

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 230 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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PANKAJBHAI JAYSUKHLAL SHAH C/O. MEENA AGENCY LTD.

Versus

ASST. COMMISSIONER OF INCOME TAX, CIRCLE 2 & 1 other(s)

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Appearance:

MR DARSHAN B GANDHI(9771) for the Petitioner(s) No. 1

MR SP MAJMUDAR(3456) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1,2

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 09/04/2019

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Rule. Mrs. Mauna Bhatt, learned senior standing counsel waives service of notice of rule on behalf of the respondents.
2. Having regard to the controversy involved in the present case, which lies in a narrow compass and with the consent of the learned advocates for the respective parties, the matter was taken up for final hearing today.
3. By this petition under article 226 of the Constitution of India, the petitioner has challenged the notice dated 29.3.2018 issued by the Income-tax officer, Ward 2(2), Jamnagar under section 148 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") seeking to reopen the assessment of the petitioner for assessment year 2011-2012. It appears that before this petition came to be filed, the Assessing Officer has proceeded further pursuant to the impugned notice and has passed the assessment order. However, since the issue raised in the present petition is a jurisdictional issue, this court had issued notice in the matter.
4. The facts stated briefly are that, the petitioner herein filed return of income for the assessment year 2011-2012 on 1.9.2012 declaring total income of Rs.44,05,746/-. The return was processed under section 143(1) of the Act. Thereafter, by the impugned notice dated 29.3.2018, the Income-tax officer Ward 2(2), Jamnagar, sought to reopen the assessment of the petitioner for the assessment year

2011-2012. In response to the notice, the petitioner submitted that the return filed by him on 31.8.2012 be treated as the return filed in response to notice under section 148 of the Act and requested the Assessing Officer to supply a copy of the reasons recorded for reopening the assessment.

4.1) It appears that after issuance of notice under section 148 of the Act, the charge over the petitioner's case was transferred to the Assistant Commissioner of Income Tax (ACIT) who is the current Assessing Officer of the petitioner.

4.2) Upon receipt of the reasons recorded, the petitioner found that the same had been recorded by the Deputy Commissioner of Income Tax (DCIT), Circle-2, Jamnagar. It appears that in the meanwhile, the petitioner participated in the assessment proceedings. Thereafter, by a letter dated 20.12.2018, the petitioner raised objections against the initiation of proceedings under section 148 of the Act. Before such objections could be decided by the respondent, the petitioner has filed the present petition seeking reliefs noted hereinabove.

5. Mr. Darshan Gandhi, learned advocate for the petitioner invited the attention of the court to the impugned notice to point out that the same has been issued by one Mr. Neeraj Kumar, Income-tax officer, Ward 2(2), Jamnagar. Referring to the reasons recorded, it was pointed out that the same has been recorded by one Mr. Chintamani V. Dingankar, Deputy Commissioner of Income-tax, Circle-2, Jamnagar.

Reference was made to section 148 of the Act, which provides for issue of notice where income has escaped assessment and, more particularly, to sub-section (2) thereof, which provides that the Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so. It was submitted that the notice under section 148 of the Act is required to be issued by the Assessing Officer who recorded the reasons; whereas in the facts of the present case, the reasons have been recorded by the Deputy Commissioner of Income-tax whereas the impugned notice has been issued by the Income-tax Officer and hence, the notice under section 148 of the Act is without jurisdiction. In support of his submission, learned advocate for the petitioner has placed reliance upon the decision of this court in case of **Hynoup Food & Oil Industries Ltd. v. Assistant Commissioner of Income-tax**, 307 ITR 115 (Gujarat), wherein the court after referring to the provisions of sections 147 and 148 of the Act, held that when section 147 is read in conjunction with section 148(2) of the Act which mandates that the Assessing Officer shall, before issuing any notice under section 148(1) of the Act, record his reasons for issuing the notice, it is clear that the officer recording the reasons under section 148(2) and the officer issuing notice under section 148(1) has to be the same person. The court further observed that the form of the notice itself indicates that the authority has to record 'whereas I have reason to believe that income liable to tax for the assessment year has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961'. Accordingly, the court held that the notice which was issued by an officer other than the

officer who had recorded the reasons was invalid. Mr. Gandhi submitted that the above decision would be squarely applicable to the facts of the present case and hence, the impugned notice which is a jurisdictional notice is invalid and without authority of law. It was, accordingly, urged that the petition deserves to be allowed by setting aside the impugned notice.

6. Opposing the petition, Mrs. Mauna Bhatt, learned senior standing counsel for the respondents, submitted that in this case the petitioner has responded to the notice issued under section 148 of the Act and has participated in the proceedings pursuant thereto, which have culminated into the impugned assessment order. It was submitted that the petitioner is, therefore, required to be relegated to the remedy of appeal under the relevant statutory provisions. It was further submitted that the petitioner has initially participated in the proceedings under section 147 of the Act and has belatedly raised the objections and before such objections could be dealt with, has approached this court, and hence, this court may not entertain this petition at this stage.

