugned common judgments and orders [Ashok Kumar Agarwal v. Union of India, 2021 SCC OnLine All 799] passed by the High Court of Allahabad and the similar judgments and orders passed by various High Courts, more particularly, the respective judgments and orders passed by the various High Courts particulars of which are mentioned hereinabove, shall stand modified/substituted to the aforesaid extent only."

20. As is apparent from a reading of the aforesaid passages of the judgment in *Ashish Agarwal*, the Supreme Court duly noticed the streamlined procedure which had come to be introduced by Section 148A and which has also adopted various salutary safeguards insofar as assessees were concerned. It also took note of the substituted Section 149 and the additional safeguards which had come to be adopted in that provision as it stood in its amended form.

21. On an overall conspectus of the aforesaid, the Supreme Court opined that rather than the reassessment notices issued under the unamended provisions of the Act being quashed, the High Courts would have been well advised to modulate their directions by providing that those notices issued under the unamended provisions of the Act be treated as notices under Section 148A(b). It was, while proceeding on the aforesaid reasoning that the Supreme Court held that the impugned Section 148 notices issued to respective assessees should be deemed to

be under Section 148A and treated to be **Show Cause Notices**[7] as contemplated under clause (b) thereof. The judgments of respective High Courts were thus proposed to be modified in terms set forth in paragraph 25.

22. However, it becomes pertinent to note that while doing so, the Supreme Court in *Ashish Agarwal* significantly observed that the modulation of the directions in terms aforenoted would be subject to compliance with all procedural requirements and without prejudice to the various defences which may be available for assessees to adopt in terms of the substituted provisions of Section 147 to 151 of the Act as well as those which may be available in terms of Finance Act, 2021. The preservation of defences and objections which assessees could possibly take, including those comprised in Section 149 stood reiterated in paragraphs 25.4 and 28.5 of *Ashish Agarwal*.

23. Proceeding to invoke its powers flowing from Article 142 of the Constitution, the Supreme Court further held that its judgment would not only apply to those notices which stood impugned in the appeals forming part of that batch but would also be applicable to all similar judgments and orders passed by various High Courts irrespective of whether any appeal had been instituted and thus observed that its order would be applicable *"PAN INDIA"*.

24. It was in purported compliance and implementation of *Ashish Agarwal* that the respondents proceeded to issue a notice on 27 May 2022 under Section 148A(b) of the Act to the petitioner. However, and

[7] SCNs

by the time the said notice came to be issued, the terminal point for commencement of reassessment, namely, 31 March 2022 had already passed. It was in the aforesaid light that one of the objections which the petitioner took was of the same being in contravention of the First Proviso to Section 149(1) of the Act. The aforesaid objection proceeded along the following lines.

25. Section 149 in its amended form reads as follows:-

> "149. (1) No notice under section 148 shall be issued for the relevant assessment year,—
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> (a) if three years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);
>
> (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 accounts or other documents or evidence which reveal that the income chargeable to tax, represented in the form of asset, which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more for that year:
>
> 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 such notice 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, as they stood immediately before the commencement of the Finance Act, 2021:
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> ……"

26. In terms of the First Proviso appended to sub-section (1) of Section 149, a notice for reassessment pertaining to any AY prior to 01 April 2021 would have to be in accord with the time limit specified under Section 149(1)(b) as it stood prior to the amendments enforced by virtue of Finance Act, 2021. Insofar as our case is concerned, that time limit would constitute a maximum of six years from the end of the relevant assessment year bearing in mind the language in which Section

149(1)(b) stood couched and existed prior to 01 April 2021.

27. However, and as was noticed in the preceding parts of this decision, the respondents assert that the Section 148A(b) notice dated 27 May 2022 was in continuation of the original Section 148 notice dated 30 June 2021 and is thus not liable to be construed as a fresh or independent action which may have been initiated. The respondents would contend that the issuance of the notice under Section 148A(b) was essentially guided by an obligation to comply with the judgment of the Supreme Court in *Ashish Agarwal*. It is the correctness of the aforesaid stand which falls for determination.

