

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 8256 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

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

SHRENIK SUDHIR VIMAWALA

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 3(1)(1),
AHMEDABAD

Appearance:

MR SN SOPARKAR, SENIOR COUNSEL WITH MR B S SOPARKAR(6851)
for the Petitioner(s) No. 1

MR MR BHATT, SENIOR COUNSEL WITH MR KARAN SANGHANI,
ADVOCATE FOR M R BHATT & CO.(5953) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 02/05/2022

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 By this writ application under Article 226 of the Constitution of



India, the writ applicant has prayed for the following reliefs:

“(a) quash and set aside the impugned notices and order at Annexure-A1, A2 and A3 to this petition.

(b) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the order and notice at Annexure – A2 and A3 to this petition and stay further proceedings for assessment for A.Y. 2018-19;

(c) any other and further relief deemed just and proper be granted in the interest of justice.

(d) to provide for the cost of this petition.”

2 On 26th April 2022, this Court passed the following order:

“1. We have heard Mr. Bandish Soparkar, the learned counsel appearing for the writ applicant for quite some time. We seek assistance of Mr. M.R.Bhatt, the learned Senior Counsel, who would be appearing for the Revenue.

2. Prima facie, the case of the department appears to be that for the Assessment Year 2018-19, the writ applicant had not disclosed about the transactions in his return of income connected with the Social Co-operative Bank Ltd.. In the reasons assigned, we find reference of three bank accounts maintained with the Social Co-operative Bank Ltd. and three bank accounts maintained with the Union Bank of India. So far as the Union Bank of India is concerned, there are hardly any transactions but, there are huge transactions so far as the Social Co-operative Bank Ltd. is concerned. Out of the three bank accounts, according to the writ applicant, one of the bank accounts maintained with the Social Co-operative Bank Ltd. is that of the HUF and the HUF is being assessed independently. Even if one of the bank accounts is that of the HUF still the question is how do we determine whether in the original return all the transactions connected with the Social Co-operative Bank Ltd. were disclosed in the return. The argument is that in the return, the assessee need not disclose anything about his bank or the bank details. In the return, he has to show the transactions, the profit and loss account etc.



3. We would like to know from both, the assessee as well as the Revenue, whether all the transactions for the relevant Assessment Year 2018-19 were with respect to only this particular bank or there are any other accounts also of the writ applicant with other banks.

4. We request Mr. Bhatt, the learned Senior Counsel, to seek appropriate instructions in this matter and revert to us on 02.05.2022.

5. Post this matter on 02.05.2022.

6. One set of the entire paper book shall be furnished to Mr. Bhatt at the earliest.

7. On the returnable date, notify this matter on top of the Board.”

3 We have heard Mr. S. N. Soparkar, the learned Senior Counsel appearing for the writ applicant and Mr. M. R. Bhatt, the learned Senior Counsel assisted by Mr. Karan Sanghani, the learned counsel appearing for the Revenue.

4 As noted in our order dated 26th April 2022, the reason why the Assessing Officer wants to reopen the assessment for the relevant year 2018-19 is that the writ applicant – assessee had not shown the transactions with respect to the Social Cooperative Bank Limited. This is evident from para 3 of the notice issued under clause (b) of Section 148A of the Income Tax Act, 1961 (for short, “the Act, 1961”), wherein the following has been stated:

Bank Name	A/c. No.	Total Debits	Total Credits
<i>The Social Co-operative Bank Ltd.</i>	<i>130002011011039</i>	<i>101,95,67,398</i>	<i>101,95,49,184</i>
<i>The Social Co-operative Bank Ltd.</i>	<i>130002016000456</i>	<i>66,75,36,803</i>	<i>66,59,46,421</i>
<i>The Social Co-operative Bank Ltd.</i>	<i>130003010007439</i>	<i>11,86,64,024</i>	<i>11,86,70,134</i>
<i>Union Bank of India</i>	<i>557905060000101</i>	<i>0</i>	<i>0</i>



Union Bank of	557905040000102	0	0
India			
Union Bank of	557902010003537	0	5,394
India			
Total		180,57,68,225	180,41,71,133

The assessee had not shown the above transactions in his return of income so filed. Thus, there is an escapement of income to the tune of Rs.1,80,41,71,133/-.

1. *In view of the above information(s) received and verified by this office and in accordance with section 148A(b) of the IT Act, 1961, you are requested to show cause as to why a notice under section 148 of the IT Act, 1961 should not be issued on the basis of above mentioned information which suggests that income chargeable to tax amounting to Rs.1,80,41,71,133/- has escaped assessment in your case for A. Y. 2018-19."*

5 To the aforesaid, the writ applicant filed a detailed reply in the form of his objections under clause (b) of Section 148A, wherein the writ applicant pointed out the following:

"1.1 The assessee vehemently objects to above re-opening which is based on incorrect facts and observations. It is submitted that all transactions in bank accounts referred in the notice by your good self belong to assessee (except one which is discussed in detail hereunder) and related to its business and the same have been duly recorded in audited books of account and effect has been given in the return of income filed by the assessee as well. The contention of assessee is explained in detail hereunder.