6.1) As regards the contention raised by the petitioner that the notice under section 148 of the Act having been issued by an officer other than the officer who recorded the reasons for reopening the assessment, the attention of the court was invited to the averments made in the affidavit-in-reply filed by the first respondent. It was submitted that the Assessing Officer namely, DCIT/ACIT, Circle-2, Jamnagar who was holding the jurisdiction over the case

recorded reasons on 27.3.2018. Thereafter, as per the requirement of the Income-tax Act, 1961, the approval of the Principal CIT, Jamnagar was sought to issue notice under section 148 of the Act on 27.3.2018. After such approval was given on 28.3.2018, the notice under section 148 of the Act was issued on 29.3.2018. For the purpose of explaining as to why the notice was issued by the Income Tax Officer and not the Deputy Commissioner of Income-tax who recorded the reasons, reference was made to the averments made in paragraph 4 of the above affidavit-in-reply reference to which shall be made hereinafter. It was submitted that issuance of the notice by the Income Tax Officer is a procedural lapse which has happened on account of the mandate of e-assessment scheme and non migration of Permanent Account Number in time. It was submitted that this being a procedural lapse, such defect would be covered under the provisions of section 292B of the Act and therefore, the impugned notice cannot be said to be invalid. It was submitted that the petitioner having participated in the reassessment proceedings, pursuant to which the reassessment order came to be passed on 28.12.2018, it is not permissible for the petitioner to now challenge the impugned notice on the ground of invalidity, in view of provisions of section 292B of the Act. It was, accordingly, urged that the petition being devoid of merits, deserves to be dismissed.

7. Having regard to the conduct of the petitioner of participating in the proceedings before the Assessing Officer and thereafter, at the later stage, filing objections and approaching this court before such objections could be

disposed of, ordinarily this court would be reluctant to interfere in such a case, more so, when the assessment order has already been passed, but having regard to the peculiar facts of the case, where the very jurisdiction of the Assessing Officer who issued the notice under section 148 of the Act is under challenge, this court has entertained the petition.

8. In the present case, what is the subject matter of challenge is the notice issued under section 148 of the Act on the ground that the assumption of jurisdiction on part of the Assessing Officer by issuance of such notice is invalid. The sole contention on the basis of which such notice is challenged before this court is that the notice has been issued by the Income Tax Officer, Ward No.2(2) Jamnagar, whereas the reasons have been recorded by the Deputy Commissioner of Income-tax, Circle-2, Jamnagar. In this regard, reference may be made to section 147 of the Act which provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently during the course of the proceedings under that section. Section 148 of the Act provides for issue of notice where income has escaped assessment and provides that before making the assessment, reassessment or recomputation under section 147 of the Act, the Assessing Officer shall serve on the assessee a notice requiring him to furnish return of income as specified

thereunder. Sub-section (2) thereof postulates that the Assessing Officer shall, before issuing any notice under that section, record his reasons for doing so.

9. This court in **Hynoup Food & Oil Industries Ltd.** (supra), has on a conjoint reading of sections 147 and 148(2) of the Act, held that the officer recording the reasons under section 148(2) of the Act and the officer issuing notice under section 148(1) of the Act has to be the same person. In this case, admittedly the officer who recorded the reasons for reopening the assessment has not issued the notice under section 148(1) of the Act. In this regard, in response to the averments made in the petition regarding lack of jurisdiction on part of the Assessing Officer on the ground of the impugned notice having been issued by an officer other than the officer who recorded the reasons, the first respondent has filed an affidavit-in-reply, wherein it has been averred thus :

“3. Xxxxxxx. So the Assessing Officer viz. the DCIT/ACIT, Cir-2, Jamnagar who was holding the jurisdiction over the case recorded reasons on 27/03/2018. Thereafter, as per the requirement of the Income-tax Act, 1961, the approval of the Pr.CIT, Jamnagar was sought to issue notice u/s 148 on 27/03/2018. The Pr. CIT, Jamnagar gave the approval to issue notice u/s 148 on 28/03/2018. Subsequently, the notice u/s 148 was issued on 29/03/2018.xxxxx

