

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 2390 of 2023**

FOR APPROVAL AND SIGNATURE:

**HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE DEVAN M. DESAI**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

M/S SAHIL INFRA CREATIVE PVT. LTD.

Versus

THE INCOME TAX OFFICER WARD 2(1)(3), SURAT

Appearance:

MR. ADITYA AJGOAKAR WITH MR. BHAUMIK DHOLARIYA(7009) for the
Petitioner(s) No. 1

KARAN G SANGHANI with KALPANAK RAVAL(1046) for the Respondent(s)

**CORAM: HONOURABLE MR. JUSTICE N.V.ANJARIA
and
HONOURABLE MR. JUSTICE DEVAN M. DESAI**

Date : 05/05/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Heard learned advocate Mr.Aditya Ajgaokar with learned advocate
Mr. Bhaumik Dholariya for the petitioner and learned advocate Mr.Karan

Sanghani for the respondents.

2. What is prayed in this petition filed under Article 226 of the Constitution is to set aside order dated 30.07.2022 under Section 148A(d), as also the consequential notice dated 30.07.2022 issued under Section 148 of the Income Tax Act, 1961, which were in respect of Assessment Year 2016-17.

3. Noticing the relevant facts, the petitioner engaged in the business as builder, land-organiser, developer of lands and such other infrastructural projects, filed its return of income alongwith computation of income for the Assessment Year 2016-2017 declaring loss of Rs. 8,24,444/- on 4.10.2016. Thereafter, on 30.6.2021, respondent No.1- the Income Tax Officer issued notice under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') requiring the petitioner to file return of income for Assessment Year 2016-2017. The petitioner filed its return of income under section 139 of the Act on 30.7.2021. The petitioner thereafter requested for copy of reasons recorded from the officer. The notice under section 143(2) of the Act was issued on 27.9.2021 and the respondent No.1 Assessing Officer supplied copy of reasons on the same date.

3.1 In the reasons recorded, respondent No.1 alleged against the petitioner that the petitioner purchased immovable property for consideration of Rs. 30,23,10,000/-. It was further alleged that the petitioner was a shell company which was not actually involved in any kind of business activity, however, was found, according to the Assessing Officer, to have acquired immovable property from income earned by

undisclosed source.

3.2 It was further alleged that while the assessee company had purchased immovable property, the details of the said transactions were not disclosed in the books of accounts of the petitioner. Therefore, the Assessing Officer concluded that the investment of Rs. 30,23,10,000/- was made for the immovable property by the Assessee from undisclosed source of income and which remained out the ambit of taxation.

3.3 The petitioner objected to the reasons recorded and filed its detailed objections by letter dated 11.10.2021. It was submitted on 12.10.2021. The allegations were refuted and it was explained that the petitioner had purchased immovable property at Dehradun for Rs. 10,59,23,190/- on 3.2.2016 and the same was registered with the office of sub-registrar, Dehradun and was also recorded in the audited books of accounts and Financial Statement as on 31.3.2016, which formed part of stock in trade of Rs. 15,04,03,552/-. The petitioner stated that he had not purchased any other immovable property during the year under consideration.

3.4 It was further stated that figure of Rs. 30,23,10,000/- shown towards purchase of immovable property was incorrect and that the initiation of the reassessment proceedings was thus based on wrong facts. It is the say of the petitioner that petitioner reeled under impression that as per the law laid down by the Supreme Court in **GKN Driveshafts (India) Ltd. vs. ITO [(2023) 259 ITR 19 (SC)]**, the Assessing Officer would dispose of the objections to the reasons recorded by passing a speaking order.

3.5 The petitioner stated that, however, in its case, the order disposing of the objections was never passed by the Assessing Officer. It was thus pleaded by the petitioner that by not passing any order disposing of the objections, not only the law laid down by the supreme court in **GKN Driveshafts (India) Ltd. (supra)** was violated, the petitioner was also deprived of a reasonable opportunity to meet with the case of the department in reassessment notice.

3.6 It is to be noted that the new regime containing newly inserted provisions relating to reassessment *inter alia* section 148A was brought in the statute book with effect from 1.4.2021. The provisions contemplated issuance of notice under section 148A(b) of the Act giving opportunity to the assessee and passing of the order by the Assessing Officer under section 148A(d) of the Act. The Supreme Court in the mean time delivered decision in **Union of India vs. Ashish Agrawal [(2022) 444 ITR 1 (SC)]** to provide that notice which may have been issued under old regime under section 148 shall be treated upto 30.6.2021 shall be treated to be the notice under section 148A(b).

3.7 Now, it is the case of the petitioner that he did not receive any notice under section 148A(b) of the Act, however, it was stated that while checking the portal, the petitioner came across the notice under section 148A(b) of the Act for the first time and order under section 148A(d) passed became known, as well as notice under section 148 of the Act thereafter came to be issued. It was, therefore, stated that it was in consequence of the decision of the supreme court in **Ashish Agrawal (supra)** that on 23.5.2022, the notice under section 148A(b) of the Act

was issued to the petitioner, although he did not receive the same.