2. *Transactions of Rs.66,75,36,803/- carried out in the bank account with the Social Co-operative Bank Ltd. in account no. 130002016000456 do not belong to the assessee*

2.1 *Before dealing with the facts and other details of the present case, it is pertinent to mention that out various bank accounts referred by your good self, one of the bank accounts with "The Social Co-operative Bank Ltd." in "Account no. 130002016000456 wherein total transactions of Rs. 66,75,36,803/- are stated to be executed during the year does not belong to the assessee, hence the assessee cannot be called upon to explain details of such transactions. It is pertinent to mention that alleged bank account belong to the HUF of the assessee which is a separate entity and assessee cannot be called upon in his individual*

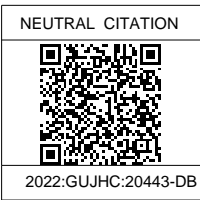


capacity to explain the same. It is pertinent to mention that such fact is mentioned in the bank statement as well. Copy of bank statement is enclosed herewith as Annexure-1 wherein it is mentioned that account is in the name of HUF of the assessee. Without prejudice to the fact that the assessee cannot be called upon to explain transactions executed in the bank account of the HUF of the assessee, it is submitted that all transactions carried out in bank account are duly reflected in books of HUF of the assessee. The Accounts of HUF are audited and it duly files return of income. Copy of return of income and Tax audit report of HUF of the assessee along with Annual Accounts which is certified by independent chartered accountant is enclosed as Annexure-2 and Annexure-3 respectively for your honours immediate reference. It is submitted that HUF of assessee is a separate entity and operates its business independently, hence transactions carried out in its bank account cannot be assessed in case of assessee.

2.2 On perusal of above details and explanation, your honour will observe that since transactions of Rs.66,75,36,803/- are not carried in the bank account of assessee, no adverse view can be taken with respect to same in case of assessee (although such transactions are genuine and related to business of HUF of the assessee and duly recorded in its books of accounts).

3. Transactions of Rs.101,95,67,398/- is carried out in the bank account with the Social Co-operative Bank Ltd. In account no. 130002011011039 which is related to business of the assessee.

3.1 It is submitted that transactions in aforementioned bank account is related to business of the assessee carried out in its proprietary concern being "Shree Trading Co." and duly reflected in the books of account of the proprietary concern. It is submitted that all transactions executed in the above bank account is related to business of the assessee. Source of credit in bank account includes receipt from customers, receipt of unsecured loan, etc which are related to business operation and duly recorded in books of account and debit in bank account includes payment to suppliers for goods and repayment of unsecured loans, etc which are also recorded in audited books of accounts. Copy of annual accounts along with tax audit report is enclosed as Annexure-4 which is audited by independent chartered accountant which proves that all transactions are verified and reported in annual accounts. Hence argument that transactions executed in bank account is not reflected in return of income is incorrect and proceedings cannot be reopened on the basis of same. In order to explain the details of above transaction, the assessee hereby encloses explanation of all transactions executed in above bank account vide Annexure-5 wherein details of transactions are mentioned."



6 While passing the final order under clause (d) of Section 148A of the Act, 1961, all that the Assessing Officer has stated in paras 7 and 8 respily is as under:

“7. The submission filed by the assessee has been duly considered and the same is not found acceptable. Having considered the submission of the assessee, it is found that the requisite documentary evidences have not been submitted by the assessee. Therefore reply of the assessee do not explain the fact that income arising from the impugned transaction/ transaction itself has been duly disclosed and relevant income arising there from has been offered for taxation for the relevant assessment year.

8. Therefore, in the light of the above reasons, information and material available on record, I am of the considered view that the assessee has failed to explain the above-mentioned transactions and income earned/ derived there from, during the year under consideration and the same remained unexplained and unsubstantiated as per the relevant provisions of the Act. Hence, on the basis of material available on record which establish that the income chargeable to tax in respect of above mentioned transactions of Rs.1,80,41,71,133/- has escaped assessment for FY 2017 18 and therefore, this is a fit case for issuance of notice u/s 148 of the Act for Assessment Year 2018-19.”