4. Xxxxxxx I submit that the reasons are recorded by Mr. Chintamani V. Dingankar, Deputy Commissioner of Income Tax, Circle-2, Jamnagar having jurisdiction over the petitioner. I submit that at the relevant point of time, the PAN of the petitioner was lying with the Income Tax Officer, Ward 2(2), Jamnagar as he was holding territorial jurisdiction over the case and therefore, the impugned notice came to be issued by the ITO, Ward 2(2) as the PAN could not be

migrated at the last moment to the DCIT, Circle-2. But as the income of the assessee was more than Rs. 15 lakh, the DCIT/ACIT, Cir-2, Jamnagar held the jurisdiction over the case as per CBDT Instruction. The notice u/s 148 was required to be issued by 31/03/2018 and the migration of the PAN was not possible in that short period. It is pertinent to mention that as per the prevailing scheme of e-assessment, the assessment was required to be made as e-Assessment and all the correspondences/notices needed to be done online through the ITBA application as the such correspondences/notices then goes to the e-filing account of the assessee which enable the assessee to respond through his/her e-filing account. As the PAN was lying in the jurisdiction of the Income-tax Officer, Ward-2(2) Jamnagar, the notice was issued from petitioner's Assessing Officer code. However, the assessment was completed by DCIT/ACIT, Circle-2, Jamnagar who was holding the jurisdiction over the case and who recorded the reasons for reopening and formed his belief for reopening u/s 147. Since the assessment was completed by the same Assessing Officer who recorded the reasons for reopening and who holding the jurisdiction over the case, the validity of issued of notice is correct and it is not a case of borrowed opinion. It was a procedural lapse which was (sic. had) happened on account of mandate of e-assessment scheme and non-migration of PAN in time."

10. From the averments made in the affidavit-in-reply filed on behalf of the respondent, it is evident that it was the Deputy Commissioner of Income-tax, Circle-2, Jamnagar, who had jurisdiction over the petitioner. Previously the Income-tax officer, Ward 2(2), Jamnagar was having jurisdiction over the petitioner, however, as per the CBDT instructions, in view of the fact that the income of the assessee was more than Rs.15 lakhs, DCIT/ACIT Jamnagar held the jurisdiction over the petitioner. It appears that it was not possible for the jurisdictional Assessing Officer viz. the Deputy Commissioner of Income-

tax to issue the notice under section 148 of the Act on or before 31.3.2018 as migration of the Permanent Account Number was not possible within that short period. Therefore, the Income-tax officer has issued notice under section 148 of the Act instead of the jurisdictional Assessing Officer. Thus there is an admission on part of the first respondent that the Deputy Commissioner of Income-tax, Circle-2, Jamnagar who had jurisdiction over the petitioner had not issued notice under section 148 of the Act but it is the Income-tax officer, Ward 2(2), Jamnagar, who did not have any jurisdiction over the petitioner, in respect of the present case, who had issued such notice. As held by this Court in case of **Hynoup Food & Oil Industries Ltd.** (supra), it is the officer who records the reasons who has to issue the notice under section 148(1) of the Act whereas in the present case the reasons have been recorded by the jurisdictional Assessing Officer, whereas the notice under section 148(1) of the Act has been issued by an officer who did not have jurisdiction over the petitioner. Since the notice under section 148 of the Act is a jurisdictional notice, any inherent defect therein cannot be cured under section 292B of the Act. A notice under section 148(1) of the Act would be a valid notice if the jurisdictional Assessing Officer records the reasons for reopening the assessment as contemplated under subsection (2) of section 148 and thereafter the same officer namely the jurisdictional Assessing Officer issues the notice under section 148(1) of the Act. In the facts of the present case, while the reasons for reopening the assessment have been recorded by the jurisdictional Assessing Officer viz. the Deputy Commissioner of Income-

tax, Circle-2, Jamnagar, the impugned notice under section 148(1) of the Act has been issued by the Income Tax Officer, Ward 2(2), Jamnagar who had no jurisdiction over the petitioner, and hence, such notice was bad on the count of having been issued by an officer who had not authority in law to issue such notice. As a necessary corollary it follows that no proceedings could have been taken under section 147 of the Act in pursuance of such invalid notice. In the aforesaid premises, the impugned notice under section 148(1) of the Act as well as all the proceedings taken pursuant thereto cannot be sustained.

11. It may be noted that before the Assessing Officer, during the course of assessment proceedings also, the petitioner had raised such objections with regard to the jurisdiction of the Assessing Officer. However, the Assessing Officer has proceeded further and instead of recording the objections raised by the petitioner, namely that the notice has been issued by the Income Tax Officer though the reasons have been recorded by DCIT, has recorded that the notice was issued by the DCIT, Circle-2 and subsequently, ACIT was holding charge of Circle-2 and, therefore, there was no harm in passing the assessment order. It, therefore, appears that the Assessing Officer has not even understood the contention raised by the petitioner during the course of assessment proceedings.

12. In light of the above discussion, the petition succeeds and is accordingly allowed. The impugned notice dated 29.3.2018 issued under section 148 of the Income Tax Act, 1961, and all the proceedings pursuant thereto including the assessment order dated 28.12.2018 are hereby

quashed and set aside.

13. Rule is made absolute accordingly with no order as to costs.

(HARSHA DEVANI, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR

