NEW REASSESSMENT PROCEDURE: TURF WARS CONTINUE.IMPLICATIONS OF DIVYA CAPITAL AND ANWAR SHEIKH JUDGEMENTS

I.INTRODUCTION:

1.A landmark ruling in **Divya Capital One (P.) Ltd. *v.*ACIT [2022] 445 ITR 436 (Delhi)** has resulted in the concept of ''information'' in the new reassessment proceedings back to being haunted by ''reason to believe''.The revenue officials ,unable to comprehend and defend a fine concept which was part of the statute for decades and had substantial judicial benediction find themselves on the cusp of an avoidable avalanche.

In **Anwar Mohd Sheikh vs ACIT dated 13.3.2023 reported in [2023] 148 taxmann.com 288 (Bombay)** THE MERE CITING OF Insight Portal was held to be inadequate basis for action u/s 1 48.

This appears to be now a case of remedy being worse than the disease as the IT Department ties itself into knots grappling with a flood of assessee favouring judgements and it is increasingly getting to be a case of moving from the frying pan into the fire.

II.WHAT WAS GIVEN A DEATH SENTENCE:

2.I had written at that time in a series of articles published online on new reassessment procedure that ***''REASON TO BELIEVE'' was a golden mean**,a wonderfully crafted piece of sound legislation which prevented revenue to open assessments on their whims and fancies while on the other*

hand kept the assessee honest in view of pathbreaking judgments like Praful Chunnilal Patel,Select Dularband and Rajesh Jhaveri.We abandoned that and created two extremes,one ***a information to suggest and two ,evidence which reveals****.One ("information which suggests")a self validating logical non sequitur prologue, a pattern of reasoning rendered invalid by fatal flaw in its* ***logical*** *structure,and the other,("evidence") ,a prelude to , which should have been a sequitur to, the investigation.*

[Link:https://www.google.com/url?client=internal-element-cse&cx=005806580856307734652:gr7eqrjogaq&q=https://taxguru.in/income-tax/tax-assessment-evidence-reveals-conundrum.html&sa=U&ved=2ahUKEwjkmKKg3sL2AhVCSWwGHSBwD68QFnoECAkQAg&usg=AOvVaw2fOPRq5VNVCWhDzGA8vQOw]

2.1 The term ''reason'' existed in s 34 of **1922 Act** and s 23(1) required a ''reason to believe'' to validate a scrutiny.A finer piece of law than the present one.
100 years of history confined to dustbin without a thought.

3.There seems to be a general covert objective on part of revenue to take away ''discretion'' and overt objective of providing legislative certainty and to bind the scope of adjudication by Courts on the one hand and at the same time face the tax payer with the unsavoury spectacle of legislatively unscrutinised delegated legislation mandated and validated overreaches. I shall demonstrate the same subsequently .

3.1The first part first.Truth be told, all of this attempt is to circumvent the adverse decisions on the supposed technicality of ''reason to believe" .The new faceless assessment procedure in general and reassessment procedure in particular has created a algorithm and digitally controlled behemoth which defeats itself by self driven illogicalities. In context of new reassment

procedure ,**the law travels from ''information which suggests'' to ''evidence which reveals''**.[This is astonishing because from the vast winnable playing fields of ''reason to believe'' we are into the unforgiving world of ''evidence''.This is not in the scope of my present article but it is the next major faultline waiting to be ripped apart in judicial scrutiny : the **application** of the phrase **''evidence which reveals''**]. It never pays to cover your ineptness by neutralizing it under the garb of legislative changes.Unfortunately,the ruse shows.Template driven conveniences riding on bits and bytes and rigours of genuine law do not make good friends.Time is teaching this lesson-again.

III.THE NEW CONCEPT:(AS AT STAGE OF ISSUE OF NOTICE DTD 31.3.21)

4.

"148. *Issue of notice where income has escaped assessment.*—Before making the assessment, reassessment or recomputation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (*d*) of section 148A, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

Provided that no notice under this section shall be issued unless there is **information with the Assessing Officer which suggests** that the income chargeable to tax has escaped assessment in the case of the assessee

for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice.

Explanation 1.—For the purposes of this section and section 148A, **the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—**

(*i*) any **information flagged** in the case of the assessee for the relevant assessment year in accordance with the **risk management strategy formulated by the Board from time to time;**

(*ii*) any **final objection** raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has **not been made in accordance with the provisions of this Act.**

[NOTE:this is original explanation 1 as inserted by FA 2021.Clause (i) continues in FA 2022,just that ''flagged''has been removed.]