7 Mr. Soparkar is justified in his submission that nothing of what was pointed by the writ applicant – assessee in his objections could be said to have been taken into consideration by the Assessing Officer in its true sense. When the assessee offers his reply by way of objections, then there is a staturoy obligation on the part of the Assessing Officer to consider the objections and deal with those in accordance with the true spirit and intent of the provisions of Section 148A of the Act, 1961. Section 148A of the Act, 1961 reads thus:

“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, with the prior approval of specified authority, 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 the provisions of this section shall not apply in a case where,—

(a) a search is initiated under section 132 or books of account, other



documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) 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 in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under 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.

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

8 The plain reading of clause (d) of Section 148A referred to above would indicate that the Assessing Officer is obliged in law to decide on the basis of the materials available on record including the 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 the specified authority within one month from the end of the month in which the reply is received by him.

9 Thus, there is an obligation cast upon the Assessing Officer in accordance with clause (d) of Section 148A of the Act, 1961 to consider the case not only on the basis of the materials available on record, but also the reply of the assessee. If the reply of the assessee has not been



considered, then passing of the order under clause (d) of Section 148A could be said to be an empty formality. The new regime of Section 148A should be strictly followed so as to make it meaningful.

10 This Court in the case of **Divya Jyoti Diamonds (P) Ltd. vs. Income Tax Officer** reported in [2021] 439 ITR 471 (to which one of us J. B. Pardiwala, J. was a party) had the occasion to consider Section 148 of the Act for the purpose of reopening of assessment. We quote the relevant observations made by this Court as under:

*“12. Having heard the learned counsel appearing for the respective parties and having gone through the materials on record, we are of the view that the AO while disposing off the preliminary objections filed by the writ applicant against the reasons recorded for reassessment, has not properly dealt with the objections. We take notice of the fact that, while disposing the objections, the AO has concluded that the objections made by the assessee are duly considered and not acceptable. In para-4 of the order, the AO has observed that the transactions made by the assessee company with Rashmi Diamond were bogus entries and the fact of difference in respect of credit entries in the bank account were not brought into knowledge of the AO during the course of assessment proceedings. We are of the view that the AO failed to take note of various objections filed against the reasons recorded. Para-4 of the order as referred to above does not reflect the proper application of mind to the objections raised by the applicant and it could not be said that the objections having been disposed of by passing reason order. In the case of **GKN Driveshaft (supra)**, the Supreme Court has laid down the procedure as to the manner of dealing with the objections raised against the notice under Section 148 of the Act. The Supreme Court has held that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notice. It was further held that the AO is bound to furnish reasons within a reasonable time and upon receipt of reasons, the noticee is entitled to file an objection to issuance of notice and AO is bound to dispose of the same by speaking order. In the case of **SABH Infrastructure Ltd (supra)**, the Delhi High Court, has held that the exercise of considering the assessee’s objections to the reopening of the assessment is not a mechanical ritual. It is a quasi judicial function. The order disposing of the objection should deal with each objection and give proper reason for conclusion. The order should reflect proper application of mind.*”



*13. Applying the dictum as laid down by the Supreme Court in the case of **GVK Driveshaft (supra)**, we are of the view that disposing of the objections raised by the assessee against the reasons recorded before issuance of notice under Section 148 of the Act, though not part of the statutory requirement, as prescribed under the Act, however, same is guided by the directions issued by the Apex Court. The specific objections raised by the writ applicant, produced on record at page-33 to 45 to this writ application, have not been properly dealt with by the AO. The lapse is in clear violation of the decision of the Apex Court. We are of the view that the AO has passed the order mechanically and without application of his mind. In other words not in a meaningful manner.”*

11 The principle of law, as explained by the Supreme Court, in the case of **GKN Driveshaft (India) Ltd vs. ITO [2003] 259 ITR 19 (SC)**, is now a statutory provision in the form of new Section 148A of the Act.

12 In view of the aforesaid, we are of the view that we should quash and set aside the order passed under clause (d) of Section 148A as well as the notice issued under Section 148 of the Act, 1961 and remit the matter to the Assessing Officer for fresh consideration of the objections filed by the writ applicant.

13 In the result, this writ application succeeds in part. The impugned order dated 7th April 2022 passed by the Assessing Officer and the notice issued under Section 148 of the Act, 1961 are hereby quashed and set aside. The matter is remitted to the Assessing Officer for fresh consideration of all the objections raised by the writ applicant. This time the Assessing Officer shall apply his mind and pass an appropriate order under clause (d) of Section 148A dealing with all the objections in its true sense. The order that may be ultimately passed under clause (d) of Section 148A should reflect proper application of mind and in consonance with spirit and objection of clause (d) of Section 148A of the Act, 1961 referred to above. Let this exercise be undertaken at the earliest and completed within a period of three months from the date of



receipt of the writ of this order.

14 With the aforesaid, this writ application stands disposed of.

(J. B. PARDIWALA, J)

(NISHA M. THAKORE, J)

CHANDRESH