28. It becomes pertinent to note at the outset that *Ashish Agarwal* was principally concerned with the correctness of judgments rendered by various High Courts on challenges raised by assessees to the initiation of reassessment in accordance with the unamended procedure and which had existed prior to 01 April 2021. The directions ultimately framed were intended to be a curative measure in respect of challenges which had succeeded.

29. To put it differently, the directions which were ultimately framed by the Supreme Court in *Ashish Agarwal* were principally intended to modify judgments and orders passed by various High Courts. The Supreme Court, while ordaining that *Ashish Agarwal* would apply *"PAN INDIA"* had observed that it would be applicable to all similar judgments and orders passed by various High Courts irrespective of whether any appeal from those decisions had been preferred. It also appears to have borne in consideration the spectre of being deluged by as many as 9,000 further appeals which would have eventually travelled

up to the Supreme Court and thus burdening its Roster.

30. It is thus manifest that the direction for notices being deemed to have been issued under section 148A was in respect of those which had been impugned either before the various High Courts or the Supreme Court itself. The directions in *Ashish Agarwal* were, as noted above, intended to resolve the impasse which ensued in light of the conflicting views expressed by different High Courts, the assessees being deprived of the salutary safeguards which Finance Act, 2021 had introduced in respect of reassessment as well as the element of public interest which warranted the Revenue being enabled to take curative action and thus saving the reassessment notices which had been struck down by High Courts.

31. However, and undisputedly, the petitioner had not instituted any legal proceedings before any court to assail the notice dated 30 June 2021 nor was it a party to the batch of writ petition which came to be ultimately allowed by this Court in terms of its judgment in *Man Mohan Kohli*. There was thus no declaration of invalidity which came to be rendered in respect of the notice issued to the petitioner. There was in our case no judgment rendered *inter partes* which may have struck down the reassessment notice as being invalid or contrary to the statutory regime which came into effect from 01 April 2021. The notice of 30 June 2021 thus remained unscathed and unimpacted. Consequently, there arose no need for its revival or resuscitation. *Ashish Agarwal* had mandated a revival of notices which had been struck down by various High Courts and modified the judgments rendered in respect of those notices. Consequent to the decision of the

Supreme Court, those judgments came to be modified with the notices being revived and ordained to be treated as having been issued under Section 148A(b). We are thus of the firm opinion that the said decision cannot be read as mandating a continuance or reinvention of notices which had not formed subject matter of challenge or a vacation of assessments which may have been made.

32. We also cannot possibly lose sight of the Supreme Court at more than one place in the judgment in *Ashish Agarwal* having preserved the rights of assessees to raise all defences and objections as were otherwise available to be adopted or taken in light of Sections 147 to 151 of the Act. The Supreme Court in paragraph 25.4 and again in 28.5 had specifically adverted to Section 149 and the defences and challenges which could be raised by assessees in light thereof. Their Lordships were clearly cognizant of the new time frames which came to be introduced by virtue of Section 149 as well as the First Proviso to Section 149(1) which governed all AYs' prior to 01 April 2021.

33. We consequently find ourselves unable to read *Ashish Agarwal* as a decision which deprived the assessee of the right to question the initiation of reassessment on grounds based on the First Proviso to Section 149(1). We also find ourselves unable to construe those directions as being intended to reinvent the wheel or reverse those proceedings in respect of which no challenge had ever been mounted. Viewed in light of the above, we find ourselves unable to recognise the notice dated 27 May 2022 as a continuation of the original Section 148 notice. Although the petitioner neither assailed the original notice nor obtained a declaration of invalidity, it was the respondents who chose to

commence proceedings afresh by issuing the notice dated 27 May 2022.

34. Regard must also be had to the fact that once an assessee had chosen to flow along with a notice issued in accordance with the erstwhile regime, participate in those proceedings by filing a return or suffer an assessment, it would have been legally impermissible for it to assail the reassessment action subsequently on grounds which were taken note of in *Man Mohan Kohli* or *Ashish Agarwal*. The law would expect and require an objection along those lines being taken and raised at the outset and at the first available opportunity. This more so since that challenge would have been only in respect of the statutory obligation of the respondents to comply with the procedure prescribed by clauses (b) and (d) of Section 148A. The right to assail the reassessment on other grounds such as absence of material, change of opinion, a failure to form the requisite opinion would, in any case, survive. We consequently find ourselves unable to accept the submissions addressed by the respondents in this regard.