Explanation 2.—For the purposes of this section, where,—

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

(*ii*) a **survey** is conducted under section 133A, other than under sub-section (*2A*) or sub-section (5) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or

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

(*iv*) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of

account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any **information contained therein, relate to, the assessee,**

the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

Explanation 3.—For the purposes of this section, specified authority means the specified authority referred to in section 151.".

'149. *Time limit for notice.*—(1) No notice under section 148 shall be issued for the relevant assessment year,—

(*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 account 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:……."

5.LEGISLATIVE INTENT NEEDS TO BE READ BEHIND THIS AS IS CLEAR FROM THE MEMORANDUM

The salient features of new procedure are as under:-

(i) *The provisions of section 153A and section 153C, of the Act* ***are proposed to be made applicable to only search initiated under section 132 of the Act or books of accounts, other documents or any assets requisitioned under section 132A of the Act, on or before 31st March 2021.***

(ii) *Assessments or reassessments or in re-computation in cases where search is initiated under section 132 or requisition is made under 132A,* ***after 31st March 2021, shall be under the new procedure****.*

(iii) *Section 147 proposes to allow the Assessing Officer to assess or reassess or re-compute any income escaping assessment for any assessment year (called relevant assessment year).*

(iii) *Before such assessment or reassessment or re-computation, a notice is required to be issued under section 148 of the Act, which can be issued* ***only when there is information*** *with the Assessing officer* ***which suggests that*** *the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year. Prior approval of specified authority is also required to be obtained before issuance of such notice by the Assessing Officer.*

(iv) *It is proposed to provide that* ***any information*** *which has been flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board shall be considered as information which suggests that*

the income chargeable to tax has escaped assessment. The flagging would ***largely be done*** *by the computer based system.*

(v) *Further, a final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been in accordance with the provisions of the Act shall also be considered as information which suggests that the income chargeable to tax has escaped assessment.*

(vi) ***Further, in search, survey or requisition cases initiated or made or conducted, on or after 1st April, 2021, it shall be deemed that the Assessing officer has information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the three assessment years immediately preceding the assessment year relevant to the previous year in which the search is initiated or requisition is made or any material is seized or requisitioned or survey is conducted.***

(vii) *New Section 148A of the Act proposes that before issuance of notice the Assessing Officer* ***shall conduct enquiries, if required, and provide an opportunity*** *of being heard to the assessee. After considering his reply, the Assessing Office* ***shall decide, by passing an order, whether it is a fit case for issue*** *of notice under section 148 and serve a copy of such order along with such notice on the assessee. The Assessing Officer shall before conducting any such enquiries or providing opportunity to the assessee or passing such order obtain the approval of specified authority. However,* ***this procedure of enquiry, providing opportunity and passing order, before issuing notice under section 148 of the Act, shall not be applicable in search or requisition cases.***

(viii *The time limitation for issuance of notice under section 148 of the Act is proposed to be provided in section 149 of the Act and is as below:*

***in normal cases**, no notice shall be issued if three years have elapsed from the end of the relevant assessment year. Notice beyond the period of three years from the end of the relevant assessment year can be taken only in a few specific cases.*
*In specific cases where the Assessing Officer has in his possession **evidence which reveal** that the income escaping assessment, represented in the form of asset, amounts to or is **likely to amount to fifty lakh rupees or more, notice can be issued beyond the period of three year but not beyond the period of ten years from the end of the relevant assessment year;***

VI.THE RULING IN Divya Capital One (P.) Ltd. *v.*ACIT [2022] 445 ITR 436 (Delhi)

6.

COURT'S REASONING
NEW RE-ASSESSMENT SCHEME WAS INTRODUCED BY THE FINANCE ACT, 2021 WITH THE INTENT OF REDUCING LITIGATION AND TO PROMOTE EASE OF DOING BUSINESS.