4. Learned advocate for the petitioner submitted that on one hand the petitioner has not received notice under section 148A(b) of the Act, the order under section 148A(d) came to be passed in which the petitioner had no opportunity to put forth his case. He could not defend against the allegations which suggested that income to the tune of Rs. 30,23,10,000/- chargeable to tax escaped the assessment as per the allegations levelled in the notice under section 148A(b) of the Act. It was submitted that respondent no.1 relied on the reasons recorded which were supplied alongwith the notice dated 27.9.2021-the earlier notice. It was submitted that the said objections were never disposed of and therefore could not be said to have been considered by the Assessing Officer at that juncture.

5. The group of sections 147 to 151 dealing with the reassessment were amended with effect from 1.4.2021. Various changes in the Scheme of provisions were brought about. The revenue had issued notices under the old sections after 1.4.2021 even though new provisions had come into force, which was by bona fide mistake on part of the department. The issue was dealt with **Union of India vs. Ashish Agarwal [(2023) 1 SCC 617]**.

5.1 The supreme court issued following directions,

"(i) The impugned section 148 notices issued to the respective assesseees 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 148A of the IT Act as substituted by the Finance Act, 2021 and construed or treated to be showcause notices in terms of section 148A(b). The assessing officer shall, within thirty days from today provide to the

respective assessee's information and material relied upon by the Revenue, so that the assessee can reply to the show cause notices within two weeks thereafter; (para 28.1)

(ii) The requirement of conducting any enquiry, if required, with the prior approval of specified authority under section 148A(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 01.04.2021 till date, including those which have been quashed by the High Courts.

(para 28.2)

(iii) Even otherwise as observed hereinabove holding any enquiry with the prior approval of specified authority is not mandatory but it is for the concerned Assessing Officers to hold any enquiry, if required;

(para 28.3)

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

(v) All defences which may be available to the assessee including those available under section 149 of the IT Act and all rights and contentions which may be available to the concerned assessee and Revenue under the Finance Act, 2021 and in law shall continue to be available.

(para 28.5)

5.2 In the present case, as noted above, the petitioner had responded to the earlier notice issued by the department under the old or unamended provisions by filing the objections, which were not decided. The petitioner groped in dark as to the receptivity, much less acceptability of its objections, at the end of the Assessing Officer. The said notice was treated to be notice under section 148A(b) of the Act in view of the decision of the Supreme Court in **Ashish Agarwal (supra)** and the direction that the notice under the unamended section 148 of the Income Tax Act shall be construed and treated to be show cause notice in terms

of section 148A(b). The petitioner at this juncture was entitled to be informed of the material relied upon by the revenue in connection with the notice. As per the direction of the supreme court in paragraph No. 28.1 of **Ashish Agarwal (supra)** upon receipt of the material, the assessee was entitled to file reply to the show cause notice within two weeks thereafter. The concept of reasonable opportunity obviously remained common thread in both old and new regime.

5.2.1 The limited case of the petitioner is *inter alia* that it did not receive notice under section 148A(b) though stated to have been issued by the department. The petitioner came to know from the portal about the order having been passed under section 148A(d) of the Act. What is submitted on behalf of the petitioner is that the response given by the petitioner in form of objections to the notice issued under the unamended provisions may be treated as a reply to the notice under section 148A(b) of the Act to which the petitioner could not file any response.

5.3 As per the case of the petitioner such notice was never received by it. It was submitted that the order under section 148A(d) of the Act passed by the Assessing Officer stands in breach of principles of natural justice inasmuch on one hand the objections filed by the assessee to the notice under the unamended section 148 of the Act were not disposed of, the petitioner had no opportunity to file reply to the notice under section 148A(b) of the Act, on the other hand. At both the point of time, the natural justice was violated, it was urged.

5.4 The grievance of the petitioner could be better appreciated upon having look at the provisions of section 148A which is extracted

hereinunder,

“148A 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:”

5.4.1 The aforesaid provision in its clause (b) expressly contemplates and provides opportunity of being heard to the assessee. The assessee is entitled to file reply. Sub-clause (c) of section 148A says that the reply of the assessee shall be considered which may be furnished by it in response to the show cause notice referred to in clause (b). As per clause (d) of section 148A, the assessing officer is required to decide the case of the assessee regarding reopening on the basis of material available on record including the reply of the assessee and to decide whether the case is fit or

not to issue notice under section 148 of the Act.

5.5 When we compare the unamended provisions and the provisions which were brought about into force with effect from 1.4.2021 in the context of observance of principles of natural justice, it could be easily seen that there exists a common thread. In the unamended provisions pursuant to notice under section 148 of the Act, the assessee was entitled to file his objections and get it disposed of either in terms of acceptance or rejection. If the objections were rejected, the assessee could pursue further remedy in that regard.

5.5.1 Under the amended provisions, the provisions to provide opportunity of being heard is given. The petitioner has right to file reply. The Assessing Officer is enjoined in law to consider such reply while rendering his decision under clause (d) of the section 148A. Even in **Ashish Agarwal (supra)** the supreme court directed that the assessee will be entitled to file reply within two weeks to the notice which was required to be treated under the amended provisions.