35. We note that while dealing with a similar challenge to a reassessment action which had been commenced post 01 April 2021 and where the assessee had failed to adopt or pursue a legal recourse to that action as well as the right of the respondents to recommence action on a purported reading of *Ashish Agarwal* had formed subject matter of our consideration in **Anindita Sengupta vs. Assistant Commissioner of Income Tax, Circle 61(1)** [8]. While dealing with the asserted right of the respondents to recommence proceedings with the issuance of a notice under Section 148A(b) in spite of no challenge to the original

[8]2024 SCC OnLine Del 2296

action having been mounted by the assessee, we had in *Anindita Sengupta* observed as follows:-

> "**22.** As is manifest from a reading of the aforesaid passages forming part of the decision in *Ashish Agarwal*, the Supreme Court was essentially concerned with the imperatives of striking a just balance between the right of the respondents to undertake and conclude a reassessment that may have been initiated while at the same time according due protection to the interest of the assessees. The Supreme Court held that although the High Courts were correct in taking the view that after the amendments in the Act, coming to be enforced with effect from 01 April 2021, notices could have been issued only in terms of the substituted provisions, the Department appeared to have proceeded under the mistaken yet bona fide belief that those amendments were yet to be enforced. It was in the aforesaid background that it found that the ends of justice would warrant the notices issued with reference to the erstwhile provisions being saved and being read as referable to Section 148A(b). It was to subserve the aforesaid primary objective that *Ashish Agarwal* proceeded to hold that the impugned Section 148 notices would be deemed to have been issued under section 148A and treated to be show cause notices referable to clause (b) thereof.
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> **23.** As we read the penultimate directions which came to be framed, the procedure laid out in *Ashish Agarwal* clearly stood confined to matters where although notices may have been issued, proceedings were yet to have attained finality. This clearly flows from the impugned notices being ordained to be treated as show cause notices under Section 148A(b) and the concomitant liberty being accorded to AOs' to proceed further in accordance with Section 148A(d). As we read that decision, we find ourselves unable to construe those directions as either warranting or mandating a reopening of proceedings which had come to be rendered a quietus in the meanwhile. The judgment was primarily concerned with the validity of various notices which had been promulgated and proceedings drawn in accordance with the statutory procedure which stood in place prior to 01 April 2021. It also becomes pertinent to note that the decision rendered by our Court in *Man Mohan Kohli* perhaps constituted the solitary exception in the sense of having left a window open to the respondents to draw proceedings afresh. A majority of the High Courts', however, do not appear to have made such a provision or provide the Revenue with a right of recourse. The Supreme Court was thus faced with a peculiar and an unprecedented situation where the Revenue was rendered remediless to assess escaped income even though material may have merited such an action being pursued solely on account of a

misinterpretation of the correct legal position. It was these factors which clearly appear to have weighed upon the Supreme Court to mould and sculpt a procedure which would strike a just balance between competing interests.

24. In order to carve out an equitable solution which would redress the deadlock, the Supreme Court invoked its powers conferred by Article 142 of the Constitution and ordained that all such notices would be treated as being under Section 148A(b) and for proceedings to be taken forward in accordance with law thereafter. The direction so framed thus enabled the assessee to question the assumption of jurisdiction under Section 148 and take advantage of the beneficial measures embodied in Section 148 A. The assessee thus derived a right to assail the initiation of reassessment proceedings on jurisdictional grounds by preferring objections which the AO was statutorily obliged to take into consideration before issuing notices under Section 148 of the Act. The Revenue on the other hand, and notwithstanding its folly of having erroneously proceeded under the erstwhile regime, was enabled to continue proceedings in accordance with the amended procedure as introduced by virtue of Finance Act, 2021 and thus avoid the specter of a *fait accompli* which it faced on account of some of the High Court decisions. This is apparent from the Supreme Court observing that the judgments rendered by some of the High Courts' had left the Revenue remediless and resulting in "*no reassessment proceedings at all, even if the same are permissible under the Finance Act, 2021 and as per substituted sections 147*."

25. However, we are of the firm opinion that *Ashish Agarwal* neither intended nor mandated concluded assessments being reopened. The respondent clearly appears to have erred in proceedings along lines contrary to the above as would be evident from the reasons which follow. Firstly, *Ashish Agarwal* was principally concerned with judgments rendered by various High Courts' striking down Section 148 notices holding that the respondents had erred in proceeding on the basis of the unamended family of provisions relating to reassessment. They had essentially held that it was the procedure constructed in terms of the amendments introduced by Finance Act, 2021 which would apply. None of those judgments were primarily concerned with concluded assessments. It is this indubitable position which constrained the Supreme Court to frame directions requiring those notices to be treated as being under Section 148A(b) and for the AO proceeding thereafter to frame an order as contemplated by Section 148A(d) of the Act. The Supreme Court significantly observed that the High Courts' instead of quashing the impugned notices should have framed directions for those notices being

construed and deemed to have been issued under Section 148A. *Ashish Agarwal* proceeded further to observe that the Revenue should have been "*permitted to proceed further with the reassessment proceedings as per the substituted provisions……*". Our view of the judgment being confined to proceedings at the stage of notice is further fortified from the Supreme Court providing in para 8 of the report that "*The respective impugned Section 148 notices issued to the respective assessees shall be deemed to have been issued under section 148A of the Income Tax Act as substituted by Finance Act, 2021 and treated to be show cause notices in terms of Section 148A(b).*" As would be manifest from the aforesaid extract, the emphasis clearly was on the notices which formed the subject matter of challenge before various High Courts' and the aim of the Supreme Court being to salvage the process of reassessment. This is further evident from the Supreme Court observing that the AO would thereafter proceed to pass orders referable to Section 148A(d). We consequently find ourselves unable to construe *Ashish Agarwal* as an edict which required completed assessments to be invalidated and reopened. *Ashish Agarwal* cannot possibly be read as mandating the hands of the clock being rewound and reversing final decisions which may have come to be rendered in the interregnum.

26. Regard must also be had to the undisputed fact that the petitioner never questioned the validity of the original notices on grounds which were urged before the various High Courts and where assessees had questioned the invocation of the unamended provisions. The petitioner chose to contest the reassessment proceedings on merits. It is also admitted before us that the petitioner was also not a party to the *Man Mohan Kohli* batch of matters. There was therefore no justification for the respondent to have issued notices afresh seeking to reopen proceedings which had been rendered a closure prior to the judgment rendered in *Ashish Agarwal*. At the cost of being repetitive we deem it appropriate to observe that the *Ashish Agarwal* judgment neither spoke of completed assessments nor did it embody any direction that could be legitimately or justifiably construed as mandating completed assessments being reopened and more so where the assessee had raised no objection to the initiation of proceedings.

27. We are also of the firm opinion that even para 25.5 of *Ashish Agarwal* would not sustain the stand taken by the respondent since the same clearly confines itself to decisions or judgments rendered by a High Court invalidating a notice under Section 148 and the manifest intent of the Supreme Court being that its judgment would apply and govern irrespective of whether an appeal had been laid before it.

> **28.** It is in the aforesaid context that we also bear in mind the pertinent observations rendered by the Constitution Bench in *High Court Bar Association* when it held that a direction under Article 142 of the Constitution should not impact the substantive rights of those litigants who are not even parties to the *lis*. The Constitution Bench while acknowledging the amplitude of the Article 142 power placed a significant caveat when it observed that benefits derived by a litigant based on a judicial order validly passed cannot be annulled especially when they may not even have been parties to the cause. This too convinces us to hold in favour of the petitioner and come to the inevitable conclusion that the writ petition must succeed."

36. Although the said decision came to be rendered in the factual backdrop of an assessment which had already been completed prior to the issuance of a notice under Section 148A(b), in our considered opinion, the principles laid down in that decision would equally apply to those cases where the assessee may have chosen to desist from adopting or pursuing a legal recourse to assail the commencement of reassessment under the erstwhile regime.

37. The ambit of the First Proviso to Section 149(1) was an aspect which had arisen for our consideration in **Manju Somani vs. Income-tax Officer and Ors.**[9] Dealing with a similar challenge based on the prescription of limitation, we had in *Manju Somani* held as under:-

> "**12.** As is manifest from the above, the proviso to section 149 clearly bids us to go back in point of time and examine whether a proposed reassessment pertaining to a period prior to April 1, 2021 would sustain based on the time frames as they existed prior to the promulgation of the Finance Act, 2021. The proviso embodies a negative command restraining the respondents from issuing a notice under section 148 in respect of an assessment year prior to April 1, 2021, if the period within which such a notice could have been issued in accordance with the provisions as they existed prior thereto had elapsed. This is manifest from the provision using the expression

[9]2024 SCC OnLine Del 5292

> "no notice under section 148 shall be issued" if the time limit specified in the relevant provisions "… as they stood immediately prior to the commencement of the Finance Act, 2021" had expired. A reassessment which is sought to be commenced post April 1, 2021 would thus have to abide by the time limits prescribed by section 149(1)(b), 153A or 153B as may be applicable.
>
> **13.** Undisputedly, section 149(1)(b) as it stood prior to the introduction of the amendments by way of the Finance Act, 2021 ([2021] 432 ITR (St.) 52) prescribed that no notice under section 148 shall be issued if four years "but not more than six years" have elapsed from the end of the relevant assessment year. Thus the period of six years stood erected as the terminal point which when crossed would have rendered the initiation of reassessment impermissible in law.
>
> **14.** Viewed in the light of the above, the impugned notice when tested on the anvil of the pre-amendment section 149(1)(b) in order to be sustained would have to meet the prescription of six years. Undisputedly that period in respect of the assessment year 2016-2017 came to an end on March 31, 2023. We thus find ourselves unable to sustain the impugned action of reassessment and which was commenced pursuant to the notice dated April 29, 2024.
>
> **15.** It would be important to note that the respondents also do not attempt to sustain the initiation of action on any other statutory provision and which could be read as extending the time limit that applied. We also find ourselves unable to read *Twylight Infrastructure* [*Twylight Infrastructure Pvt. Ltd.* v. *ITO*, (2024) 463 ITR 702 (Delhi); 2024 SCC OnLine Del 330.] as empowering them to reopen assessments contrary to the negative covenant which forms part of section 149 of the Act."

38. When tested on the aforesaid principles also, it becomes apparent that the impugned action of reassessment cannot be sustained. This in light of us having already found that the notice of 27 May 2022 cannot be viewed as being in continuation or substitution of the original notice dated 30 June 2021.

39. While parting, we note that although the petitioner had while responding to the original Section 148 notice dated 30 June 2021 alluded to the amended statutory regime which had come into existence

and had placed the AO on notice of an obligation to follow the procedure as prescribed under Section 148A, however, no legal challenge seeking to impugn the action commenced by virtue of the notice dated 30 June 2021 was ever instituted. The reassessment action also did not come to be interdicted by any order or injunction passed by a court. This was, therefore, clearly not a case where the subsequent notice under section 148A(b) could be countenanced to be in continuance or substitution of the original notice. The substitution of original notices was one which *Ashish Agarwal* had provisioned for in respect of notices which had been impugned before various High Courts and had come to be quashed.

40. We also bear in mind that no fetter operated upon the AO to take remedial steps and follow or adopt the procedure as prescribed by Section 148A prior to 31 March 2022. This aspect assumes added significance in light of the writ petitioner itself having drawn the respondents attention to the amended procedure for reassessment. Thus, even though the AO was duly apprised and placed on notice of the aforesaid aspects, it failed to take any corrective action.

41. We also find that the petitioner had merely asserted that the notice of 30 June 2021 was liable to be withdrawn as opposed to being placed in abeyance. In fact it had been submitted on its behalf that in case the notice of 30 June 2021 was proposed to be proceeded with, they should be provided the reasons underlying the formation of opinion that income had escaped assessment. It had also furnished a return pursuant to that notice. We thus find ourselves unable to sustain the action impugned before us.

42. Accordingly, and for all the aforesaid reasons, we allow the instant writ petition and quash the impugned notice referable to Section 148A(b) of the Act dated 27 May 2022, order under Section 148A(d) of the Act dated 30 July 2022, notice referable to Section 148 of the Act dated 30 July 2022 and all consequential proceedings thereto.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

SEPTEMBER 09, 2024/RW