*''7. **This Court is of the view that the new re-assessment scheme (vide amended Sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business.** In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in **GKN Driveshafts (India) Ltd. v. ITO, (2003) 259 ITR 19 (SC)** before any exercise of jurisdiction to initiate re-assessment proceedings under Section 148 of the Act.*

8. *This Court is further of the view that* ***under the amended provisions, the term "information" in Explanation 1 to section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a ground to give unbridled powers to the Revenue. Whether it is "information to suggest" under amended law or "reason to believe" under erstwhile law the benchmark of "escapement of income chargeable to tax" still remains the primary condition to be satisfied before invoking powers under section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as "information" may vest it with the power to issue a notice of re-assessment under section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under section 148 post an order under section 148A(d).***"

Paras 9 to 16 further are of great significance,but for our present study the focus is on the term ''information''as explained by the hon'ble Court.

6.1 The cited subsections are quoted under for ease of reference:

> [6][**Conducting inquiry, providing opportunity before issue of notice under section 148.**
>
> **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, [26a][***] by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued,**

or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (*a*);

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

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

Provided that.....

VII.THE ANWAR SHEIKH JUDGEMENT dated 13.3.2023 [2023] 148 taxmann.com 288 (Bombay).

7.The AY involved was 13-14.The present is second 147 ,the first one ,under the earlier regime pending disposal at FAA.148 was issued on 31.3.21

The reopening was on allegation of **"Fictitious Profits in Equity/Derivative Trading"** and bogus long term capital gain transactions under Section 10 (38) and short term capital loss. The revenue was of the opinion that the transactions referred to therein were of suspicious nature purely **on the basis of some information received by it, from the Insight portal**.

7.1 It was held that:

*''**(24)** After considering all the above case law on the issues raised before us, we are clear in our mind that the impugned notice, **other than merely quoting that the Insight portal contains information as stated by the Assessing Officer in his reasons for the reopening, does not further investigate the information or come to an independent assessment connecting the petitioner to the particular transactions specified in the information.** The entire notice **proceeds on the basis of suspicion** that the petitioner has entered into the fictitious transactions of the script M/s. Confidence Finance & Trading Ltd. The Assessing Officer **has not even bothered to compare the information furnished by the petitioner in its reply or go through the income tax return of the petitioner**, which was before the Assessment Officer, wherein long term capital gain transactions of securities were specifically disclosed.''*

VIII.What is the implication of ruling in Divya ?:

8.

1.Even under the amended provisions, the term "information" in Explanation 1 to section 148 cannot be lightly resorted to for 148 validation.

2.This information cannot be a ground to give unbridled powers to the Revenue.

3. "Information to suggest" under amended law or "reason to believe" under erstwhile law BOTH ARE SUBJECT TO THE LITMUS TEST OF **"escapement of income chargeable to tax"** which remains the primary condition for section 147 of the Act.

4. Classification of a fact already on record as "information" merely vests Revenue with the power to issue a notice of under section 148A(b).

5.However **that information ,by itself does not vest the power to issue a re-assessment notice under section 148** post an order under section 148A(d).

8.1 Lets add to the above: A ‘’means’’ definition takes away discretion and application of mind of the AO but an opaque **RISK MANAGEMENT STRATEGY** created by the regulatory body CBDT comes into play.And we enter into **the realm of delegated legislation** which could result in executive overreach.And did.

The result is the Divya judgement.And its just the beginning.I am all for merits in the inexactitude of law, because some freeplay within joints is necessary for forward movement.But the **delegated legislation aspect** is a different cup of tea altogether.I wrote an article on this issue sometime back on this esteemed forum.Those interested may refer to the following link:

https://itatonline.org/digest/articles/the-henry-viii-manoeuvre/

Risk Management Strategy has definitely turned out to be a HENRY VIII clause(ref.Article ,supra).

8.1 The key point is reiterated here. **Parliament giving authority for legislation to be delegated enables other persons or bodies to provide more detail to an Act of Parliament.** Parliament thereby, through primary legislation (i.e. an Act of Parliament), permit others to make law and rules through delegated legislation.The RISK MANAGEMENT STRATEGY(supra) is an illustration of delegated legislation.

8.1.1 **Non judicial functions** take within its sweep –

- **Quasi-legislative acts**(law/rule making)
- **Quasi-judicial acts**(law/rule deciding)
- **Purely administrative acts**(law/rule applying)

From a broad perspective all the three above may be labelled administrative acts and **include Ministerial acts** as well.