5.6 The provisions of section 148A in its various sub-clauses provide and underline the need to extend reasonable opportunity to the assessee and gives right to file a defence. The Supreme Court in **Ashish Agrawal (supra)** gave eight weeks time to assessee to file reply, thereby emphasised observance of natural justice.

5.6.1 In **Dharampal Satyapal Ltd. vs. Dy. Commissioner of C.Ex., Gauhati [(2015) 8 SCC 519]**, it was observed that natural justice is an expression of English Common Law, which is not a single theory. It is a family of views in administering the justice. Observance of

principles of natural justice is treated as natural virtue and part of natural justice. It is also called 'naturalist' approach to the phrase 'natural justice' and is related to 'moral naturalism'.

5.6.2 It was observed in para 19,

“..the concept and doctrine of natural justice, particularly which is made applicable in the decision making by judicial and quasi judicial bodies, has assumed different connotation. It is developed with this fundamental in mind that those whose duty is to decide, must act judicially. They must deal with the question referred both without bias and they must be given to each of the parties to adequately present the case made. It is perceived that the practice of aforesaid attributes in mind only would lead to doing justice. Since these attributes are treated as natural or fundamental, it is known as 'natural justice'”

5.7 The position which unfolds in this case is that the petitioner assessee had filed its objections to the notice for reassessment under section 148 unamended issued to him, however, the Assessing Officer never attended to the objections dated 12.10.2022 and left it undecided. Thereafter, the old notice dated 30.6.2021 was treated under the new provisions to be the notice under section 148A(b) at this stage the petitioner was deprived of opportunity to put forth his case against the proposed reopening of the assessment. According to the petitioner assessee, the notice was never subsequently served on him and he did not receive it and only knew about passing of the order under section 148A(d) from the portal. Be as it may.

5.8 In the totality of facts emerging, when the petitioner is deprived of opportunity of defending his case and consideration of his reply to the notice for reopening, the request that the objections which was filed in response to the notice under unamended provisions may be considered by the Assessing Officer to be the reply to notice under section 148A(b) of

the Act, is reasonable. It would sub-serve the purpose of compliance of natural justice and giving a fair treatment to assessee to put forth its case and avail the reasonable opportunity of being heard which the statute expressly contemplates for the assessee. It is in tune with provisions of section 148 of the Act.

5.9 Sub-clause(b) of section 148A of the Act provides for giving opportunity of being heard to the assessee by serving upon him notice to show cause. Similarly, under clause (c), the Assessing Officer is mandated to consider the reply of the assessee in response to the show cause notice. When the reassessment notice issued under the unamended provision is directed to be treated and deemed to have been as notice under section 148A(b) of the Act, the scope of words in sub-clause (c), “consider the reply of the assessee furnished, if any, in response to the show-cause notice referred to in clause (b)” could be construed and applied accordingly. The show cause notice referred to in clause (b) could be equated with show cause notice issued under the unamended section 148 of the Act.

5.9.1 Similarly, reply of the assessee furnished could be equated with the reply-cum-objections to the reasons supplied alongwith the notice under the old regime.

5.9.2 As noted above, the petitioner submitted its reply-cum-objections and they remained undecided. In the circumstances, it would be therefore trite that the Assessing Officer while exercising his powers under and within the ambit available to him as per section 148A of the Act, considers the reply-cum-objections of the petitioner treating it to be

the reply in response to notice under section 148A(b) of the Act. This would rule out the possibility of occurrence of prejudice to the assessee.

6. As a result of the above discussions and reasons, the following order is passed,

(i) The proceedings of the case are remanded to the competent Assessing Officer.

(ii) The competent Assessing Officer shall decide afresh the notice under section 148A(b) dated 23.05.2022 of the Act after considering the reply-cum-objections dated 11.10.2021 submitted by the petitioner to previous notice dated 30.06.2021 issued under Section 148 of the Act under the old regime provisions relating to reassessment, whereby the assessment of the petitioner for the Assessment Year 2016-17 was sought to be reopened.

(iii) The reply-cum-objections dated 11.10.2021 of the petitioner shall be treated by the Assessing Officer as response to the notice dated 23.05.2022 issued under Section 148A (b) of the Act. The contents of the said reply-cum-objections shall be considered and shall be taken into account in deciding the notice dated 23.05.2022 afresh, which shall be decided in accordance with law and in its own merits.

(iv) The exercise as above may be completed by the Assessing Officer within eight weeks from the date of receipt of this order.

(v) In order to enable the Assessing Officer to decide afresh as per the directions above, order dated 30.07.2022 under Section

148A(d) and the consequential notice dated 30.07.2022 under Section 148 of the Income Tax Act, 1961 are hereby set aside.

6.1 The setting aside of the notice, order as well as the consequential notice as per the (v) above are in view of the reasons spelt out in the order above and only on the ground stated.

6.2 It is clarified that this Court has not gone into or expressed anything on merits.

7. The petition stands allowed in terms of the aforesaid order and directions.

(N.V.ANJARIA, J)

(D. M. DESAI, J)

C.M. JOSHI/pps