8.2 The RMS is a quasi legislative act. **Constitutional limit for delegated legislation is that t**he Rules Regulations/Instructions/Circulars/Notifications should not be ultra vires the provisions of the parent Act and should not fail to conform to the substantive provisions of the statute. **Historically, delegated legislation was designed for prescribing matters of administrative and technical detail, not substantive policy decisions**. Gradually, however, the threshold between primary and delegated legislation shifted.And that is the root cause of executive overreach leading to judicial censure. Some laws/provisions therein have 'skeleton' parts to them that contain powers rather than policy – reflecting administrative convenience, incomplete policy development or Ministers' wish for the greatest freedom to act at a later date. **In 'skeleton' provisions some key operational content(though affecting substantial rights) is left to be decided at a later date through delegated legislation**.The skeletal drafting leads to broad based structuring of statutory clauses leading to possibility of exercise of a substantial discretion(RMS here).

[My detailed exposition on RMS can be accessed as under:

https://www.google.com/url?client=internal-element cse&cx=005806580856307734652:gr7eqrjogaq&q=https://taxguru.in/income-tax/risk-management-strategy-

occurring-section-148-income-tax.html&sa=U&ved=2ahUKEwjkmKKg3sL2AhVCSWwGHSBwD68QFnoECAIQAg&usg=AOvVaw3LF_CO3Hci0LyweBVVZPXM]

8.3 The resultant danger is that power under the parent law allows the Executive to clarify or interpret the meaning of the provisions given.The ambiguity or generality or skeletality enables the Executive: the Central Govt. or CBDT in Indian context-to virtually amend the main law or make it amenable to their objectives.

8.4 The delegated legislation can be challenged in India in the courts of law as being **unconstitutional, excessive and arbitrary**. It can be controlled by the Judiciary on either being **substantial ultra vires** or on the ground of **procedural ultra vires.**

9.In Divya ,the appellant probably missed a trick in not arguing to overturn the whole RMS brouhaha via arguing that the delegated legislation has resulted in a Henry VIII manoeuvre ,shortcircuiting the legislative process and circumventing the Parliamentary validation route.

9.1 But no irreversible harm is done.My suggestion to all suffering the quirks and fancies of the provision as executed by the IT Department that you must take up the vires of the specific RMS in appeal and stop the arbitrary harassment of 148 proceedings.

IX.ANALYSIS:

10.'Information' stands under judicial scrutiny now.In Divya,at the risk of repeating,it has been clearly held that :

a."Information to suggest" under amended law is SUBJECT TO THE LITMUS TEST OF "escapement of income chargeable to tax" which remains the primary condition for section 147 of the Act.

b.Second ,and more importantly , Classification of a fact already on record as "information" merely vests Revenue with the power to issue a notice of under section 148A(b) but by itself does not vest the power to issue a re-assessment notice under section 148 post an order under section 148A(d).

10.1 These then are the two war planks.The assessee,apart from other technical and factual challenges,must incorporate a technical challenge on above two planks.And add to it the Anwar (supra) decision observation that ***''other than merely quoting that the Insight portal contains information as stated by the Assessing Officer in his reasons for the reopening, does not further investigate the information or come to an independent assessment connecting the petitioner to the particular transactions specified in the information.....''***

So the mechanical citing of information by the magical RMS won't do.

For all information ,investigation thereof and independent assessment is a must.Merely because they classify a fact(or fiction) as information may ensure initiation u/s 148(b) or issuance of a 148A(d) but not a notice u/s 148.

We are back to reason to believe. The AO has to independently record reason that **INCOME HAS ESCAPED ASSESSMENT** thus having to establish first,that **what is proposed to be assessed is INCOME** and secondly that **it has ESCAPED assessment.**Thus ''**full and true disclosure'', ''change of opinion''** all get **resurrected by necessary implication** via this route and **must be pleaded in Courts as adjuncts to** the escapement clause to flatten irrational whims and fancies of revenue.

11.''INFORMATION''

11.1 What does 'information' per se mean?

A.Lexicon view:

Oxford Dictionary : facts told, heard or discovered about somebody/something.

The Law Lexicon : 'information' is the act or process of informing, communication or reception of knowledge.

B.Judicial view:

In **CIT v. A. Raman & Co.[1968] 67 ITR 11 (SC)** it was held that the expression 'information' means 'instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment'. **Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC)** included information as to the true and correct state of the law.

C.A LEGAL FICTION?

But we already have a ''means'' information definition...dare I say a legal fiction(or a deeming provision) is introduced because it begets a narrow interpretation and no purposive definition is possible in case of a legal fiction...an attempt to reduce litigation....or a self goal?

Court wit has it: *''11. The Legislature is entitled to engraft a deeming provision on a certain statute. It may even say that a man shall be deemed to be a woman or a woman shall be deemed to be a man for certain purposes and when it is so enacted, it is not open to the Courts to start looking for*

various attributes of a man or a woman to see whether one is a man or a woman. The Court must accept the verdict of the Legislature for the given purpose. Biological or physical realities may be any..''[**153 ITR 1.P& H. Swaroop Kishan**]

But this has to be verdict of Legislature.Not of CBDT.Purpose rule and Mischief rule, all have a say.And limitations of delegated legislation come into play.

D.A HISTORICAL VIEW

a.Interestingly the aspect of ''INFORMATION'' EXISTED earlier in s 147 without being legislatively circumscribed as it is this time.

1962:

147. INCOME ESCAPING ASSESSMENT

If– (a) the Income-tax Officer has **reason to believe** that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has **in consequence of information in his possession reason to believe that** income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.— For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:– (a) where income chargeable to tax has been under-assessed; or (b) where such income has been assessed at too low a rate; or (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income-tax Act, 1922 (11 of 1922), or (d) where excessive loss or depreciation allowance has been computed. Explanation 2.— Production before the Income-tax Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section. This was done away in 1989.

b.I will stick my neck out and say that the phrase *'' the Income-tax Officer has* ***in consequence of information in his possession reason to believe that*** *income chargeable to tax has escaped* assessment''is back in play even minus the phraseology of ''reason to believe''.So it should be pleaded in Courts to cut the trickery of RMS down to size.

E.The FORGOTTEN NORTH STAR:

a.It is a matter of pride that this country has such a rich history of tax jurisprudence.But it is said that those who forget their history shall be condemned to repeat it.We are now repeating it.In fact a judgement which could have been a beacon in validating assessments related to audit objection and information was so many times successfully utilized to defeat the reason to believe (due to sheer incompetence of the AOs and complete failure and ineptitude of the supervisory officers) that half of the

definition of ''information''was devoted to audit in extant law.The decision in question**: Indian & Eastern Newspaper Society v. CIT[1979] 119 ITR 996 (SC)** and the relevant para being concluding part of **para 11** *'' Neither statute supports the conclusion that an audit party can pronounce on the law, and* ***that such pronouncement amounts to "information"*** *within the meaning of section 147(b) of the Income-tax Act, 1961.'' In para 13 the hon'ble SC goes down wonderfully to explain the apparaently revenue contrary view (supra) by saying that'' That part of the note of an audit party* ***which mentions the law constitutes alone "information"*** *within the meaning of section 147(b)''*.And para 12 is a virtual guideline as to how audit para is to be used (a/w para 13) to be classified as information ,for a very valid reason to believe to be recorded.They had it ,the revenue,and they blew it.

The appellants would do well to use this decision and multitudes following it, to create a back channel of compelling argument.

b.Such is the level of non awareness that inspite of having a three judge SC decision (which is clearly laying down law), that it had to be apparently negated in ignorance by a legislation .Now this very judgment stands again in direct conflict with the amended law . Does this again create a legal oxymoron,challengable in a Court of Law?

F.IN CONFLICT

Alongwith this,**the definition is in direct conflict with section 16 of** the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971. The hon'ble SC's view in para 11 of IENS judgment(supra) can be conveniently referenced.

X.CONCLUSION:

a.FUTURE TURF WARS

12.As are being indicated by quickfire amendments,future turf wars would be on the following in my view:

1.The expanded s 149(1)(b) by FA 2022:

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

(i) *an asset;*

(ii) ***expenditure in respect of a transaction or in relation to an event or occasion; or***

(iii) ***an entry or entries in the books of account,***

which has escaped assessment amounts to or is likely to amount to fifty lakh rupees or more: **]**

Clause (ii) and (iii) are added in 2022.**The terms ''transaction'' ''event''and ''occasion''** remain undefined as far as I could fathom.

''**Books of accounts** ''now virtually become evidence and are in the teeth of settled law in landmark decisions like **KEDARNATH JUTE MFG. CO. LTD. vs.CIT**(1971) 82 ITR 0363(SC) and running on to **TAPARIA TOOLS LIMITED vs. JCIT**(2015) 372 ITR 0605 (SC).How does law of evidence in s 34 fits in all this is another moot point.

Fresh contest is ready because to my mind ,the decisions like Kedarnath and Taparia remain good law even today and any chilling effect sought to be created by revenue through this process should be contested because it gives them a carte blanche to now use and misuse the amendment to initiate 148 based only on books.

Remember Divya test still reigns.It will have to be demonstrated that **INCOME HAS ESCAPED ASSESSMENT.**

2.Amendments and additions in Explanation 1 by FA 2022:

[(ii) ***any audit objection to the effect that*** *the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or*

(iii) ***any information received under an agreement*** *referred to in section 90 or section 90A of the Act; or*

(iv) ***any information made available to the Assessing Officer*** *under the scheme notified under section 135A; or*

(v) ***any information which requires action*** *in consequence of the order of a Tribunal or a Court.* **]**

What is **''in accordance with the provisions of the Act''** which **''agreements''**, what **''scheme''** and what is **''requires action''** are all grey areas of overt and covert delegated legislation and expansions ,requiring contest, to prevent arbitrary and capricious exercise of power by the taxmen to bring more cases under the umbrella of 148.

3.Removal of the term''flagged'':

Term 'flagged' removed from Explanation 1(i) to Section 148 *- Explanation 1* defines information with the Assessing Officer which suggests that income has escaped assessment ("the information"). Clauses thereof describe the information.

The first clause therein provided that any information **flagged** in the case of the assessee which is in accordance with the risk management strategy of CBDT shall be considered as information with the AO which suggests that income has escaped assessment.

The word 'flagged' in *Explanation 1(i)* is omitted arguably ''To correct the inadvertent drafting errors and align the provisions with the intent of the section''(see Circular 23/2022 dated 3.11.22 as amended by circular 2/2023)

Accordingly, even if information is not flagged, the same shall be considered as information with the AO, which suggests that income has escaped assessment, provided the same is:

(*a*) in the case of the assessee;

(*b*) for the relevant assessment year;

(*c*) in accordance with the risk management strategy formulated by CBDT.

Delegation expands further now.**It is not a drafting error as claimed.It is expansion of scope.**

4..The retrospectivity in Exlanation 1 of s 149(1)(b) by FA 2022.

13.Whenever a far reaching amendment to laws is made it is generally supposed to be a product of drawn out deliberations and ideally should be a subject of debate and comments by stakeholders.The latter is now virtually gone.As to the former ,if the creation is a kneejerk reaction brought out by hasty summation of disparate points of view in face of adverse results instead of being a holistic fusion of carefully crafted piece of judicial thought culminating in sound legislation,the result is a flood of circulars,instructions and repeated amendments.S 10(23C)(vi)is another illustration.Such amendments and instructions must be put to deep scrutiny.What will most likely come out is fault lines attempted to be cemented by layering and piling.The earlier 148 was supposedly complicated.Now the present 148 and 148A make that supposed complicatedness a ridiculous joke.The more it is amended with every adverse judicial view,the more unviable will it become.

It would be laughable had it not been tragic.

14.Now in Finance Act 2023 again modifications are proposed in s 148,149 and others(ref clause 72,73 etc).It would be an interesting exercise to find out how many modifications and qualifications ,additions and subtractions and clarifications has the original law gone in just about two years.

15.Look for such ,virtually contemporaneous modifications in such comprehensive pieces of legislation.The fatal fault lines shall appear there ,exposing the provisions to adverse judicial decisions.

CONCLUDING REMARKS:

16.''Information which suggests ‘' was a creation of some fancy footwork by revenue.On the one hand the ''means'' definition given gave the

impression that it was cast in stone.But **cleverly Trojan horsed therein** was a piece of HENRY VIII-the Risk Management Strategy-an ill advised delegated legislation which is starting to be called out categorically for its executive overreach –Divya and Anwar decisions-are the first breaches in the dam-the trick is now trickling out-exposed to judicial scrutiny.RMS was kept deliberately vague and undefined to arbitrary diktats of the Board wherein whatever caught their legislative fancy was to validate a 148 proceeding.

17.The observations in Divya seem tragic truth now wherein the hon'ble Court indicated that'' ***This Court is of the view that the new re-assessment scheme (vide amended Sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business.''***

Did it?

The jury is out but the writing is on the wall.